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U.S. DISTRICT COURT
N.D. OF ALABAMA

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.,	)	
	)	
	)	
Defendant.	)	

REPLY TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Benchmark Electronics Huntsville, Inc. ("BEHI"), in reply to the response filed by John Harrison ("Harrison"), states as follows:

I. OUR CIRCUIT HAS NOT RECOGNIZED A PRIVATE CAUSE OF ACTION BASED UPON IMPROPER MEDICAL INQUIRY.

The United States Court of Appeals, Eleventh Circuit ("Eleventh Circuit") simply and plainly does not recognize a private cause of action for improper medical inquiry, at least pursuant to the Americans with Disabilities Act ("ADA"), and Harrison never asks this Court to do so.[1] Although Harrison baldly asserts that "every other circuit to address these issues has 1) found a private right of action for

[1] Harrison asserts a new cause of action and abandons his claim that BEHI perceived him to have a disability. Such a bald attempt to amend a complaint, months after this Court's deadline to amend had passed, should fail. "It is well-established that a plaintiff may not amend [his] complaint through argument in a brief opposing summary judgment." Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004).

applicants[,]" he provides no citations from all such circuits to support it. In fact, he does not even state what circuits have addressed the issue.

Even the cases relied upon by Harrison in support of a cause of action for improper medical inquiry address issues of *current* employees, not unsuccessful job applicants; medical examinations; requests for diagnoses from current employees; or medical record review, NOT pre-employment drug screening. See, e.g., Conroy v. New York State Dept. Corr. Servs., 333 F.3d 88, 91-92 (2nd Cir. 2003); Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1229, n. 5 (10th Cir. 1997); Posey v. Alternative Home Health Care of Lee County, Inc., No. 2:07-CV-103, 2008 WL 2047935 (M.D. Fla. May 13, 2008) (**default judgment** granted).

In short, the Eleventh Circuit does not recognize a cause of action for an alleged improper medical inquiry. Accordingly, to the extent Harrison's case is based on such a claim, BEHI is entitled to summary judgment.

II. EVEN IF THE ELEVENTH CIRCUIT WERE TO RECOGNIZE A CAUSE OF ACTION FOR IMPROPER MEDICAL INQUIRY, HARRISON DID NOT PLEAD THE CLAIM.

Even if the Eleventh Circuit were to recognize a cause of action for improper medical inquiry, Harrison did not plead one in his complaint.[2]

[2] He likewise did not include any such claim in his EEOC charge. Instead, Harrison's EEOC charge specifies he is "disabled," saying, "I believe I have been discriminated against *because of my disability* in violation of the Americans with Disability Act[.]" (Compl. Ex. 1) (emphasis added).

Harrison must ensure he has pleaded his causes of action sufficiently and to give fair notice that he intends to make a prohibited medical inquiries claim. See, e.g., Grimsley v. Marshalls of MA, Inc., No. 07-15102, 2008 WL 2435581, *5 (11th Cir. Jun. 17, 2008). "'The point is to give the defendant fair notice of what the claim is and the grounds upon which it rests.'" Id. (quoting Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 974 (11th Cir. 2008)). Additionally, the requirement that "each claim founded on a separate transaction or occurrence be stated in separate counts if needed for clarity" requires "the pleader to present his claims discretely and succinctly, so that his adversary can discern what he is claiming and frame a responsive pleading[.]" Id. (quoting Davis, 516 F.3d at 980 n. 57; Fed. R. Civ. P. 8; Fed. R. Civ. P. 10). In Grimsley, the two-count complaint mentioned a prohibited medical inquiry as part of a list of behavior resulting in a hostile environment. The court held it did not state a claim for medical inquiry.

Harrison's complaint likewise does not state a claim for improper medical inquiry. Rather than selecting the provision of the ADA Harrison believes was violated, Harrison cites to "42 U.S.C. §§ 12101 – 12213." (Compl. ¶ 1.) Under "Count One," Harrison alleges he was perceived to have a disability. (See, e.g., Compl. ¶ 6 ("Plaintiff is a person with a disability because defendant perceived that plaintiff's epilepsy substantially limited plaintiff's ability to perform major life activities."); ¶¶ 7, 11.) In seven paragraphs, Harrison alleges BEHI perceived him

to be disabled (or similar phrasing). Just as the complaint in Grimsley had one paragraph that mentioned medical inquiry, so, too, paragraph 12 of the complaint includes a list of three items, two of which involve perception of disability. It is incumbent upon Harrison to clearly state that he claims BEHI engaged in an improper medical inquiry, particularly in a jurisdiction that does not recognize such a claim. His failure to do so prevented BEHI from filing a valid motion to dismiss for failure to state a claim or for pursuing discovery to defend the issue.[3] Harrison's attempt to amend his complaint now – to find some potential cause of action with which he thinks he can succeed – is improper. Because Harrison did not state a claim for improper medical inquiry in his complaint, he cannot do so in his response to BEHI's motion for summary judgment.

III. EVEN IF THE ELEVENTH CIRCUIT COURT RECOGNIZED A CAUSE OF ACTION FOR IMPROPER MEDICAL INQUIRY, AND EVEN IF HARRISON HAD PLEADED A CLAIM, HARRISON HAS NOT PRESENTED SUFFICIENT EVIDENCE TO AVOID SUMMARY JUDGMENT ON SUCH A CLAIM.

Section 12112(d)(2)(A) prohibits medical examinations or making inquiries of an applicant "as to whether such applicant is an individual with a disability or as to the nature or severity of such disability. 42 U.S.C. § 12112(d)(2)(A). However, "a test to determine the illegal use of drugs shall not be considered a medical

[3] Harrison's failure to properly plead the claim causes BEHI to spend the majority of its reply brief addressing a new cause of action, which could have been addressed in its brief in support of motion for summary judgment, rather than rebutting the many mischaracterizations of Anthony's testimony submitted by Harrison, thus resulting in further prejudice to BEHI.

examination." 42 USC § 12114(d)(1). "Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results." Id. at (d)(2).

A. Harrison Cannot Prove He Was Subjected to an Improper Inquiry.

Harrison has not presented any evidence he underwent a medical examination or was subjected to an improper medical inquiry. The ADA does not consider drug tests a medical examination, and the EEOC permits follow-up questions when drug tests have positive results, such as Harrison's. See Conroy, 333 F.3d at 96 (internal citations omitted) ("Questions that are *not* likely to elicit information about a disability are always permitted, and they include asking employees about . . . current illegal use of drugs."). The EEOC also acknowledges that a potential employer may question an applicant regarding drug use under certain circumstances. "If an applicant tests positive for use of a controlled substance, the employer may lawfully ask questions such as, 'What medications have you taken that might have resulted in this positive test result? Are you taking this medication under a lawful prescription?'" EEOC Notice Number 915.002, October 10, 1995 (available at http://www.eeoc.gov/policy/docs/preemp/html).

The only "evidence" that BEHI or Don Anthony ("Anthony") made any inquiry is Harrison's self-serving testimony regarding his telephone conversation

with a Medical Review Officer (MRO). At the very worst, Anthony informed Harrison he had tested positive in pre-employment drug screening. (See Harrison Dep. at 68:14 – 18.) Harrison testified that when Anthony told him about the positive drug test, He only said he was taking a prescribed medication. (See id. at 69:4-5.) Harrison also testified Anthony asked him to "go get [his] pill bottle[;]" and had Harrison make a phone call. (Id. at 69:6-7; 70:3-6.) Harrison then alleges that Anthony stood in the room while Harrison made the call to the MRO and answered questions. (See id. at 71:18 – 72:6.) Harrison does not provide this Court with a description of any alleged questioning, much less questioning that constituted a prohibited medical inquiry.

Harrison claims, but provides no authority for the claim, that, as a result of Anthony allegedly listening to one side of a conversation, BEHI made an improper medical inquiry. Simply, Harrison cannot establish that the alleged questions exceeded the follow-up questions allowed by the EEOC or that BEHI made the inquiries.

B. Harrison Has Not Presented Any Evidence That He Was Subjected to a Change in Circumstances as a Result of Any Alleged Improper Inquiry.

Even if Harrison was subjected to an improper inquiry, he has no evidence he was discriminated against as a result of the answers to that inquiry. In fact, contrary to Harrison's misrepresentation of Anthony's testimony, Anthony did not

testify he told Human Resources not to send an offer letter. Instead, he testified he did not recall. (See Anthony Dep. at 125:16 – 126:3.) He testified as to his ordinary practice. (See id. at 110:14 – 111:20.) But he did not remember telling anyone to send, or not to send, the offer letter. (See id. at 125:16 – 126:3.) No witness testified they were told by Anthony not to send the offer letter. While Harrison may not understand the complexity of preparing for an audit,[4] or why doing so would cause Anthony to ask that an offer letter not go out, Anthony testified it was all-involving. (See id. at 112:16-22; 113: 8-12.)

After the conversation with the MRO, Harrison's pay did not change. His assignments did not change. He was not asked to take any precautions to protect the boards in the event he had a seizure while working on one. He went back to his position, and he stayed there, with the same pay and benefits, until August. It is undisputed that Anthony was told after he sent Harrison for a drug test that Harrison threatened him. (See Anthony Dep. at 119:10-15.) It is undisputed that Anthony was told by Tim Brown ("Brown") – AFTER Harrison was sent for the drug test – that Harrison was not cutting it and that it would be a mistake to hire him. (See id. at 89:22 – (90:11.) It is undisputed that, whether or not Harrison thinks it was a bad joke, Anthony was told Harrison refused to repair a board. (See id. at 143:12-21.) In short, after the alleged improper medical inquiry (which

[4] That lack of understanding might explain why the perception of Harrison's performance changed after the drug test.

appears to be the sole basis on which Harrison relies), NOTHING changed until Anthony received reports of Harrison's poor performance and threats.

The undisputed facts clearly demonstrate that any alleged medical inquiry did not result in Harrison's dismissal. Harrison's behavior, as reported to Anthony, resulted in his dismissal. Courts of this circuit have concluded that "[e]mployers have the freedom to make unwise, unsound, or even irrational decisions, and courts do not sit as super-personnel boards." Tarrance v. Montgomery County Bd. of Educ., 157 F. Supp. 2d 1261, 1263 (M.D. Ala. 2001). Whether or not Harrison or this Court would have given credence to Brown's complaint about Harrison is irrelevant. Anthony did. And Anthony acted on Brown's report, and the reports that Harrison had threatened him.[5] Accordingly, Harrison's claim of improper medical inquiry would fail if such a cause of action were even recognized by the Eleventh Circuit.

IV. HARRISON HAS ABANDONED HIS CLAIM THAT BEHI DISCRIMINATED AGAINST HIM AS A RESULT OF A PERCEIVED DISABILITY AND FAILED TO MEET HIS BURDEN TO AVOID SUMMARY JUDGMENT.

In his response, Harrison abandons his claim for perception of disability, writing "Harrison does not have to prove he was perceived as having a disability

[5] Even though Harrison questions the extent to which the threats were a legitimate rationale for asking Aerotek not to return Harrison because such was not in the EEOC response, BEHI notes it is undisputed Anthony told Aerotek about the threats contemporaneously with BEHI's request.

by Benchmark[.]"[6] (Resp. Mot. Summ. J. at 15.) However, even if he had not abandoned the claim, Harrison never provides this Court with any evidence that BEHI believed epilepsy was a disability. Harrison may think he has provided evidence that a reasonable jury might conclude that Anthony did not like epileptics (a contention with which BEHI disagrees), but that alone is not proof that Anthony believed Harrison 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" *because* of his epilepsy. 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)).

First, the only evidence Anthony knew Harrison was epileptic is Harrison's self-serving testimony. Second, if Harrison truly believed Anthony thought he was disabled, he would be able to describe an immediate change of behavior to this Court immediately after Anthony allegedly learned he was epileptic. Harrison cannot, and does not, point to any direct or circumstantial evidence that Anthony's attitude toward him changed as a result of the test. Harrison testified no behavior changed after Anthony allegedly learned about the epilepsy. . (Harrison Dep. at

[6] The abandonment is unsurprising given Harrison's acknowledgement that, in cases such as is this one, in which plaintiff can show no evidence of statement by decision-makers concerning the impairment, and combined with the legitimate, nondiscriminatory reasons given by BEHI, a finding in favor of the plaintiff is extremely rare. Indeed, in Ross v. Campbell Soup Co., 237 F.3d 701 (6th Cir. 2001), relied on by Harrison, a memorandum addressing concerns about Ross' previous back injuries, and statements by decision-makers that Ross could not hurt his back again, were in evidence. Id. at 703.

72:15 – 73:5; 164:10-22.) 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 assumption is simply not enough. See Sonnier v. Computer Programs & Sys., Inc., 168 F. Supp. 2d 1322, 1332 (S.D. Ala. 2001).

In short, Harrison has not provided this Court with any evidence that BEHI perceived him to be disabled. Therefore, Harrison's claim for perception of disability fails.

CONCLUSION

Harrison has not been able to find a single cause of action for which he is entitled to relief. He is not disabled. BEHI did not perceive him as being disabled. Even if the Eleventh Circuit were to decide today to recognize a cause of action by an unsuccessful job applicant for an improper medical inquiry, and even if Harrison had actually made such a claim, Harrison cannot prove such a claim. In short, based on the evidence and briefs submitted by both parties, no genuine issue of material fact exists, and BEHI is entitled to judgment as a matter of law on all claims, filed and unfiled, made by Harrison.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 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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