IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

RANDY BIRCH,

Plaintiff,

v. MEMORANDUM AND ORDER

JENNICO 2, 05-C-670-S

Defendant.

Plaintiff Randy Birch proceeding pro se was allowed to proceed in forma pauperis on his claim under the Americans with Disabilities Act against Jennico 2. In his complaint he alleges he was terminated by the defendant because he was medically unsuitable for the position. Plaintiff is now represented by counsel.

On March 15, 2006 defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affined is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Defendant moves to strike the affidavits of Jeff Scott Olson and Kathy Condon because they do not comply with Rule 56(e), Federal Rules of Evidence. The Court agrees that these affidavits are not admissible evidence and the affidavits will be stricken.

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Randy Birch is an adult resident of Eau Claire, Wisconsin. Defendant Jennico 2 is a Wisconsin corporation with its principal place of business in Eau Claire Wisconsin. Jennico 2 manufactures, markets and distributes laundry aids and surface cleaning products as well as plastic bottles for those products.

Plaintiff is homosexual and was diagnosed as being HIV positive in 1993. His HIV condition has been reasonably stable since that time. Since February 2001 plaintiff has been treated for his condition by Dr. Robert Noyce, M.D. On February 20, 2004 Dr. Noyce state that plaintiff's HIV condition should not affect the major life activities of walking, talking and self-care.

As a homosexual man plaintiff could have a child with a female partner or through artificial insemination but he does not see reproduction as a viable option because of his HIV. If he did not have HIV plaintiff believes he would seek to have a child by artificial insemination.

Plaintiff started working at Jennico 2 in September 2002 as a contract worker employed by Jobs Plus in the plastics department. While working at Jennico 2 he was an employee of and received his pay from Jobs Plus.

In November 2003 Jennico 2 decided to train plaintiff for a Batch Maker vacancy. Plaintiff understood if he successfully completed his two or there weeks of training he would no longer be an employee of Jobs Plus but would instead be moved onto Jennico

2's payroll. He also understood this training period would be used to determine whether he could do the job as a Batch Maker and whether he liked the position.

A Batch Maker is required to work with varying quantities of toxic and potentially hazardous chemicals to manufacture the company's cleaning products. Because Connie Alf, an owner and executive vice-president at Jennico 2, heard that plaintiff was receiving chemotherapy cancer treatments, she was concerned whether he could safely work in the toxic batch making environment. She did not ask plaintiff about his medical condition but advised Kathy Condon at Jobs Plus that she wanted a written medical statement from plaintiff's doctor saying it was okay to work in the batch making environment.

On November 21, 2003 plaintiff met with Amy Olssen, a human resources representative for Jennico 2, who advised plaintiff that he required a medical evaluation and should talk to Kathy Condon about it. Plaintiff confirmed with Kathy Condon that Jennico had requested a medical evaluation.

On November 26, 2003 Jim McCormick terminated plaintiff's assignment as a Batch Maker trainee at Jennico 2.

It is disputed whether plaintiff was an employee of Jennico 2 in November 2003 while he remained on Jobs Plus payroll.

MEMORANDUM

Plaintiff claims defendant Jennico 2 unlawfuly required him to obtain a medical examination. He also claims that he was terminated because of his disability, his HIV positive condition. Defendant denies that it unlawfully required plaintiff to obtain a medical examination. Further, defendant argues that plaintiff was not disabled under the ADA.

The Americans with Disabilities Act requires employers to reasonably accommodate a qualified individual with a disability. 42 U.S.C. §12112(a), and prohibits discrimination on the basis of a disability. The Americans with Disabilties Act also prohibits medical examinations and inquiries until after the employer has made a "real" job offer to an applicant. See 42 U.S.C. § 12112(d)(3); Leonel v. American Airlines, Inc., 400 F. 3d 702, 708 (9th Cir. 2005). The ADA requires only that such examinations be conducted as a separate, second step of the selection process, after an individual has met all other job pre-requisites.

In this case defendant argues that plaintiff was already hired by Jennico when the examination was required. Plaintiff argues that he was required to get a medical examination before he was placed on Jennico 2's payroll. A factual dispute remains as to whether plaintiff was employed by Jennico prior to being required to get a medical examination. Where plaintiff was required to get

a medical examination before he was hired by Jennico the ADA may have been violated.

Defendant argues that had the examination been required prior to his employment it was lawful because it was job related and consistent with business necessity. 42 U.S.C. § 12112 (d)(4)(A). In the alternative, such an examination would be lawful if the job environment would pose a direct threat to the applicant's health. 29 C.F.R. § 1630.15(b)(2). See Chevron U.S.A., Inc., v. Echazabal, 536 U.S. 73 (2002).

Defendant argues that when Connie Alf heard that plaintiff may have cancer she was concerned for his safety working with toxic materials and required him to obtain a medical examination. Factual disputes remain whether such a medical examination was job related, consistent with business necessity or required because the job environment would pose a direct threat to plaintiff's health.

Defendant's motion for summary judgment on this claim will be denied. Plaintiff's belated motion for summary judgment on this claim will also be denied because factual disputes remain.

Plaintiff also claims that he was terminated because of his disability, his HIV positive condition. Defendant argues that plaintiff is not disabled as that term is defined in the ADA. A disability is defined as a physical or mental impairment which substantially limits one or more of a person's major life activities. 42 U.S.C. §12102(2). These activities include caring

for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. §1630.2(j).

In Roth v. Lutheran General Hospital, 57 F. 3d 1446, 1454, (7th Cir. 1995), the Court held that plaintiff must meet the threshold burden to establish that he or she is disabled within the meaning of the Act. The Court stated:

> An individual is "disabled" if he (or she) has (1) a physical or mental impairment which substantially limits one or more of the major life activities; (2) a record of such impairment; or (3) if he (or she) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B; 29 C.F.R. § 1613.702(a); 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

"Substantially limits" means that the employee is either unable or significantly restricted in the ability to perform a major life activity that the average person in the general population can perform. 29 C.F.R. § 1630.2(j)(1). Toyota Motor Mfg., KY, Inc. v. Williams, 534 U.S. 184 (2002).

In Bragdon V. Abbott, 524 U.S. 624, 641 (1998), the United States Supreme Court held that a woman's HIV infection is a physical impairment which substantially limits a major life activity, her ability to reproduce and bear children.

To show that he is disabled under the Act plaintiff must show that his HIV positive condition substantially limits a major life activity. He stated in his deposition that his condition substantially limits the major life activity of reproduction. This testimony raises a genuine issue of material fact whether

plaintiff's medical condition substantially limits his major life activity of reproduction. Accordingly, defendant's motion for summary judgment on the basis that plaintiff is not disabled under the ADA will be denied.

ORDER

IT IS ORDERED that defendant's motion to strike the affidavits of Jeff Scott Olson and Kathy Condon is GRANTED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff's request for summary judgment in his response brief on his medical examination claim is DENIED.

Entered this 19th day of April, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge