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

JOHN HARRISON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action Number: CV07-J-0815 NE
	)	
BENCHMARK ELECTRONICS HUNTSVILLE, INC., [1]	)	
	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Benchmark Electronics Huntsville, Inc. ("BEHI"), submits this brief in support of its pending motion for summary judgment. For the reasons stated in its pending motion, and stated below, BEHI requests that the Court grant summary judgment in its favor and dismiss, with prejudice, all claims asserted against it by plaintiff John Harrison ("Harrison"). The undisputed facts prove BEHI did not violate the Americans with Disabilities Act ("ADA"), as alleged by Harrison; there are no genuine issues of material fact; and BEHI is entitled to judgment as a matter of law. Specifically, BEHI shows the Court as follows:

1 Pursuant to this Court's order of June 5, 2007, Benchmark Electronics Huntsville, Inc. ("BEHI"), has been substituted for Benchmark Electronics, Inc. ("BEI"). Although plaintiff did not file an amended complaint indicating the substitution, BEHI will read any and all references to BEI as if referring to BEHI, unless specifically indicated.

I. STATEMENT OF THE CASE

A. Narrative Summary of Undisputed Material Facts[2]

Harrison's Non-Disabling Epileptic Condition

1. Harrison is epileptic and has taken barbiturates for his epilepsy since he was a child. (See Ex. A Harrison Dep. at 70:19 – 71:5.) He referred to the epilepsy as "his disability" several times during his deposition. (See, e.g., Harrison Dep. at 73:16-23.)

2. Epilepsy is not a disability, as acknowledged by Harrison's counsel: "We don't contend he has an actual disability . . . If it's in the complaint, it's strictly a perceived disability case. . . . [T]his is definitely one there's no actual disability being claimed." (See Harrison Dep. at 102:5-15.)

3. Despite his counsel's admission, though, Harrison – and only Harrison – appears to consider his epilepsy as a disability, testifying that epilepsy prevented him from joining the military; obtaining a commercial driver's license; and playing football. (See Harrison Dep. at 104:18 – 105:11.)

4. Harrison also testified that he told several people, most of whom he identified as his friends, about his epilepsy after they asked. (See Harrison Dep. at 73:10 – 74:13; 76:11 – 79:15.) He even discussed epilepsy in great detail with

[2] BEHI reserves the right to contest at any trial, and in any other stage of this litigation, any or all of plaintiff's or other witnesses' allegations and any or all of these narrative facts, although they may be taken as true for purposes of this motion

Robin Gary ("Gary")[3] because, he says, her daughter is also epileptic. (See id. at 73:10 – 74:13.)

5. In addition to his friends and Gary, Harrison testified he told Tim Brown (an employee of BEHI) about his epilepsy. (See Harrison Dep. at 76:11 – 79:15.)

Harrison's Assignment to BEHI and Application for Employment

6. Harrison was employed by Aerotek, Inc.

7. Aerotek is in the business of placing temporary workers at various companies, including BEHI. (See Ex. B McSherry Dep. at 27:3-6.)

8. In mid-November 2005, Aerotek assigned Harrison to BEHI, where he performed the duties of a "debug tech." A debug tech is required to identify and repair problems on a particular board that is not working properly. (Harrison Dep. at 34:12-15; Ex. C Anthony Aff.[4] ¶ 4.)

9. In general, when Don Anthony ("Anthony") (a BEHI employee and supervisor) thought someone might be a candidate for permanent employment at BEHI, he advised that person to complete an application. (See Anthony Aff. ¶ 6.)

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3 Robin Gary's name was mentioned in certain depositions as a person with information regarding Harrison's claims and allegations. Unfortunately, Ms. Gary suffered a brain aneurysm, which has apparently made her unable to testify. (See Ex. D B. Smith Dep. at 7:13 – 8:10.)

4 Harrison took the deposition of Anthony on July 8, 2008. As of the date on which this motion has been filed, the court reporter in question has not provided BEHI with a transcript of the deposition in spite of multiple requests. Similarly, Harrison only supplied BEHI with the video recording of Anthony's deposition approximately two hours before this motion was filed.

Then, when a position was approved by "corporate," Anthony generally sent the person to BEHI's human resources department to complete the background check information and to obtain a drug test. (Id. ¶ 7.)

10. Lena Williams ("Williams"), an employee of BEHI who works in the human resources department, testified that as part of the application process, each applicant agrees to a background check, as well as a drug test performed by an independent laboratory. (See Ex. E Williams Dep. at 45:19 – 46:4; Ex. F Employment application ("Application") (attached to Harrison Dep. as Ex. 2.) at p. 4.)

11. Williams testified that the drug test results were usually available three to five days after the drug test was administered. (See Williams Dep. at 18:18.)

12. On May 17, 2006, Harrison submitted an application to BEHI for employment with BEHI. (See Application.)

13. Harrison testified that Anthony suggested he complete the application (although he testified he completed the application in July, rather than in May as shown on the application). (See Harrison Dep. at 39:7-11.)

14. In July of 2006, Anthony instructed Harrison to report to the human resources department for BEHI to take a drug test. (See Harrison Dep. at 38:19-22; Anthony Aff. ¶ 8.)

15. Harrison did so, and was sent to a local medical clinic to submit the drug test. (See Ex. G Consent Form (attached to Robinson Dep. (Vol. I) as exhibit 7.))

16. Some time after sending Harrison for his drug test, Williams was informed by the MRO that he had not been able to reach Harrison to discuss an issue with his drug test. (See Williams Dep. at 9:7-13.) The MRO asked Williams if she could put him in touch with Harrison. (See id.)

17. Harrison testified Anthony told him there was a problem with the drug test and that he had tested positive for barbiturates. (See Harrison Dep. at 68:14-18.) Harrison testified that he told Anthony he had a prescription for the drugs. (See id. at 69:4-5.) According to Harrison, Anthony asked him to get the prescription, and then took Harrison to Anthony's office. (See id. at 69:7-11.) Harrison further testified Anthony then dialed a phone number and stayed in the office while Harrison spoke to someone on the other line about his prescription.[5] (See id. at 69:12-16.)

18. Harrison testified he explained to the MRO that he took the barbiturates for his epilepsy and provided the prescription information. (See Harrison Dep. at 70:19 - 71-12.)

5 BEHI disputes this description of events, for any purpose other than this motion for summary judgment. In fact, Anthony specifically denies Harrison's version of the events, as does Williams.

19. Eventually, BEHI received a report from the MRO indicating Harrison had "cleared" the drug test. (See Williams Dep. at 103:12–14.)

20. Williams informed Anthony that Harrison's paperwork was back. (See Williams Dep. at 50:16 – 51:4.)

Timing of Anthony's Decision-Making

21. When Anthony was informed Harrison's paperwork was back, he was in the midst of preparing for an audit of the company. (See Anthony Aff. ¶ 12.)

22. The audit was to take place in the middle of August of 2006, and Anthony began preparing for the audit approximately sixty days beforehand. (See id. ¶ 12.)

23. Preparing for an audit is time-consuming, and can be stressful. (See id. ¶ 13.)

24. Busy preparing for the audit, Anthony did not move forward with deciding to offer or not to offer Harrison a position, and hiring a temporary employee as a permanent employee was not high on his priorities. In addition, various employees began expressing concerns to Anthony about Harrison's job after learning Harrison was being considered for permanent employment. (See Anthony Aff. ¶ 13-15.)

25. Specifically, an employee who worked closely with Harrison, Tim Brown, bluntly told Anthony not to hire Harrison. (See Ex. H Brown Dep. at 13:19-20.)

26. Additionally, Tim Brown told Anthony that if he were to hire Harrison, Brown would have "two jobs instead of one[,]" because "Harrison could not do the job." (See Brown Dep. at 14:1-6.)

27. Brown testified Harrison had no trouble-shooting skills and he frequently had to tell Harrison what part on a board needed to be replaced. (See id. at 14:19-23.)

28. Brown waited to tell Anthony about his concerns until after Brown learned Anthony was considering hiring Harrison because, before that time, it was not an issue. (See id. at 18:15-22.)

29. Anthony also was told by a number of people that Harrison had been heard threatening Anthony either if Anthony did not ease up on him during the audit preparation and threatening to sue if Anthony did not hurry up and hire him. As a result of all of the above, he simply wanted to wait a bit longer to continue to evaluate Harrison after the concerns were raised. (See Anthony Aff. ¶¶ 12-15; 18-19.)

30. Faye Robinson ("Robinson"), director of Human Resources at BEHI, testified that Anthony spoke to her about concerns related to Harrison's

performance after hearing concerns from others. (See Ex. I Robinson Dep. (Vol. I) at 72:21-23; 77:3-13.)

31. Robinson told Anthony he should be certain of his decision and be careful about making his decision before he hired Harrison. (See Robinson Dep. at 114:15-18.)

BEHI Rescinds Job Openings.

32. On or about August 10, 2006, all open positions were closed, and previously-approved requisitions for employees (including the position for which Harrison was being considered) were revoked. (See Robinson Dep. (Vol. I) at 64:4-16; Ex. J 2006 Requisition Log (attached to Robinson Dep. (Vol. II) as Ex. 17.)

Anthony's Request to Aerotek

33. In August, Anthony received a report that Harrison had refused to fix a board that was extremely urgent, commonly referred to as a "hot board." (See Ex. K E-mail, Anthony to Williams, Aug. 23, 2006 (attached to Robinson Dep. (Vol. I) as exhibit 12.) While some of the details may differ, the testimony has been that Harrison essentially said he could see a bad board (either from across the room, or a mile away, depending on the testimony), and that the board should either be sent to Thailand (an expensive proposition) or sent to MRB (materials review board – also an expensive proposition). (See Anthony Aff. ¶ 21; E-mail,

Anthony to Williams, Aug. 23, 2006.) Either way, it is undisputed that Anthony was informed that Harrison had refused to repair a board. (Anthony Aff. ¶ 21.)

34. Upon being informed of the incident with the hot board, and in conjunction with previously hearing that Harrison had made a threat, Anthony decided to ask Aerotek not to return Harrison to BEHI. (Anthony Aff. ¶ 23.)

35. Anthony explained the reasons for his decision to Heather McSherry, an Aerotek employee. (McSherry Dep. at 45:9-23.)

Harrison's EEOC Charge

36. Even after Anthony asked Aerotek not to return Harrison to BEHI and after Harrison filed a charge with the Equal Employment Opportunity Commission ("EEOC"), Lara Harrison continued to work as an employee of BEHI. (See Ex. L L. Harrison Dep. at 17:23 – 18:9.)

37. Lara Harrison had a copy of BEHI's employee manual, which, although confidential, she provided to Harrison for the purposes of this suit. (Harrison Dep. at 129:4-11; L. Harrison Dep. at 41:17-23.)

38. The employee manual contains express prohibitions against discriminating for reason of age, gender, and other classifications, including disability. (See Ex. M Benchmark Electronics Employee Manual ("Manual") at 16 (attached to Harrison Dep. as exhibit 7.))

39. The manual also provides express instructions for employees who believe they witnessed violation of any such law, including a toll-free phone number and method by which an employee could report the behavior without going through her direct supervisor. (Manual at 14 ("The Company will not retaliate or discriminate against any employee for reporting conduct, which might be harassment or violations of the code of conduct.")

40. In spite of the allegation that BEHI did not hire Harrison in violation of the ADA, neither Lara Harrison nor Harrison himself contacted the hotline. (See Harrison Dep. at 129:22 – 130:4; L. Harrison Dep. at 42:5-14.)

41. Harrison did not identify any changes to Anthony's behavior after the drug test or the discussion about Harrison's epilepsy. Instead, he simply assumed that Anthony learned he had epilepsy and decided not to hire him. (Harrison Dep. at 72:15 – 73:5; 164:10-22.) In fact, Harrison cannot state a single specific *fact*, supported by evidence, on which to base the instincts which are the foundation of his claims. (Harrison Dep. at 164-10:22.)

42. On September 26, 2006, Harrison filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging BEHI violated the Americans with Disabilities Act ("ADA") by failing to hire him because "of his disability." (See Ex. N EEOC Charge Sept. 26, 2006.)

43. According to documents obtained in response to a Freedom of Information Act ("FOIA") request, the EEOC investigated Harrison's claim that he had a disability. (See Ex. O EEOC Response, FOIA Request ("EEOC Response"), at Interview Format.)

44. Notes from the EEOC response to the FOIA request indicate that on January 26, 2006, the EEOC investigator determined "CP failed to establish that he suffered an impairment that affects a major life activity." (See Ex. P Pre-Determination Interview (attached to Harrison Dep. as Ex. 6.))

45. Upon completing the investigation, the EEOC determined Harrison did not have a disability. (See id.)

46. The EEOC ultimately issued a dismissal and notice of rights on February 7, 2007. (See Compl.)

B. Procedural History

On May 3, 2007, Harrison filed his complaint with the United States District Court for the Northern District of Alabama. His one-count complaint alleged "defendant" violated the Americans with Disability Act ("ADA"), codified at 42 U.S.C. § 12101, et. seq., "by forcing plaintiff to answer prohibited medical questions prior to making an offer of employment to him, by refusing to hire him based on a *perceived* disability, and by terminating him based on a *perceived* disability." (Compl. ¶ 12) (emphasis added). Harrison filed suit against

Benchmark Electronics, Inc. ("BEI"), not BEHI. (Compl.) On May 29, 2007, BEI moved this Court to dismiss the complaint against it. On June 4, 2007, Harrison moved this Court for permission to substitute BEHI as defendant in the matter. On June 5, 2007, this Court granted Harrison's motion to substitute BEHI as defendant and declared the motion to dismiss filed by BEI moot. Harrison did not amend his complaint, and he has never made any additional claim other than the violation of the ADA.

II. ARGUMENT

For Harrison to prove BEHI violated the ADA, Harrison must prove: (a) he is disabled (which he claimed in his EEOC charge); or (b) BEHI perceived him to be disabled, *and* that BEHI took an adverse employment action against him *as a result* of his alleged disability or BEHI's perception of same. See, e.g., Carruthers v. BSA Advertising, Inc., 357 F.3d 1213, 1215 (11th Cir. 2004). The undisputed material facts prove Harrison is not disabled and BEHI never perceived Harrison to be disabled. Indeed, even if this Court believes the facts require it to look at the matter further using the McDonnell-Douglas analysis, Harrison's claims still cannot survive a motion for summary judgment. The undisputed material facts demonstrate that Harrison cannot establish a *prima facie* case under the ADA; BEHI has stated legitimate, non-discriminatory reasons for not hiring Harrison; and Harrison has no evidence the reasons given were pretextual.

A. Harrison Is Not Disabled and Cannot Prevail on Any Claim Made Pursuant to the ADA for a Disability

The ADA prohibits employers from discriminating against those with disabilities. See, e.g., Carruthers, 357 F.3d at 1215. "The ADA defines 'disability' as '(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.'" Id. (quoting 42 U.S.C. § 12102.2). Just having a condition is not sufficient to establish that a person is disabled. See, generally, Carruthers, 357 F.3d at 1217.

Harrison's EEOC charge specifies he is "disabled." However, counsel for Harrison has specifically indicated Harrison is NOT in fact, disabled, and the undisputed facts support only one conclusion – Harrison is not disabled. Indeed, the EEOC investigator found that Harrison had not proved he was disabled. As a result, to the extent Harrison makes a claim that he is disabled, that claim fails, and Harrison must prove that BEHI perceived him to have a disability to prevail against this motion. He cannot do so.

B. Harrison Was Not Perceived As Disabled by BEHI

The undisputed material facts establish that BEHI is entitled to judgment as a matter of law on Harrison's claim because Harrison was not perceived as being disabled, and no such perception resulted in an adverse employment decision.

To establish a prima facie case under the ADA, Harrison must show "a disability (whether real or perceived), that [he] was otherwise qualified to perform the essential functions of the job, and [he] was discriminated against based upon the (real or perceived) disability." Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002). "'The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.'" Carruthers, 357 F.3d at 1216 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). Harrison must "show that [he] was considered to be '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." Iduoze v. McDonald's Corp., 268 F. Supp. 2d 1370, 1376 (N.D. Ga. 2003) (quoting 29 C.F.R. § 1630.2(j)(3)(i)). Harrison cannot do so, and BEHI is entitled to judgment as a matter of law.

For all of the problems with Harrison about which Anthony learned, including Harrison's attitude and other subjective opinions that Harrison was simply not doing the job he was hired to do, not one person from BEHI ever told Anthony Harrison's epilepsy might affect Harrison's performance or was a concern. Proof that Harrison was simply disliked is NOT proof that Harrison was perceived as having a disability. Nothing in the record even hints at such an

attitude. Without that evidence, BEHI is entitled to judgment as a matter of law on Harrison's claims.

C. Harrison's Claims Likewise Do Not Survive the McDonnell-Douglas analysis

The McDonnell-Douglas analysis is used by a court when a plaintiff claims that he has circumstantial evidence of discrimination. See Collado v. United Parcel Serv. Co., 419 F.3d 1143 (applying McDonnell-Douglas analysis to a claim involving circumstantial evidence of violation of ADA). Clearly, in the present case, Harrison does not have even a hint of direct evidence that BEHI perceived him as disabled. Therefore, Harrison's claims must survive the McDonnell-Douglas analysis to avoid summary judgment.

Courts apply a three-part analysis. First, a plaintiff must carry the "initial burden of establishing a *prima facie* case." See, e.g., McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Harrison cannot. Second, the defendant must provide (not prove) a legitimate, non-discriminatory reason for taking the actions complained of by the plaintiff. See Williams, 303 F.3d at 1291; see also Ramige v. McNeil Nutritionals, Inc., No. 05-0101-BH-B, 2006 WL 2798774, *14 (S.D. Ala. Sept. 29, 2006) ("It is then up to the employer to articulate a legitimate, nondiscriminatory reason for the adverse-employment actions taken."). BEHI has provided the requisite legitimate and non-discriminatory reasons. Third, a plaintiff must prove the legitimate, non-discriminatory reasons provided by the defendant

are mere pretexts. Id. Harrison cannot. In short, Harrison's claims cannot survive a McDonnell-Douglas analysis, and BEHI is entitled to judgment as a matter of law.

1. Harrison Cannot Prove His *Prima Facie* Case under the First Prong of the *McDonnell-Douglas* Analysis

Under the McDonnell-Douglas analysis, Harrison must first prove his *prima facie* case: that he was perceived to be disabled and suffered an adverse job action as a result of that perception. For purposes of this motion, BEHI will concede that Anthony's decision not to hire Harrison and to ask Aerotek not to return Harrison to BEHI constitutes an adverse job action. However, Harrison still must prove that he was perceived as being (or was) disabled, and that Anthony made his decision *as a result* of that perception. Harrison simply cannot do so.

A disability is a condition that impairs an ability to perform a wide range of activities. See, e.g., 29 C.F.R. § 1630.2(j)(3)(I); see also D'Angelo v. ConAgra Foods, Inc., 422 F.3d, 1220, 1227 (11th Cir. 2005) ("The district court correctly concluded that D'Angelo's vertigo does not qualify as an actual-impairment disability under the ADA, since it does not "substantially limit[ ] one or more of the major life activities" of D'Angelo. . . . D'Angelo says that her vertigo condition substantially impairs her ability to work, which we have consistently treated as a major life activity. . . . The problem is that she has not shown a genuine issue of

material fact as to whether her vertigo *substantially limits* her ability to work.) (emphasis in original).

Harrison must prove that Anthony perceived Harrison to be substantially limited in his ability to work in a wide range of jobs by his epilepsy. Harrison does not even have evidence that Anthony believed the epilepsy limited Harrison's abilities to do anything. Therefore, Harrison cannot even meet the first prong of the McDonnell-Douglas analysis.

2. Harrison Cannot Defeat BEHI with Respect to the Second Prong of the *McDonnell-Douglas* Analysis

The second prong of the McDonnell-Douglas analysis requires BEHI to provide a legitimate, non-discriminatory basis for its decision.

Although BEHI has more than sufficient evidence to *prove* it had legitimate, non-discriminatory reasons not to hire Harrison, it actually does not have to prove any such thing to meet the second prong of the McDonnell-Douglas analysis. See e.g., Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978); see also Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000) (internal citations omitted) ("[T]he employer's burden is merely one of production; it need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated"). "Because the defendant need only produce, not prove, a nondiscriminatory reason, this burden is "'exceedingly light.'" Perryman

v. Johnson Products Co., Inc. 698 F.2d 1138, 1142 (11th Cir. 1983) (internal citations omitted).

Simply put, Anthony chose not to hire Harrison because Anthony believed Harrison refused to repair a board; was not performing; and had threatened him. Those reasons are clearly legitimate and non-discriminatory.

BEHI's reasons for not hiring Harrison are sufficient. As BEHI informed Aerotek and the EEOC, Harrison was not hired because of his attitude and because he made threats against Anthony.

3. Harrison Cannot Satisfy the Third Prong of the *McDonnell-Douglas* Analysis

Finally, the third prong of the McDonnell-Douglas analysis requires Harrison to produce sufficient evidence to demonstrate that the legitimate, non-discriminatory reasons provided by BEHI for its decision not to hire Harrison were mere pretexts *and* to demonstrate with sufficient evidence what the "real reasons" were. See e.g., Keene State College, 439 U.S. at 25. "If the plaintiff fails to proffer sufficient evidence to create a genuine issue of material fact as to whether each of the defendant's proffered reasons is pretextual, the defendant is entitled to summary judgment." Wascura v. City of South Miami, 257 F.3d 1238, 1243 (11th Cir. 2001). Harrison cannot merely argue that the legitimate, non-discriminatory reasons are wrong. He must prove that they are false, AND that the real reason he was not hired was that Anthony perceived him to be disabled. See, e.g., Zapata-

Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 45 (1st Cir. 2002) ("[E]ven if the trier of fact disbelieves the nondiscriminatory explanation given by the employer, the trier is not compelled to find that the real reason was discrimination. . . . [T]he ultimate question is not whether the explanation was false, but whether discrimination was the cause of the termination.").

It is undisputed that Anthony learned of the other employees' concerns only after Harrison was sent for a drug test. The circumstances and information to which Anthony had access changed between the time Anthony sent Harrison to human resources and mid-August. Harrison cannot prove that the changed circumstances and reasons given by Anthony for asking Aerotek not to return Harrison to BEHI and for not hiring Harrison are pretextual.

Further, BEHI could not have hired Harrison after August 10, 2006, even if Anthony had decided to hire a temporary employee with an attitude problem, who was not performing up to BEHI standards, and who had threatened Anthony, such as Harrison. It is undisputed all open positions, including the position for which Harrison was being considered, were closed entirely without being filled on August 10, 2006. Therefore, Anthony's decision whether or not to hire Harrison was irrelevant after August 10.

Harrison cannot, and does not, point to any indication or circumstantial evidence that Anthony's attitude toward him changed as a result of the test.

Harrison testified no behavior changed after he alleges Anthony learned about the epilepsy. Instead, he simply *assumes* that Anthony learned he had epilepsy and decided not to hire him and testified he based his claim on his "instinct." "An employee's subjective belief of discrimination alone is not sufficient to warrant judicial relied." Sonnier v. Computer Programs & Sys., Inc., 168 F. Supp. 2d 1322, 1332 (S.D. Ala. 2001).

In short, nothing in the record even suggests BEHI's legitimate, non-discriminatory reasons for not hiring Harrison and for asking Aerotek not to return Harrison to BEHI were pretextual, and Harrison cannot prevail on the third prong of the McDonnell-Douglas analysis.

III. CONCLUSION

Harrison is not disabled (although he claimed he was when he filed his EEOC charge), and there is no evidence that BEHI perceived Harrison to be disabled, as defined by the ADA. In short, the undisputed facts prove BEHI is entitled to judgment as a matter of law. For all of the above reasons, BEHI moves this court for judgment as a matter of law, and for dismissal, with prejudice, of all of Harrison's claims.

S/ Allen L. Anderson
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2008, I electronically filed the foregoing with Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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