Appeal No. 11-11758-H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD ROE,

Plaintiff/Appellant

v.

CITY OF ATLANTA,

Defendant/Appellee

On Appeal from the United States District Court
For the Northern District of Georgia, Atlanta Division

Opening Brief of Appellant Richard Roe

Counsel for Appellant Richard Roe

Gregory R. Nevins
GA State Bar No. 539529
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
730 Peachtree St. NE, Suite 1070
Atlanta, GA 30308
Telephone: (404) 897-1880
Facsimile: (404) 897-1884

Scott A. Schoettes
Illinois Bar No. 6282105
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
11 E. Adams Street, Suite 1008
Chicago, IL 60603
Telephone: (312) 663-4413
Facsimile: (312) 663-4307

APPELLANT RICHARD ROE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (11th Cir. R. 26.1-2(c))

Pursuant to Eleventh Circuit Rule 26.1-2(c), Appellant Richard Roe hereby submits the following Certificate of Interested Personas and Corporate Disclosure Statement, and pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, hereby certifies that the following is a complete list of the Trial Judge, all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party:

Koval, Steven H., Trial Counsel of Record for Appellant

The Koval Law Firm, LLC, Trial Counsel of Record for Appellant

Michael D. Grider, Esq., Former Trial Counsel of Record for Appellant

Richard Roe, Appellant

Lambda Legal Defense and Education Fund, Inc., Counsel for Appellant

Gregory R. Nevins, Counsel for Appellant

Scott Schoettes, Counsel for Appellant

Robert N. Godfrey, Counsel for Appellee

Kristi D.A. Matthews, Counsel for Appellee

City of Atlanta, Georgia, Appellee

Shoob, Marvin H., United States Senior District Court Judge

There are no publicly traded corporations that have in interest in the outcome of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Rules

Regulations

Articles and Notes

STATEMENT REGARDING ORAL ARGUMENT

Because this case does not fall under one of the exceptions set forth in Federal Rule of Appellate Procedure 34(a)(2), Plaintiff respectfully requests oral argument. *See also* 11th Cir. Rule 34-3(b). Moreover, in addition to addressing a number of procedural deficiencies in the court below, this case presents important questions involving the nature of a disabled plaintiff's prima facie burden to establish that he does not present a direct threat to the health or safety of others.

Furthermore, the alternative basis for resolving this appeal—reconsideration of this Circuit's current position on the placement of the burden on direct threat—is one of exceptional importance. Placing the burden on the defendant to prove the existence of a direct threat would eradicate an unnecessary impediment to expeditious and fair resolution of disability discrimination claims and potentially help resolve a circuit split on this issue.

I. JURISDICTIONAL STATEMENT

This action was filed in the United States District Court for the Northern District of Georgia, alleging, *inter alia*, violations of Title I of the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101 *et seq.* (the "ADA") and Section 504 of the Federal Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 *et seq.* ("Rehabilitation Act"). The district court had subject matter jurisdiction pursuant to 28 U.S.C. §1331, as the action arose under the laws of the United States.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as this is an appeal of a final order from the district court granting summary judgment. The final order of the district court from which this appeal follows was entered on March 16, 2011. Roe timely filed his Notice of Appeal on April 15, 2011.

II. STATEMENT OF THE ISSUES

A. Whether the district court erred by granting summary judgment based on Roe's purported inability to establish he was qualified to perform the essential functions of a police officer—divorced from any concerns related to a potential direct threat presented by his HIV—when City of Atlanta did not articulate or argue that as a basis for summary judgment.

B. Whether the district court erred in granting summary judgment in City of Atlanta's favor based upon the City's argument that Roe was unable to establish that his HIV did not present a direct threat to the health or safety of others, in light of these independently reversible errors:

1. the court should have precluded City of Atlanta from arguing that Roe's HIV presented a direct threat to the health or safety of others, based on judicial admissions made by City of Atlanta during discovery; or

2. the court misapplied controlling authority of this Court that prohibits granting summary judgment to an employer based on direct threat when the employer has not conducted a particularized inquiry regarding the plaintiff's disability; or

3. the court misapplied the evidentiary standard applicable to a plaintiff's prima facie case of discrimination under *McDonnell Douglas*, and therefore erroneously held that Roe had failed to discharge his burden on the issue of direct threat.

C. Whether the district court erred by granting summary judgment without addressing Roe's claim that City of Atlanta violated the Americans with Disabilities Act and the Rehabilitation Act when it required him to undergo a medical examination prior to making a conditional offer of employment.

D. In the alternative, whether the Eleventh Circuit, pursuant to Circuit Rule 35(a), should revisit and reconsider its current position that a plaintiff bringing a claim under §12112(a) of the Americans with Disabilities Act (and/or §504 of the Rehabilitation Act of 1973) bears the burden of establishing the absence of a direct threat, and instead place the burden on the defendant to establish the existence of such a direct threat as an affirmative defense.

III. STATEMENT OF THE CASE

Plaintiff Richard Roe brought this action challenging the hiring procedures of City of Atlanta ("COA") and its refusal to hire him as an Atlanta Police Department ("APD") police officer based on the fact that he has HIV. (Am. Compl. (Docket No. 26) (Docket No. hereinafter "Doc.").) As part of his claims, Plaintiff sought damages for COA's violations of the ADA and the Rehabilitation Act.[1] (Doc. 26, ¶¶51-62.) Specifically, Roe alleged that COA violated both of these statutes by requiring him to undergo a medical examination before making him a conditional offer of employment and by subsequently refusing to hire him because of the disability uncovered during that unlawful medical examination. (*Id.*)

At the close of discovery, COA moved for summary judgment. COA first argued that it was entitled to summary judgment because Roe could not establish that he was subjected to illegal discrimination because of his disability. (COA's Brief in Support of MSJ (Doc. 119) at 4-12). Secondly, COA argued that, because

[1] Roe brought additional claims against COA but dismissed those at the summary judgment stage of the proceedings. (Pl.'s Response to MSJ (Doc. 168) at ¶1) Roe also brought claims against Caduceus Occupational Medicine, LLC—the company engaged by COA to conduct pre-employment medical testing of police officers—and the individual doctors who had performed the HIV test without Plaintiff's knowledge or consent. (Doc. 26 at ¶¶ 63-112.) Plaintiff is not appealing the portions of the district court's order granting summary judgment in favor of Caduceus and the individual doctors.

of the purported direct threat to others presented by his HIV, Roe could not establish that he is a qualified individual. (Doc. 119 at 12-15.)

The district court granted summary judgment to COA on the latter grounds. (Order (Doc. 175) at 12-18.) In addition, though it had not been argued by COA, the district court held that Plaintiff—for reasons unrelated to the direct threat issue—could not establish that he was qualified to perform the essential functions of the job. (Doc. 175 at 10-11.) The district court granted summary judgment in COA's favor on all counts without addressing Plaintiff's claim that COA violated the ADA and Rehabilitation Act by requiring him to undergo a medical examination without making him a conditional offer of employment. (Doc. 175, *passim*.)

Plaintiff filed a motion for reconsideration regarding the ADA and Rehabilitation Act claims against COA. After briefing from both parties, the district court denied Plaintiff's motion for reconsideration. Notice of this appeal was timely filed.

IV. STATEMENT OF FACTS

Plaintiff's Application Process

In January 2006, Plaintiff Richard Roe, who has been living with HIV since at least 1997, applied to be a police officer with COA. (COA Statement of Facts (Doc. 119-2), ¶ 1; Roe Additional Statement of Facts (Doc. 168-21), ¶ 1.) As part

of the application process, Roe passed a written examination, psychological examination, computerized voice stress analysis test, and background check. (COA Response to EEOC (Doc. 168-5 (Exh. D)), p. 5; Ford Dep. (Doc. 168-26) at 68:4-25.)

In August 2006, COA sent Roe to Caduceus Occupational Medicine, LLC ("Caduceus") for a medical examination. (Doc. 119-2, ¶ 24.) Caduceus was under contract with COA to provide pre-employment medical examinations for police officers. (Doc. 119-2, ¶ 10.) Prior to sending Roe for medical examination, COA did *not* make him an offer of employment conditioned only upon successfully passing the medical examination. (COA's Resp. to Pl.'s Third Request for Admission (Doc. 168-16 (Exh. O)), Nos. 12 and 13.)

During his medical examination with Caduceus on August 14, 2006, Roe was given an HIV test.[2] (Doc. 168-21, ¶ 20; Greene Dep. (Doc. 168-28) at 96:6-9.) On September 7, 2006, Roe met with Dr. Alton Greene of Caduceus, who informed Roe of his positive HIV test result. (Roe Dep. (Doc. 168-31) at 125:18-22.) Dr. Greene further stated that COA had a policy of not hiring individuals with HIV to be police officers and that he would be advising COA that, as a result of

[2] In a previous visit to Caduceus, as part of an application process for a different position with COA, Roe had been advised by the doctor performing his medical examination that he did not need to disclose his HIV status to a prospective employer, because his HIV status was "none of the employer's business." (Roe Dep. at 82:1-10; Dhara Dep. at 24:1-15.)

Roe's HIV, Roe could not be employed in a position in which he had any contact with the public. (Doc. 168-21, ¶ 30; Greene Dep. at 102: 1-7; Roe Dep. at 126:1-13.) Dr. Greene conducted no further tests, examinations or inquiries aimed at discovering the metrics underlying Roe's HIV (e.g., viral load or T-cell count), the success or failure of his treatment, or the degree to which his HIV did or did not place any limitations upon his capabilities to perform the job of police officer. (Greene Dep. at 125:6-24, 126:1-8.)

In his report to COA, Dr. Greene stated that the Plaintiff had "Failed" his medical exam due to the "HIV serology testing" and that, as a result of this medical condition, Plaintiff should have "no physical contact or involvement with individuals." (Doc. 168-4 (Exh. C); Greene Dep. at 99:9-21; 102:1-7; 108:3-11.) Dr. Greene cited no other health condition or reason for imposing these restrictions upon Roe and/or for failing him in his medical review. (Doc. 168-3 (Exh. B); Doc. 168-4 (Exh. C); Greene Dep. at 108:6-11.) After his September 7 meeting with Dr. Greene, Roe received no further communications from his recruiters, and he was not hired to be a police officer with COA.[3] (Doc. 168-21, ¶ 21; Roe Dep. 214:3-5)

[3] On or around November 4, 2006, Roe submitted to Dr. Greene a letter he had obtained from his primary HIV-care provider, Gayle F. Arberg, C.N.P. (certified nurse practitioner), stating that there is no reason Roe could not assume the full duties of a police officer and that his condition is well controlled and not transmitted through casual human contact. (Doc. 168-17 & 18, Exhs. P & Q; Roe Dep. at 135:15-25.)

Procedural Facts

On September 5, 2008, Roe filed a complaint in the United States District Court for the Northern District of Georgia alleging, *inter alia*, disability discrimination under the ADA and the Rehabilitation Act. In its answer to the complaint, COA did not assert a defense based upon any purported direct threat posed by the Plaintiff's HIV. (Answer (Doc. 31)). In fact, COA explicitly denied that it "maintained a policy and/or custom of not hiring persons to be Atlanta police officers who test positive for the human immunodeficiency virus ("HIV")." (*Id.*, ¶ 14.)

COA maintained this position throughout the discovery process. In response to a request for production of documents, Plaintiff received the "Atlanta Department of Public Safety Manual of Medical Standards," which was provided to Caduceus by COA to determine the medical eligibility of individuals to be police officers. (Doc. 119-2, ¶ 26.) This manual lists over 165 disqualifying medical conditions in twenty-one categories. (*See* "Atlanta Department of Public Safety Manual of Medical Standards," (Doc. 119-10 (Exh. 8) (Record Excerpts, Tab H).) There is no explicit mention of HIV in this document. (*Id.*) Rather, in the section entitled "Vascular System," the manual lists several specific diseases of the blood or blood-forming conditions that "will disqualify" a person from being a police officer (e.g., anemia, leukemia, hemophilia) and subsequently includes this

category: "Any other disease of blood or blood-forming tissues which could adversely affect the performance of the duties of a sworn employee of the Department of Public Safety." (*Id.*, pp. 7-8 (Sec. X(b))) After reviewing this disqualifying criteria, Plaintiff sought to clarify COA's position that it did not consider mere seropositivity to equate to a "disease of blood or blood-forming tissues which could adversely affect the performance of" a police officer's duties. Plaintiff made this specific request for admission to COA: "Request to Admit No. 17: The Atlanta Police Department does not consider HIV to be a medically disqualifying condition for applicants to become police officers." (COA's Response to Pl.'s Fourth Request for Admissions (Doc. 168-12 (Exh. K)), No. 17.) COA's response to this request: "Admitted." (*Id.*)

COA did not identify an expert to testify regarding any purported direct threat to the health or safety of others presented by a police officer living with HIV. (*See* Doc. 119 at 12-15 (citing no expert testimony).) Based on his understanding of COA's position on this issue and the evidence he had obtained locking COA into this position, Plaintiff also did not identify an expert on this subject during discovery.

On summary judgment, however, COA reversed course and—to Plaintiff's great surprise given COA's admissions and the position it had taken throughout the litigation—argued that Plaintiff was not qualified to serve as a police officer

because of the direct threat that his HIV purportedly posed to the health or safety of others.[4] (COA Brief in Support of Motion for Summary Judgment (Doc. 119) at pp. 12-15.) COA's contention that Roe's HIV would present a direct threat to the health or safety of others was not rooted in any evidence—indeed there had been no evidence generated to support this notion—and instead relied upon medically and scientifically outdated case law discussing the risk of HIV transmission in contexts far removed from the one presented here. (Doc. 119 at 14.)

In his response to the motion for summary judgment, Plaintiff argued that—based on COA's admission that HIV was not a disqualifying condition—COA should be precluded from asserting or arguing that Roe posed a "direct threat" on this basis. (Pl.'s Response to MSJ (Doc. 168) at 20-28.) Nonetheless, Plaintiff gamely marshaled the evidence at his disposal to defeat this argument—and even submitted an affidavit from an expert Plaintiff *would have* identified in discovery had COA previously revealed it was actually defending on the grounds that it believes a police officer with HIV presents a direct threat to others. (Doc. 168 at

[4] This was not COA's primary argument regarding Plaintiff's claims under the ADA and the Rehabilitation Act. COA's summary judgment brief first argued that Plaintiff's application was suspended because he failed to adhere to departmental communication policies, that Plaintiff could not show he was discriminated against on account of his disability because COA was unaware that Plaintiff had HIV, and that Plaintiff had disqualified himself by omitting certain information during the application process. (Doc. 119 at 5-8, 8-10, 10-12.) The district court rejected each of these arguments. (Doc. 175 at 8-10.) These arguments are not discussed in any detail in this brief because they are not relevant to Plaintiff's appeal.

26-28; Affidavit of Howard Paul Katner, M.D., dated July 9, 2010 (Doc. 168-9) (Exh. H).)

In its ruling on summary judgment, the district court rejected COA's primary arguments. Citing extensive disputes of material fact, the court rejected COA's argument that it was unaware of Plaintiff's HIV status and thus could not have discriminated. (Doc. 175 at 8.) Citing the "after-acquired evidence" rule, the court also rejected COA's argument that its rejection of Roe's application was justified by any omissions of medical information on his application. (Doc. 175 at 9.)

The court next discussed—and ruled in COA's favor on—a basis for summary judgment that was never articulated by COA in its motion or briefs. Specifically, the court held that, regardless of whether he presented a direct threat, Plaintiff could not establish he was qualified to perform the "essential functions" of the job. (Doc. 175 at 10-11.) The district court reached this conclusion despite the fact that COA had not identified any essential functions of the job or made any argument regarding Plaintiff's qualifications to perform the job, other than its argument that Plaintiff's HIV presented a direct threat to others. (Doc. 119 at 12-15.)

The court next addressed the argument that COA disclaimed in discovery but embraced on summary judgment: that Plaintiff was not qualified to be a police

officer because he posed a direct threat to the safety of others on account of his HIV. (Doc. 119 at 12-15.) The court first rejected any reliance upon the judgment of Dr. Greene (or Caduceus), because Dr. Greene had not conducted the individualized inquiry required under the ADA and there was no indication that Dr. Greene had relied upon the most current medical knowledge and/or the best available objective evidence on HIV. (Doc. 175 at 13-14.)

Despite rejecting COA's reliance on Dr. Greene's decision to fail the Plaintiff as "evidence" of the existence of a direct threat—and acknowledging at least some of Plaintiff's evidence on the subject of direct threat—the district court nonetheless ruled in favor of COA based on its direct threat argument. (Doc. 175 at 15-18.) The court acknowledged some of the admissible evidence Plaintiff presented —including the admissions from COA that HIV is not a disqualifying condition for the position of police officer, that COA does not test its current police officers for HIV, and information from the federal Centers for Disease Control and Prevention ("CDC") regarding the facts that the modes of possible HIV transmission are very limited, that it does not survive long outside of the body, and that it is not easily transmissible. (Doc. 175 at 15-17.) The court rejected as inadmissible some other evidence from the Plaintiff on this point—such as the belatedly submitted affidavit regarding HIV transmission risks. (Doc. 175 at 15-16.) However, the district court also discounted or disregarded other evidence

presented by Plaintiff—such as his affidavit stating that he has previously performed in similar law enforcement capacities and/or the letter from Certified Nurse Practitioner Arberg stating that Plaintiff can safely perform the duties of a police officer. (Doc. 175 at 16, 19.)

Based on its view of the very substantial nature of a plaintiff's prima facie burden on direct threat and its evaluation of Plaintiff's evidence on the subject in light of that heavy burden, the court ruled that COA was entitled to summary judgment. (Doc. 175 at 20.) The court failed to address Plaintiff's argument that COA violated the ADA and Rehabilitation Act by requiring Plaintiff to undergo a medical examination before providing him with a conditional offer of employment. (Doc. 175, *passim*.)

V. SUMMARY OF THE ARGUMENT

With respect to Plaintiff's claims under the ADA and the Rehabilitation Act, the district court ruled in City of Atlanta's favor on summary judgment on two separate grounds: 1) that Plaintiff could not establish he was qualified to perform the essential functions of the job of police officer for reasons unrelated to any alleged direct threat presented by his HIV; and 2) that Plaintiff could not discharge his prima facie burden to show that his HIV would not present a direct threat to the health or safety of others in serving as a police officer. In its opinion order, the

district court did not address Plaintiff's claim that COA violated the ADA and the Rehabilitation Act by requiring him to undergo a medical examination without making him a conditional offer of employment.

With respect to the first ground for granting summary judgment, the district court erred by ruling against Plaintiff on a basis that was not articulated by COA in its motion for summary judgment or its brief in support of that motion. COA did not contend or argue that Plaintiff could not meet the objective prerequisites for the position of police officer or that Plaintiff was unable to perform the essential functions of the job. Rather, COA's sole contention regarding Plaintiff's qualifications was that Plaintiff could not show that his HIV would not present a direct threat to the health or safety of others, thereby making him unable to show he was qualified for the position of police officer. By raising *sua sponte* Plaintiff's qualifications unrelated to his HIV as a basis for summary judgment—and ruling in COA's favor on this ground without notifying Plaintiff and providing him with an opportunity to respond to this argument—the district court committed reversible error.

With respect to the second ground for granting summary judgment in COA's favor, Plaintiff identifies three errors made by the district court. First, based on judicial admissions made by COA during discovery, COA should have been precluded from raising any purported direct threat related to his HIV. Second, the

district court misapplied controlling Eleventh Circuit case law that prohibits granting an employer summary judgment on grounds of direct threat when the employer has not engaged in the required particularized inquiry regarding the plaintiff's disability. Third, the district court misapplied the evidentiary standard for making a prima facie showing that one's disability does not present a direct threat. Because the burden on the plaintiff in his prima facie case is not an onerous one—and Plaintiff presented substantial evidence to discharge his light burden in this stage of the inquiry—the district court committed reversible error by granting summary judgment in COA's favor on this ground.

The district court also committed reversible error when it repeatedly ignored Plaintiff's claim that COA violated the ADA and the Rehabilitation Act by requiring him to undergo a medical examination without making him a conditional offer of employment. Under Eleventh Circuit precedent, liability attaches for this violation committed against any applicant, subject only to the applicant's ability to prove damages as a result. Because Plaintiff can prove he was denied employment as a result of the information learned about his disability during the medical examination, this cause of action is viable and must be remanded for trial.

In the alternative, Plaintiff requests that the Eleventh Circuit revisit and reconsider its position as to which party bears the burden with respect to the issue of direct threat. While the problems giving rise to this appeal were caused by the

district court's misapplication of Rule 56, Plaintiff contends that *most*—if not *all*—of these problems also could be alleviated by this Court's reconsidering where the burden on direct threat properly lies. By revisiting this issue—and reallocating the burden on direct threat to the defendant—an *en banc* panel of the Eleventh Circuit could not only rectify the problems encountered by the parties to this litigation, but also could ensure that future ADA litigants will be able to resolve disputes in a fair and expeditious manner.

VI. ARGUMENT

Legal Standards

This Court reviews *de novo* a grant of summary judgment on ADA claims. *Holly v. Clairson Indus.*, 492 F.3d 1247, 1255 (11th Cir. 2007). The party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). "An issue of fact is 'material' if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. It is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (*en banc*) (citations omitted). On summary judgment, the court must review the evidence "in a light most favorable to the non-moving party." *Id.*

"The ADA provides that no covered employer shall discriminate against a 'qualified individual with a disability because of the disability of such individual' in any of the 'terms, conditions, [or] privileges of employment.'." *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1304 (11th Cir. 2000) (citing 42 U.S.C. §12112 (a)). "Under the controlling law of this Circuit, '[t]he burden shifting analysis of Title VII employment discrimination claims is applicable to ADA claims.'" *Holly*, 492 F.3d at 1255 (citing *Earl v. Mervyn's Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000).

For a claim of disability discrimination, a plaintiff may either present direct evidence of discrimination based upon disability or may proceed using circumstantial evidence under the burden-shifting mechanism described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and its progeny. *See Wascura v. City of S. Miami,* 257 F.3d 1238, 1242 (11th Cir. 2001). Under the burden-shifting mechanism of *McDonnell Douglas* as applied to an ADA claim under §12112(a), a plaintiff must establish a prima facie case of discrimination by showing that: (1) he has a disability; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. *Morisky v. Broward County*, 80 F.3d 445, 447 (11th Cir. 1996). "A 'qualified individual with a disability' is an 'individual with a disability who, with or without' reasonable accommodation, can perform the essential functions of

the employment position that such individual holds or desires.'" *Davis,* 205 F.3d at 1305 (citing 42 U.S.C. § 12111(8)).

A. It Was Improper to Grant Summary Judgment Based on Plaintiff's Purported Inability to Show He Could Perform the Essential Functions of a Police Officer—Divorced From Any Concerns Relating to Direct Threat—When COA Did Not Raise That as a Basis for Summary Judgment.

Twenty years ago, the Eleventh Circuit held that a "district court may grant summary judgment on an issue only if a party moves for summary judgment on that issue." *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1556 (11th Cir. 1991); *see generally Latecoere Int'l, Inc. v. U.S. Dep't of the Navy*, 19 F.3d 1342, 1366 (11th Cir. 1994) ("A party is entitled to notice when the record is being built that it might lose the case on that record[.]") (citing Fed. R. Civ. P. 56(c)); *Griffith v. Wainwright*, 772 F.2d 822, 824-825 and nn.3-4 (11th Cir. 1985) ("Summary judgment cannot be entered against a party unless that person has been given express notice."). Since that time, the rules have been slightly modified to allow a district court to raise *sua sponte* a possibly meritorious basis for summary judgment not articulated by the moving party—and to rule in movant's favor on that basis—but only "[a]fter giving notice [to the nonmoving party] and a reasonable time to respond." Fed. R. Civ. P. 56(f); *see Yates v. GMAC Mortgage, LLC*, No. 1:10-CV-02546-RWS, 2010 U.S. Dist. LEXIS 133785, at *12 (N.D. Ga. Dec. 17, 2010). In its brief in support of its motion for summary judgment, COA

did not raise any argument concerning Plaintiff's meeting the objective criteria for the position of police offer. (Doc. 119 at 12-15.) Therefore, the district court should not have based its ruling on Plaintiff's silence on a point not put at issue by COA's motion—at least not without notifying Plaintiff and allowing an appropriate opportunity to respond to this argument.

A careful examination of the three-page portion of COA's brief laying out its argument that Roe cannot show he is a "qualified individual" reveals that the sole focus is on whether Roe's HIV presents a direct threat that would make him unqualified to serve as a police officer. (Doc. 119 at 12-15.) COA first explains the generic principles for making a prima facie showing that one is "qualified." (*Id.* at 13.) COA describes the legal inquiry as "two steps"—the first being an assessment of whether "the prerequisites for the position, such as the appropriate educational background, employment experience, skills or license" are satisfied. (*Id.*) COA makes no claim that Plaintiff is unable to meet these prerequisites or is unable to perform the essential functions of the job for reasons unrelated to his HIV. (Doc. 119 at 13 and n.20.[5]) Per COA, the second step of the "qualified" inquiry is whether "[a]n individual, *who can perform the essential functions*, may

[5] In fact, COA's brief and statement of facts did not identify—or even allude to—the prerequisites and essential functions of a police officer, except to the extent some functions might relate to the issue of direct threat. (*See* Doc. 119 at 12-15 and n.24.) This fact alone makes it difficult to contend that COA was actually advancing basic qualifications as a basis for summary judgment, or that Plaintiff was put on sufficient notice that he needed to respond to any such argument.

nevertheless not be a qualified individual, where there are health or safety risks associated with his performance of the job." (*Id.* at 13-17 (emphasis added).) It was only in this direct threat discussion that COA advanced arguments that Plaintiff was not "qualified." (*Id.*) COA's brief affirmatively narrowed the contested issue and led Plaintiff to believe that the *sole* basis for its contention that he was not qualified to be a police officer was the supposed direct threat that his HIV presented to others. (*See* Doc. 119 at 15 ("Therefore, Plaintiff was not a qualified individual pursuant to the ADA's 'direct threat' exception.").)

In an employment discrimination claim, there are literally dozens of things that could potentially disqualify a job applicant, and a plaintiff is not required to engage in a guessing game as to which of those things serve as the basis for a defendant's motion for summary judgment. *See Celotex*, 477 U.S. at 323, 1065 S. Ct. at 2552 ("[The movant] always bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.") It is therefore incumbent upon the defendant-employer, in a motion for summary judgment, to identify which of the job functions are essential. *See Bishop v. Ga. Dep't of Family and Children Servs.*, No. 04-16695, 2006 U.S. App. LEXIS 5968, at *6-7 (11th Cir. Mar. 10, 2006) (noting employer's failure to produce evidence regarding essential job functions, in reversing grant of summary judgment based on failure to make a prima facie case);

see also Bates v. UPS, 511 F.3d 974, 991 (9th Cir. 2007) ("Thus, to the extent that an employer challenges an ADA plaintiff's claim that he can perform the job's essential functions, we think it appropriate to place a burden of production on the employer to come forward with evidence of those essential functions.").[6]

The Eleventh Circuit requires that the defendant-employer not only identify a particular job function that the plaintiff is allegedly unable to perform, but also establish that the particular job function is "essential" as compared to "marginal" in nature. *See, e.g., Holly,* 492 F.3d 1247, 1257-61 (reviewing the evidence as to whether punctuality was an essential function of the job and concluding that "the most that can be said for [the employer's] position is that a genuine dispute of material facts exists regarding whether punctuality . . . is an *essential* element of [plaintiff's] job, and it was thus error for the district court to have taken this issue away from the fact-finder and awarded summary judgment to [the employer].") (emphasis in original); *see, e.g., Davis*, 205 F.3d at 1305-06 (describing the multiple factors to be considered in assessing whether a function is "essential" and reviewing the evidence presented by defendant on this issue).

It was especially unfair for Plaintiff not to have notice of any issue about meeting prerequisites, because Eleventh Circuit law sets an easily met threshold

[6] Indeed, even in discovery, COA refused to identify which of the job functions it considered essential, claiming that such information was subject to the "work product doctrine." (COA Response to Third Interrogatories (Doc. 168-12 (Exh. K)), Nos. 4-5.)

for employees and job applicants needing to make this prima facie showing. In *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763 (11th Cir. 2005), the court held that a "plaintiff need only show that he or she satisfied an employer's objective qualifications[,]" which in *Vessels* were "the requisite education, years of experience, and state certification levels." *Id.* at 768-69 (noting that any subjective criteria, even if legitimate, can "have no place in the plaintiff's initial prima facie case" because "we have made clear that the prima facie case is designed to include only evidence that is objectively verifiable and either easily obtainable or within the plaintiff's possession."); *accord Roper v. City of Foley*, 177 Fed. Appx. 40, 48 (11th Cir. 2006) (plaintiff met his prima facie case, "applying the employer's objective qualifications, [that] he was at least minimally qualified for the lieutenant position.").

Had Roe thought his basic qualifications were at issue, he could have presented evidence that he: 1) had already passed the other COA pre-employment tests for the position of police officer; 2) had been asked to proceed to a medical examination, which is only supposed to happen after a candidate is deemed otherwise qualified; and 3) had "failed" his medical examination *solely* on the basis of the purported threat his HIV presented to others (i.e., no other medical condition was mentioned or identified as a disqualifier). (Doc. 168-26 at 68:4-25; Doc. 168-4 (Exh. C).) This evidence would have been more than sufficient to

make a prima facie case regarding Plaintiff's objective qualifications to serve as a police officer. *See, e.g., Isenbergh v. Knight-Ridder Newspaper Sales*, 97 F.3d 436, 440 (11th Cir. 1996) ("[W]e can infer from the fact that he was granted an interview that Isenbergh was at least at some level qualified for the new job.")

In short, COA's motion and brief failed to place Plaintiff on notice that he needed to produce evidence on summary judgment regarding his basic qualifications for the position. *John Deere Co. v. American Nat'l Bank*, 809 F.2d 1190, 1191 (5th Cir. 1987) (mention in movant's brief that plaintiff had suffered no injury did not validate summary judgment entered on that ground, where the "point [was] not argued as a ground for summary judgment . . . [and] certainly was not raised by the [movant] in a manner that would be sufficient to put [nonmoving party] on notice that failure to present evidence of damages could be grounds for summary judgment."). Neither COA—nor the district court—identified a single essential function of the job that Plaintiff allegedly could not perform. (Doc. 119 at 12-15; Doc. 175 at 10-11.) It was therefore inappropriate to hold that Plaintiff failed to show he could satisfy the objective prerequisites or perform the essential functions of the job, and the district court's holding on this issue should be reversed.

B. It Was Improper to Grant Summary Judgment in Favor of COA Based on Direct Threat.

In its brief in support of summary judgment, COA asserted that Plaintiff could not establish that he was qualified for the position of police officer because he could not show that a police officer with HIV would not present a direct threat to the health or safety of others. (Doc. 119 at 12-15.) In ruling for COA on this basis, the district court committed three independently reversible errors: (1) COA should have been precluded from asserting that Plaintiff's HIV would present a direct threat, based on judicial admissions COA made during discovery; (2) COA should have been denied summary judgment under controlling precedent of the Eleventh Circuit, because COA did not conduct the required particularized inquiry into the effect of the Plaintiff's disability on his ability to safely perform the essential functions of the job; and (3) the district court misinterpreted the nature of Plaintiff's burden on direct threat in his prima facie case and misapplied the law to the evidence presented in ruling that Plaintiff had failed to discharge his burden on direct threat.

1. City of Atlanta Is Precluded From Asserting That Plaintiff's HIV Presents a Direct Threat.

The district court should not even have entertained COA's argument that HIV is a disqualifying condition for the position of police officer and/or that COA

could legitimately reject Roe's application on this basis, because COA made judicial admissions precluding it from raising this argument.

It is well-established law that a party is bound by its judicial admissions. *See Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) ("[A] party is bound by the admissions in his pleadings."). "Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." *Hill v. Fed. Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941). The purpose of obtaining such admissions in the discovery process is to narrow the scope of the disputed issues and conserve judicial resources expended during trial. *Ojeda-Sanchez v. Bland*, No. 608CV096, 2010 U.S. Dist. LEXIS 43609, at *6-7 (S.D. Ga. May 4, 2010) ("Judicial admissions, such as formal concessions in pleadings, 'provide notice to all litigants of the issue remaining in dispute, identify those that can be eliminated from the case and those that cannot be, narrow the scope of discovery to disputed matters and thus reduce trial time.'") (citations omitted).

Until filing its motion for summary judgment, COA's position in this litigation was that it does *not* consider HIV to be a disqualifying medical condition for those employed as police officers. From the outset of litigation, COA denied basing employment decisions on a person's HIV status. (*See* Doc. 31 at 1-4 and ¶ 14 (failing to assert any defense based on direct threat and explicitly denying that

COA "maintained a policy and/or custom of not hiring persons to be Atlanta police officers who test positive for the human immunodeficiency virus").) COA maintained this position throughout discovery by, among other things, admitting that it does not test its current police officers for HIV, does not know or attempt to learn their HIV status and does not require them to disclose to COA a positive HIV test result. (*See* Doc. 168-21, ¶¶ 63-65; COA's Resp. to Pl.'s Fourth Request for Admissions, Nos. 1-4, 6-13, 16.) Most important of all, COA made a direct judicial admission that it "does not consider HIV to be a medically disqualifying condition for applicants to become police officers." (Doc. 168-21, ¶ 62; COA's Response to Pl.'s Request for Admission, No. 17.)

As was appropriate, Plaintiff relied upon these admissions in shaping his litigation strategy, choosing not to name an expert on the issue of direct threat. Uncovering facts and exploring the positions that the opposing parties will take in the litigation is the purpose of discovery, and litigants should be encouraged to engage in an honest exchange of information that will allow them to narrow the disputed issues that require adjudication at trial. *See Ojeda-Sanchez*, 2010 U.S. Dist. LEXIS 43609, at *6-7. It is patently unfair to reward COA for, as one court adroitly termed it, "play[ing] possum" until discovery has closed, only to "revive that issue on the very day that summary judgment motions were due." *Id.* at *7.

COA should be held to the judicial admissions it has made and precluded from asserting or arguing that Plaintiff is not qualified to be a police officer with the APD because of his HIV. *See Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1178 (11th Cir. 2009) ("These judicial admissions are binding, and the four appellants cannot now claim the exact opposite to be true when [that] might work [in their favor]."); *see also Holiday Inns, Inc. v. Alberding*, 683 F.2d 931, 934-35 (5th Cir. 1982). Because COA cannot escape the consequence of its judicial admission, the district court should not have even entertained an argument from COA regarding HIV as a direct threat, much less granted COA summary judgment on this ground. For this reason alone, the district court's ruling on summary judgment should be reversed and this case remanded for trial.

2. City of Atlanta Did Not Conduct the Legally Required Individualized Assessment of Plaintiff's Disability.

During the application process, COA did not conduct the particularized inquiry regarding Roe's HIV that would have allowed it to properly evaluate his ability to perform safely as an APD police officer. (Doc. 175 at 13-14; Greene Dep. at 125:10-18.) Under controlling case law, failure to engage in this individualized inquiry also should have precluded summary judgment in COA's favor.[7] *See Lowe v. Ala. Power Co.*, 244 F.3d 1305, 1308-09 (11th Cir. 2001).

[7] It is difficult to overstate the extent to which COA's belated "direct threat" argument flouts the ADA. The ADA forbids knee-jerk exclusions of persons with

In the Eleventh Circuit, the law is clear: it is impermissible to grant summary judgment to an employer based on the supposed existence of a direct threat when the employer has not conducted the required particularized inquiry regarding a disabled plaintiff's ability to safely perform the essential functions of the job. *Id.* In this case, the district court correctly cited *Lowe* in holding that COA failed to satisfy the ADA's requirement to conduct an individualized assessment of the plaintiff's ability to perform safely the job at issue. (Doc. 175 at 14.) However, the district court neglected to apply *Lowe*'s holding regarding the *consequence* to the employer of having failed to make the necessary particularized inquiry—namely, that the employer is not entitled to summary judgment based on direct threat. *Lowe,* 244 F.3d at 1309.

In *Lowe*, the employer denied the plaintiff, a double amputee, a position as a tool-room mechanic because of restrictions placed on the plaintiff after a "cursory" examination conducted by the employer's physician many months before the plaintiff applied for the position. *Id.* at 1306. In reversing the district court's grant

---

disabilities; instead requiring employers, *ex ante*, to examine an employee's condition to determine whether the employee can perform a given job. *See Lowe*, 244 F.3d at 1308 ("To prevent the very reliance on stereotype and related perceptions of an individual's limitations that the ADA prohibits, an employer must point to particularized facts about the specific person's condition to support its decision."). To allow COA to deny even knowing of Roe's disability, and then later to rely on that disability when its primary arguments have been rejected, flies in the face of Congress's goals in passing the ADA.

of summary judgment for the employer, the Eleventh Circuit noted that: "The restrictions were also based, at least in part, on [the physician's] assumption that all double amputees have the same limitations." *Id.* at 1309. This, the *Lowe* court held, was inappropriate because "an employer must point to particularized facts about the specific condition to support its decision." Citing to *Bragdon v. Abbott*, 524 U.S. 624 (1998), the *Lowe* court stated that "a good-faith belief that a significant risk of harm exists is insufficient if it is not grounded in medical or other objective, scientific evidence." *Lowe*, 244 F.3d at 1308. Because the employer did not conduct the necessary individualized assessment of the plaintiff's abilities, the Eleventh Circuit held that summary judgment in the employer's favor was improperly granted. *Id.* at 1306 ("[S]ince Alabama Power's company physician did not base his decision to restrict Lowe's work activity on a timely, particularized assessment of Lowe's capabilities, summary judgment was improperly granted.").

This Court now faces an analogous case. COA conducted a medical examination revealing only that Plaintiff had HIV—and COA's physician did nothing to assess the effects of Plaintiff's HIV on his ability to safely perform the essential functions of the job. (Doc. 175 at 13-14; Greene Dep. at 125:6-18.) In fact, COA failed to state, much less establish, what the essential functions of a police officer are. (Doc. 119 at 12-15.) Instead, relying on Dr. Greene's

assumption that all individuals with HIV have the same limitations, COA denied Roe employment as a police officer. Granting summary judgment to the employer under these circumstances is squarely prohibited by *Lowe*.[8]

The cases cited by the district court in support of its ruling that Plaintiff cannot meet his minimal burden in establishing a prima facie case regarding direct threat, *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996) and *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275 (11th Cir. 2001), are inapposite regarding the problem identified and addressed by *Lowe* (*i.e.*, the employer's failure to conduct an individualized inquiry), because those cases both appear to involve an employer that conducted the required individualized assessment. And, unlike here, those opinions certainly do not include a finding that such an assessment did *not* occur. *Moses* rejected the employee's assertion

---

[8] To the extent COA claims no particularized inquiry was required because it believes that *every* police officer with HIV presents a direct threat to the health or safety of others, it has converted "not having HIV" into a qualification standard for the job. *See* 42 U.S.C. § 12112(b)(6) (prohibiting an employer from applying a qualification standard that screens out or tends to screen out the disabled). If that is the case, then COA assumes the burden of proving that its job qualification standard is "job-related and consistent with business necessity." *See Rizzo v. Versus Children's World Learning Ctrs.*, 173 F.3d 254, 259-60 (5th Cir. 1999) (holding that "when a court finds that the safety requirements imposed tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat"). Because COA cannot make this showing regarding the safety qualification of "no HIV," it should not have been granted summary judgment. *See Allmond v. Akal Security, Inc.*, 558 F.3d 1312, 1316-17 (11th Cir. 2009) (describing this affirmative defense and the "generally quite high" burden it entails).

that the employer failed "to investigate his condition" by pointing out that the employer "knew he was taking medication for his epilepsy but that his medication was not controlling his seizures." *Moses*, 97 F.3d at 448. *Waddell* specifically states that "[d]uring the next week. . . [the dentist-employer] studied his stockpile of dental journals to glean information about the transmission of HIV in the dental context. The Centers for Disease Control and Prevention ("CDC") also was consulted concerning the risk of transmission." *Waddell*, 276 F.3d at 1278. Furthermore, the opinion does not indicate that Waddell challenged the individualized assessment performed by the dentist-employer. *Id.*, *passim*. *Lowe's* holding that a defendant who fails to perform the requisite assessment on direct threat will be denied summary judgment on that defense is not undermined by *Moses* and *Waddell,* because those courts did not find that the respective defendants failed to engage in the required individualized assessment.

The most relevant, controlling authority in this case is *Lowe*, and its proper application precludes summary judgment in favor of the Defendant COA. Therefore, the district court's order granting summary judgment in COA's favor should be reversed and this case remanded for trial.

3. The District Court Charged Plaintiff with an Improperly High Prima Facie Burden and Inaccurately Assessed the Evidence Presented by Plaintiff to Discharge That Burden.

Should this Court determine that COA is not precluded from arguing that HIV is a disqualifying medical condition for those seeking to become police officers and that *Lowe* is not controlling authority in this case, the Plaintiff should nonetheless prevail. The district court erred by holding Plaintiff to a substantially higher burden in establishing a prima facie case of discrimination than is called for under *McDonnell Douglas*. While a plaintiff in this circuit currently bears the burden of establishing that his disability does not present a direct threat to the health or safety of others,[9] *see, e.g., Moses,* 97 F.3d at 447, Roe met his prima facie burden on direct threat because that burden is not a heavy one, and he produced evidence sufficient to make the required threshold showing of disability discrimination.

Under the burden-shifting mechanism of *McDonnell Douglas*, "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1094 (1981); *Vessels*, 408 F.3d at 769 (holding that dismissal for failure to make the minimal showing required at this stage is at odds "with the Supreme Court's instruction that the plaintiff's prima facie burden is not onerous.") (citing *Patterson*

[9] In Section VI.D., *infra,* Plaintiff argues in the alternative that this Court should reconsider its position on this issue.

v. McLean Credit Union, 491 U.S. 164, 186, 109 S. Ct. 2363, 2377 (1989)); *accord St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 2747 (1993) (citing "the minimal requirements of such a prima facie case"). These holdings recognize that the *McDonnell Douglas* burden-shifting is an evidentiary mechanism designed to assist a plaintiff in establishing a claim when he lacks direct evidence of illegal discrimination. *See also Walker v. Mortham,* 158 F.3d 1177, 1192-1193 (11th Cir. 1998) (acknowledging that the purpose of the prima facie case under *McDonnell Douglas* is to allow the plaintiff to establish a claim through circumstantial evidence).

In the prima facie case, the plaintiff need only be able to raise a solid inference that the employer based an adverse employment action on an impermissible distinction regarding the plaintiff.[10] *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1094 ("The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.").

---

[10] Furthermore, this is in keeping with the holding in *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996). *Moses* did not increase or enhance the plaintiff's burden in establishing a *prima facie* case of disability discrimination; rather *Moses* made clear that, in the Eleventh Circuit, the burden of persuasion as to direct threat remains with the plaintiff, even after the defendant has legitimately raised the issue and, at least in *Moses* and the other cases cited by the district court, presented some quantum of evidence with respect to it.

The burden in the prima facie case, however, should not be confused with the ultimate burden to establish that illegal discrimination has taken place. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579-80, 98 S. Ct. 2943, 2951 (1978) ("A *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus[.]").

The very fact that COA is asserting that it may refuse to hire Roe because his HIV purportedly presents a direct threat to the health or safety of others calls into question any need for Roe to raise an "inference" of disability discrimination in the first stage of the *McDonnell Douglas* burden-shifting process. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358, 97 S. Ct. 1843, 1866 (1977) (explaining that the plaintiff's initial burden under *McDonnell Douglas* is to offer "evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."). In this case, COA's own argument that it is entitled to refuse to hire *all* individuals with this particular disability as police officers, because of subjective concerns it has regarding a supposed direct threat presented by employing individuals with HIV in this capacity, establishes far more than an inference; rather, it shows that an adverse employment action has been taken based on the plaintiff's membership in a protected class. *See, e.g., White v. York Int'l Corp.*, 45 F.3d 357, 361 n.6 (10th

Cir. 1995) ("Where, as here, an employer readily acknowledges that the decision to terminate the employee was premised, at least in part, on the employee's disability, the ultimate purpose of the [Tenth Circuit's equivalent of *McDonnell Douglas* burden-shifting] analysis will have been achieved from the outset.")

In affirmatively citing Roe's disability as a justification for its decision not to hire him, COA has released the Plaintiff from any obligation to raise an "inference" of disparate treatment based on his disability. *See, e.g., Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1182 (6th Cir. 1996) ("The *McDonnell Douglas* burden shifting approach is unnecessary [for cases in which the employer acknowledges that it relied upon the plaintiff's handicap in making its employment decision] because the issue of the employer's intent, the issue for which *McDonnell Douglas* was designed, has been admitted by the defendant in such cases, and the plaintiff has direct evidence of discrimination on the basis of his or her disability."). Roe should not be required to establish in his prima facie case that discrimination based on his disability was operating here, because COA has made that perfectly clear in its papers on summary judgment.

Even assuming Plaintiff needed to raise the "inference" of disability discrimination normally created through a prima facie case, Roe has presented more than sufficient evidence to discharge the burden imposed on the plaintiff at this stage of the inquiry. (Doc. 168 at 20-28.) Roe presented ample evidence that

his disability would not present a direct threat to the health or safety of others while serving as a police officer (i.e., that he is "qualified" to serve as a police officer). First and foremost, Roe has COA's very own words: COA has *admitted* that HIV is not a disqualifying medical condition for employment as a police officer. (Doc. 168-12 (Exh. K), No. 17.) In addition to this explicit admission, Roe has admissions regarding the conduct and policies of COA that implicitly confirm that a police officer with HIV does not present a direct threat to the health and safety of others. (Doc. 168-21, ¶¶ 63-65; Doc. 168-12 (Exh. K), Nos. 1-4, 6-13, 16.) Specifically, these admissions establish that COA does not know the HIV status of its police officers, that it does not test its current police officers for HIV, and that it does not require its police officers to disclose a positive HIV test result. (*Id.*)

On top of the admissions of COA pertaining to whether a police officer with HIV presents a direct threat, Plaintiff submitted evidence from the public health establishment regarding the fragility of the HIV virus and the lack of transmission through casual contact. (Doc. 168 at 26-28.) According to the Supreme Court, this type of evidence from public health authorities should be given great credence in establishing whether a transmittable infection in fact presents a direct threat to the health and safety of others. *See Bragdon v. Abbott,* 524 U.S. 624, 650, 118 S. Ct. 2196, 2211 (1998). Plaintiff also submitted evidence in the form of his affidavit

attesting to the well-controlled state of his HIV and the absence of any effect on his ability to safely perform in previous law enforcement positions.[11] (Roe Second Affidavit (Doc. 168-2 (Exh. A)), ¶¶ 25-33.) And finally, Plaintiff presented as evidence a letter from a medical professional who was treating his HIV at the time of his application to the APD, establishing that his HIV is well-controlled and would not present a direct threat to himself or others were he to be employed as a police officer. (*See* Ltr. fr. Gayle Arberg, C.N.P., dated Oct. 31, 2006 (Doc. 168-18 (Exh. Q)).)

When the evidence that Roe submitted in support of his contention that his HIV should not disqualify him from being a police officer is stacked up in this manner, it becomes evident that the district court erred in holding that the evidence was insufficient to discharge the relatively light burden Plaintiff has in establishing that he is "qualified" for purposes of his prima facie case. *See Mack v. ST Mobile Aerospace Eng'g*, 195 Fed. Appx. 829, 841 (11th Cir. 2006) (holding a district court has the duty to examine all of the evidence "'collectively' and

---

[11] In evaluating Plaintiff's evidence on the issue of direct threat, the district court discounts the statements made in his affidavit as "nothing more than plaintiff's opinion, unsupported by any objective evidence, medical or otherwise." (Doc. 175 at 16.) Given, however, that COA presented no evidence to refute the statements in Plaintiff's affidavit, there is simply no reason to deprive Plaintiff's testimony of any weight or value in assessing the strength of his prima facie case. *See* Fed. R. Evid. 701 (allowing lay opinion testimony); 29 C.F.R. 1630 Appendix ("Relevant evidence may include input from the individual with a disability, [and] the experience of the individual with a disability in previous similar positions[.]")

'cumulatively,' and to construe all evidence and inferences in the light most favorable to the nonmoving party.") (citations omitted). If the district court had applied the preponderance of the evidence standard it was purporting to apply for making a prima facie case, Plaintiff would have succeeded, because COA presented *no evidence* on summary judgment regarding whether HIV presented a direct threat. (Doc. 119 at 12-15; COA's Reply (Doc. 171), *passim*.) Instead, COA relied entirely upon outdated case law regarding HIV in other contexts—which is certainly not evidence in this case—and completely unsupported argumentative statements made by its attorneys. (Doc. 119 at 14-15 and n.24 ("There is a likelihood that transmission of HIV can occur during any physical engagement.").)[12] Plaintiff's multiple pieces of admissible evidence on the subject must constitute the "preponderance" of the evidence when they are weighed against absolutely no evidence submitted by the defendant.

It is worth noting that the final piece of evidence described above—the letter from Nurse Practitioner Arberg—is particularized to Roe and his contemporaneous condition as a person living with HIV. (Doc. 168-18 (Exh. Q).) The district court makes much of the fact that a majority of the admissible evidence Roe submitted

---

[12] Although the district court correctly rejects COA "reli[ance] on the medical judgment of Dr. Greene and Caduceus for the conclusion that plaintiff was not a qualified individual and posed a direct threat," (Doc. 175 at 13), even Dr. Greene and Caduceus never made the claim that a direct threat to others is posed by an individual living with HIV serving as a police officer. (Doc. 119 at 14-15.)

concerned HIV in general—as opposed to evidence that was the result of a particularized inquiry regarding Roe.[13] (Doc. 175 at 15, 19-20 n.3.) Roe, however, should not have been required to submit such particularized evidence (though he did present at least some evidence of this nature, including the letter from Arberg), because he was responding to the argument advanced by COA in its motion for summary judgment, which was that a person with HIV *by definition* presents a direct threat. COA did not argue that an attribute of Roe's HIV in particular made him a direct threat when others with HIV would not be. Roe should not be penalized for responding to the only actual argument presented in COA's motion for summary judgment. (*See generally* Section VI.A., *supra*, at 19.)

Furthermore, the district court imposed a substantial burden on the Plaintiff to conduct a particularized inquiry into his disability—and its effect (if any) on his ability to safely perform the essential functions of the job—that is not supported by the law. Even in this Circuit, which currently places a burden on the plaintiff with

[13] Roe gathered and submitted more substantial expert evidence regarding the status of his HIV condition after being confronted with the direct threat argument COA made at summary judgment (*see* Affidavit of Howard Paul Katner, M.D., dated July 9, 2010 (Doc. 168-9 (Exh. H)); however, the district court rejected this evidence as inadmissible because there had not been a timely disclosure of the affiant as an expert. (Doc. 175 at 15-16.) Plaintiff does not contest the district court's ruling on this issue, but points out that he would have retained and properly disclosed this expert had COA not hoodwinked him into believing that direct threat was not at issue. The Plaintiff remains willing to engage on the subject of whether his HIV presents a direct threat to the health or safety of others in the performance of the duties of a police officer, should this Court determine that discovery should be re-opened on this topic before the parties proceed to trial on remand.

respect to direct threat, the requirement to conduct a *particularized* inquiry into whether the plaintiff's disability presents a direct threat is aimed at the defendant-employer. *See, e.g., Lowe*, 244 F.3d at 1308 ("[A]n *employer* must point to particularized facts . . .") (emphasis added); *id.* ("The key inquiry is whether *the employer* made a reasonably informed and considered decision[.]") (emphasis added); *Haynes v. City of Montgomery*, No. 2:06-CV-1093-WKW, 2008 U.S. Dist. Lexis 79992, at *15-16 n.4 (M.D. Ala. Oct. 6, 2008) ("In fact, it was the City's duty under the law, not Mr. Haynes's, to have an individualized assessment conducted."). Plaintiff is unaware of any cases that impose a heightened burden on the plaintiff – particularly in establishing a *prima facie* case – to engage in a particularized inquiry or to preemptively negate a defendant's possible assertion of the direct threat defense through expert testimony. *See, e.g., id.* ("The City's failure to conduct an individualized assessment is the operative cause of its current predicament, and its attempt to deflect the blame to Mr. Haynes was soundly rejected by the jury.") That is especially true here, where Defendant COA has not collected or presented *any* evidence regarding a direct threat presented by Roe's HIV. *See, e.g., id.* at *7-8, *14-15.

The evidence Plaintiff submitted on summary judgment regarding the direct threat issue—including COA's admission that HIV in general is not a disqualifying condition for employment as a police officer, coupled with the fact that COA

conducted no individualized inquiry from which it might be able to establish that Roe's HIV *in particular* presented a direct threat—is more than sufficient to discharge Plaintiff's burden in establishing a prima facie case of disability discrimination. *See, e.g.*, *Reeves*, 594 F.3d at 807 (holding an employer must not be awarded summary judgment if a "rational trier of fact [could] find for the nonmoving party.") Because Plaintiff is able to establish a prima facie case of disability discrimination—and, in particular, presented substantial evidence to discharge his burden regarding the fact that HIV does not present a direct threat to others while one is serving as a police officer—the district court's order on summary judgment should be reversed and the case remanded for trial.

C. The District Court Committed Reversible Error by Failing to Address Roe's Claim That COA Violated the ADA When It Required Him to Undergo a Medical Examination Prior to Making Him a Conditional Offer of Employment.

Under this Court's clear precedent, COA violated the ADA by requiring Plaintiff to undergo a medical examination before making him a conditional offer of employment. *See Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206 (11th Cir. 2010). The district court committed reversible error by failing to address the claim despite the fact that Plaintiff raised this issue on summary judgment and raised it again in his briefing on the motion for reconsideration.

The ADA is clear: an employer is forbidden from requiring a job applicant

to undergo a medical examination unless the employer has made a "conditional offer" of employment—meaning one conditioned *only* on the results of the medical examination. *See* 42 U.S.C. § 12112(d); *Harrison,* 593 F.3d at 1213 ("Thus, one way a disabled plaintiff could meet his prima facie case of discrimination would be by showing that his employer discriminated against him by requiring a pre-employment medical examination or making a pre-employment improper medical inquiry in violation of subsection [12112](d)."); *Buchanan v. City of San Antonio*, 85 F.3d 196, 199 (5th Cir. 1996) (offer was not a qualifying "conditional offer" under the ADA, where applicant still had to endure "'the entire screening process,' which included 'physical and psychological examinations, a polygraph examination, a physical fitness test, an assessment board, and an extensive background investigation.'"). The Eleventh Circuit has joined its sister circuits in recognizing that a private cause of action exists for violation of this provision of the ADA. *See Harrison,* 593 F.3d at 1211-14; *see also, e.g., Leonel v. American Airlines*, 400 F.3d 702 (9th Cir. 2005); *Murdock v. Washington*, 193 F.3d 510, 512 (7th Cir. 1999).

In his complaint, Plaintiff alleged a violation of this provision of the ADA. (Doc. 26, ¶¶ 54, 60). In discovery, COA admitted that it required Plaintiff to undergo a medical examination without having extended him a conditional offer of employment:

> Request to Admit No. 12: Defendant did not extend a conditional offer of employment to Plaintiff for the position of police officer before scheduling his August 14, 2006, pre-employment medical examination.
>
> RESPONSE: Admitted.

(Doc. 168-16 (Exh. O), No. 12; *see also* COA's Resp. to Pl.'s Fourth Req. for Prod. (Doc. 168-12 (Exh. K)), No. 4 (disclaiming the existence of "[d]ocuments reflecting and sufficient to identify the paperwork generated in extending a conditional offer of employment to applicants for police officer.").) COA did not directly address this alleged violation of the ADA in its motion for summary judgment.[14] (Doc. 119, *passim.*) Nonetheless, in his response to that motion, Plaintiff pointed out that summary judgment could not be granted in COA's favor on this claim because COA had admitted to its violation of this provision of the ADA. (Doc. 168 at 13-16.) For reasons that are unclear, the district court did not mention this claim—or COA's admitted violation of it—in its opinion order granting summary judgment in COA's favor. (Doc. 175, *passim.*)

[14] Seemingly in response to Plaintiff's allegations of assault and battery, COA simply asserted that "the Eleventh Circuit has routinely held that the medical testing of police officers is job-related and consistent with business necessity." (Doc. 119 at 5.) However, the relevance and necessity of a medical examination is a necessary but not sufficient condition for the exam to comply with the ADA. *See* 42 U.S.C. § 12112(d). Plaintiff was not challenging the right of police forces to require appropriate medical examinations before one joins the force, and indeed the ADA's conditional offer requirement presupposes that a medical exam may well be legitimate. Rather, Plaintiff is asserting that COA's failure to follow the mandated sequence of events (conditional offer prior to medical examination) is a per se violation of the ADA under *Harrison*. *Harrison*, 593 F.3d at 1213.

Significantly, Plaintiff's claim under this section is unaffected by the alleged deficiencies identified by the district court with respect to Plaintiff's other claims under the ADA and the Rehabilitation Act. Unlike for claims under §12112(d)(1), the plaintiff need not demonstrate that he is a "qualified individual with a disability" under §12112(d)(2), because the latter provision applies to applicants in general, not only to those who are disabled (or by extension of the reasoning in *Harrison*, only to those who are qualified). *See Harrison,* 593 F.3d at 1213 ("In contrast, § 12112(d)(2) sets forth a specific bar against medical examinations and inquiries with respect to *any* applicant who has not yet received a job offer."). Nonetheless, a successful plaintiff, who may or may not be a qualified individual with a disability, must be able to demonstrate damages in order to obtain relief under this provision of the ADA. *See id.* at 1216-17. However, in Roe's case, the damages are clear. A plaintiff has suffered damages if a decision not to hire the applicant is based on information learned as a result of an illegal medical examination, and a reasonable jury could reach the conclusion that Roe was not hired because of his HIV status, which was discovered during the unlawful medical exam performed by Caduceus at COA's request. *See id.* at 1217.

The district court's failure to address COA's alleged violation of §12112(d)(2) requires reversal of the district court's order granting summary judgment and remand for proper adjudication of this claim. *See, e.g., Weed v.*

Washington, 242 F.3d 1320, 1325 (11th Cir. 2001) (remanding for the district court to address arguments that would have allowed appellant to prevail in the trial court).

D. In the Alternative, the Eleventh Circuit Should Revisit and Reconsider Its Position Regarding Placement of the Burden with Respect to the Issue of Direct Threat.

As an alternative means of resolving this appeal, Plaintiff respectfully requests that the Eleventh Circuit revisit and reconsider its position as to which party bears the burden with respect to the issue of direct threat. While the problems giving rise to this appeal were caused by the district court's misapplication of Rule 56, most—if not *all*—of these problems also could be alleviated by this Court's reconsideration of where the burden on direct threat properly lies. By revisiting this issue—and reallocating the burden on direct threat to the defendant—an *en banc* panel of the Eleventh Circuit could not only rectify the problems encountered by the parties to this litigation, but also could allow future disability discrimination litigants to engage in a more straightforward and fair discovery process, thereby conserving judicial resources to address issues that *both* parties understand are in dispute.[15]

---

[15] Plaintiff recognizes that a panel of this Court cannot overrule a prior panel or *en banc* decision of this Circuit. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981). Plaintiff also notes, however, that a mechanism exists for the Court to decide *sua sponte* to hear a case *en banc*, and that this Court has utilized this provision to resolve intercircuit conflicts with the authoritative decisions of

A clear split has developed between the circuits as to which party bears the burden of establishing the existence or absence of a direct threat under the ADA and the Rehabilitation Act. *Compare Branham v. Snow*, 392 F.3d 896, 906-07 n.5 (7th Cir. 2004) *with McKenzie v. Benton*, 388 F.3d 1342, 1355-56 (10th Cir. 2004). Approximately half of the circuits—the Second, Seventh, Eighth, and Ninth, and less definitively, the Sixth —consider "direct threat" to be an affirmative defense for which the defendant bears the burden.[16] *See EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007); *Hargrave v. Vermont*, 340 F. 3d 27, 35 (2nd Cir. 2003) (citing *Lovejoy-Wilson v. NOCO Motor Fuel*, 263 F.3d 208, 219 (2nd Cir. 2001)); *Branham,* 392 F.3d at 906-07; *Hutton v. Elf Atochem North America, Inc.,* 273 F.3d 884, 893 (9th Cir. 2001). Three other circuits —the First, Fifth and Tenth—have staked out a compromise position, holding that in some circumstances, a plaintiff bears the burden of showing s/he does not pose a direct

---

other circuits. *See* Fed. R. App. P. 35(a); *see, e.g., Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 543-44 (11th Cir. 2002) (overruling *Bank v. Pitt*, 928 F.2d 1108 (11th Cir.1991)); *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 289 F.3d 1268, 1275-77 (11th Cir. 2002) (concurring opinion) (requesting that the matter be heard *en banc*).

[16] The Sixth Circuit appears to be on this side of the circuit split, though it has not explicitly held that the burden is on the defendant. *See Hamlin v. Charter Twp. of Flint*, 165 F.3d 426, 431-32 (6th Cir. 1999) (noting, without directly addressing, that the defendant had asserted direct threat as "a defense" to plaintiff's ADA claims); *see also EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1171 (E.D. Mich. 1996) (comparing and contrasting the analysis as to qualifications and stating that "[h]ere, however, it is Defendant's burden to prove that Darling was in fact a 'direct threat.'"), *rev'd on other grounds*, 172 F.3d. 48 (6th Cir. 1998).

threat, as part of establishing that he is "qualified" for the position in question. *See McKenzie*, 388 F.3d at 1355-56; *Rizzo,* 173 F.3d at 259-60; *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997).[17] This Circuit takes what has been interpreted as the most extreme position in favor of placing the burden on the plaintiff, holding that "[t]he employee retains *at all times* the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." *Moses*, 97 F.3d at 447.

As the Seventh Circuit has pointed out, the most sensible and workable interpretation of the ADA—and the one most faithful to the statute—requires placing the burden on the defendant to prove the existence of a direct threat. *See Branham*, 392 F. 3d at 907 n.5 ("Our earlier decision finds support in the plain wording of the statute and in common sense."); *see also* Jon L. Gillum, *Tort Law and the Americans with Disabilities Act: Assessing the Need for a Realignment*, 39 Idaho L. Rev. 531, 539, 565-67 (2003); Sarah R. Christie, Note, *AIDS,*

---

[17] These circuits place the burden on the plaintiff in certain circumstances—e.g., when the "employee is responsible for ensuring the safety of others entrusted to his or her care," such as the a person who is responsible for administering medication to the disabled (First Circuit), or the job is "inherently dangerous," because a person with mental health issues will be wielding a firearm (Tenth Circuit). The Fifth Circuit takes the most equivocating position on this issue, requiring a court finding before the parties know which party will bear the burden. *See Rizzo*, 173 F.3d at 259-60 (holding that "when a court finds that the safety requirements imposed tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat").

Employment, and the Direct Threat Defense: The Burden of Proof and the Circuit Court Split, 76 Fordham L. Rev. 235, 236-37, 243-46, 276-280 (2007).

A purely textual analysis of the statute establishes that the burden should be on the defendant. Outside of the "Definitions" section of the statue, the concept of direct threat is discussed in the ADA only in 42 U.S.C. § 12113, a section subtitled "Defenses." *See* 42 U.S.C. §12101 *et seq.* Some courts and commentators addressing proper placement of the burden have confused the issue because "direct threat" is mentioned as part of a "qualification standard" in 42 U.S.C. § 12113(b) (which some have inferred sounds like part of a plaintiff's prima facie case of showing he or she is "qualified."). But as the Supreme Court itself has pointed out, the other two references in the statute to "qualification standard" show that the term is used to describe a basis for liability (*i.e.*, if the "standard" tends to "screen out" persons with disabilities), and/or as an "affirmative defense" to liability if that standard is "shown to be job-related for the position in question and . . . consistent with business necessity" and a reasonable accommodation is unavailable. 42 U.S.C. §§ 12112(b)(6), 12113(a); *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 78, 122 S. Ct. 2045, 2049 (2002). Thus, the employer should bear the burden not only because the "direct threat" operative provision is in the section entitled "Defenses," but also because the statute makes clear that the defendant bears the burden to show that any qualification standard that tends to screen out disabled people

(regardless of whether it is based on a purported direct threat) is "job-related . . . and consistent with business necessity."[18] 42 U.S.C. § 12112(b)(6).

From a policy perspective, it also makes the most sense to place this burden on the defendant. The disability discrimination laws were enacted to force employers (and those operating public services and public accommodations) to get past their unfounded fears, stereotypes and prejudices regarding disabled individuals. *See, e.g., Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 278-79, 107 S. Ct. 1123, 1126-27 nn.2-3 (1987). Placing the onus on employers to support with objective evidence any alleged concerns they may have regarding the existence of a direct threat to the health or safety of others is the mechanism by which the ADA operates to break down those stereotypes and unfounded fears. *See, e.g., Lowe*, 244 F.3d at 1308 (holding the employer must cite to particularized facts about the specific person's condition "[t]o prevent the very reliance on stereotype and related perceptions of an individual's limitations that the ADA prohibits"). The ADA was intended to reverse the previously prevalent presumption that employing the

[18] Furthermore, the most definitive legislative history on point clearly places the burden on the defendant-employer to show the existence of a direct threat. The House Report, in concordance with the plain meaning of the statute, states that, "if the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the employer can demonstrate that the applicant's disability poses a direct threat to others in the workplace." H.R. Rep. No. 101-485, pt. 3, at 34 (1990), 1990 U.S.C.C.A.N. at 457; *see generally Echazabal*, 536 U.S. at 78, 122 S. Ct. at 2049 (describing a legitimate "qualification standard," including the absence of a direct threat, as an "affirmative defense").

disabled would inherently be dangerous to other employees and the clientele of the business; placing the burden on the defendant to establish the existence of a direct threat serves the public policy goals of the statute. *See* Gillum, *supra*, at 533 n.4, 545-46, 567.

Placing the burden with respect to direct threat on the defendant in all circumstances is also the most efficient and workable solution. *See* Gillum, *supra*, at 558, 563. Litigants require clear rules to govern the litigation process—rules that allow the parties to resolve disputes in a fair and expeditious manner. *Id.* at 541-42. The compromise position of the First, Fifth and Tenth circuits—which would place the burden on the defendant in some circumstances but on the plaintiff in other circumstances—does not provide the needed clarity or steadfastness within the litigation process. This "solution" to the purported ambiguity of the statute these courts see—an ambiguity that Plaintiff has explained above does not really exist—serves only to further cloud the issue by posing a different question that the parties will need to wrestle with and wrangle over before knowing which party bears the burden.[19] *Id.* It simply does not make sense to force the parties to

[19] For instance, under the compromise solution created by the Fifth Circuit, the dispute over which party bears the burden merely will be transferred to a dispute over whether the employer has a safety qualification standard that tends to screen out disabled people. *Rizzo,* 173 F.3d at 259-60. In fact, the Fifth Circuit presupposes that the court may need to make a finding as to whether the safety qualification standard is one that tends to screen out disabled people before the parties will know which party bears the burden. *Id.*

engage in the litigation process before knowing what evidentiary standards will be applied when the matter is adjudicated.[20] *Id.* at 568 ("After all, how can parties even begin litigation when each side has a viable argument that the other party has the burden of proof?")

Finally, and perhaps most important, placing the burden on the defendant is the most practical solution. As the Seventh Circuit points out, this position is the one that is most supported by "common sense," because the defendant-employer is the party with the necessary information at its disposal to assess the physical abilities and deficiencies of the candidate related to the safety requirements of the job. *See Branham,* 392 F.3d at 906-07 n.5 ("The [employer] is certainly in the best position to furnish the court with a complete factual assessment of both the physical qualifications of the candidate and of the demands of the position."); *see also* Gillum, *supra,* at 542-43, 568-69.

In this case, the litigation would have proceeded in a more productive fashion if the employer bore the burden of establishing a direct threat. From the beginning, it would have been clear to all involved whether the existence of a direct threat would be a disputed issue, because COA would have known that it

[20] While the Eleventh Circuit's current position—that the plaintiff bears the burden on direct threat in *all* contexts—does not suffer from this deficiency, it suffers from the problem of not being compatible with the text of the statute. The analyses of the First, Fifth and Tenth circuits bear further witness to the fact that one simply cannot square the text of the statute with placing the burden on the plaintiff in all circumstances.

needed to assert it as an affirmative defense in its answer and initial disclosures. Rather than playing "hide the ball" in discovery, COA would have had a vested interest in establishing what the essential functions of the job were; in crafting its interrogatory responses to support its subjective belief that HIV presented a direct threat in this context; and in not making admissions that were directly contrary to the defense it wanted to assert. Furthermore, COA would have almost assuredly identified an expert on the issue of direct threat—because it would not have been possible to carry its burden based solely on the testimony of Dr. Greene. This would have prompted Plaintiff to disclose a rebuttal expert on this topic, and the issue would have been fully vetted by both parties before the close of discovery.

This is precisely the goal of the rules of discovery, and of civil procedure more generally: to narrow and refine the litigation to those issues that are truly in dispute, to prevent surprises and litigation by ambush, and to place the parties on equal footing heading into the adjudication of the matter. *See, e.g., In re Hillsborough Holdings Corp.*, 118 B.R. 866, 869 (Bankr. M.D. Fla. 1990) ("The rules of discovery were designed to eliminate trial by ambush and to assure speedy, expeditious resolution of controversies on a level playing field where both sides have access to information which is helpful in a truth-seeking process and helps promote a just and fair resolution of controversies."). The parties would have been

well served by a rule on direct threat that fostered this type of above-board behavior and pushed them toward achieving the aforementioned goals.

Aside for the effect it would have on the outcome of this particular case, which Plaintiff has established is not necessary to provide him with appropriate relief (*see* Sections VI.A, VI.B and VI.C, *supra*), there are multiple factors that weigh in favor of revisiting the holding of *Moses* through an *en banc* review of this case. First, *Moses* was one of the earliest opinions to address this issue directly and, therefore, the *Moses* court did not have the benefit of the experience of its sister circuits in addressing this issue. Second, perhaps as a result of being the "pioneer" on the issue, the *Moses* court did not engage in a great deal of analysis—textual or otherwise—in reaching the conclusion that the plaintiff always bears the burden on direct threat. Third, it is not clear that the one opinion upon which the *Moses* court relied in reaching its holding on this issue, *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995), actually stands for the proposition for which it was cited.[21] *See, e.g.*, *Wagner*, 289 F.3d at 1275 n.10 (concurrence) (noting that the opinions relied upon by a prior decision do not compel the holding). Fourth, and perhaps most important, clarifying this rule—

---

[21] *Benson* was not in the context of direct threat. In fact, the circuit court that rendered that opinion has since held that the burden on direct threat rests with the defendant because it is an affirmative defense, without revisiting or "reversing" the holding on which the *Moses* court ostensibly relied. *See Wal-Mart Stores*, 477 F.3d at 571.

and reallocating the burden to the defendant on direct threat—will assist future litigants and help them to avoid the problems encountered by the parties to this litigation.

The case at bar presents this Court with a perfect opportunity to revisit its position with respect to placement of the burden on direct threat in an ADA or Rehabilitation Act claim and create the type of clear guidance that litigants need to resolve such disputed claims in a fair and expeditious manner. Rather than creating another work-around to the harshness of a rule that places the direct threat burden on the plaintiff—which arguably the decision in *Lowe* was—this Court has the opportunity to get to the bottom of the problem and eradicate it from its roots. In fact, if remand is appropriate based on any of the primary arguments made in the first half of this brief, an *en banc* panel of this Court could reverse the panel's decision in *Moses,* reallocate the burden to COA to prove the existence of a direct threat, and send the parties back into discovery—where the issue of direct threat could be fully vetted—so that neither party would be prejudiced by having conducted discovery based on the previous state of the law. Because the issue of placement of the burden on direct threat is such an important one for those litigating under the ADA, Plaintiff respectfully requests that this Court invoke Circuit Rule 35(a), hear this case *en banc*, and reconsider its current position on this issue.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the order of the district court and remand for further proceedings.

Dated: July 15, 2011

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

By: Gregory R. Nevins
Scott A. Schottes (admitted *pro hoc vice*)
Lambda Legal
730 Peachtree St. NE, Suite1070
Atlanta, GA 30308
Telephone: (404) 897-1880
Facsimile: (404) 897-1884
E-mail: gnevins@lambdalegal.org

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies this brief is typed in 14-point Times New Roman font and complies with the type-volume limitation of the rule, containing 13,934 words, excluding those sections of the brief that do not count towards that limitation, in accordance with Rule 32(a)(7)(B), as determined by the word processing system used to prepare this brief.

This 15th day of July, 2011

Gregory R. Nevins (GA Bar No. 539529)
730 Peachtree St. NE, Suite 1070
Atlanta, GA 30308
Telephone: (404) 897-1880
Facsimile: (404) 897-1884
GNevins@lambdalegal.org
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the Opening Brief of Appellant Richard Roe upon counsel for all parties by placing a copy for delivery with the U.S. Postal Service, first class, postage prepaid, addressed to the following attorneys of record:

Robert N. Godfrey
CITY OF ATLANTA LAW
DEPARTMENT
68 Mitchell Street, S.W.
4100 City Hall Tower
Atlanta, GA 30303-3520

Kristi D.A. Matthews
CITY OF ATLANTA LAW
DEPARTMENT
68 Mitchell Street, S.W.
4100 City Hall Tower
Atlanta, GA 30303-3520

This 15th day of July, 2011

Gregory R. Nevins (GA Bar No. 539529)
730 Peachtree St. NE, Suite 1070
Atlanta, GA 30308
Telephone: (404) 897-1880
Facsimile: (404) 897-1884
GNevins@lambdalegal.org
Attorney for Appellant