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

Reply Brief of Appellant Richard Roe

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I. ARGUMENT

As set forth in Plaintiff/Appellant Richard Roe's opening brief, the district court erred by: awarding summary judgment on a basis that was not articulated by Defendant/Appellee City of Atlanta ("COA"); granting summary based on Plaintiff's purported failure to discharge his prima facie burden on direct threat; and failing to address Plaintiff's claim that requiring him to undergo a medical exam prior to a conditional offer of employment was a *per se* violation of the ADA. COA's failure to refute these arguments requires reversal and remand. In addition—and in the alternative—Plaintiff respectfully requests that this *en banc* Court revisit and reconsider which party bears the burden of proof on direct threat.

A. COA Did Not Provide Plaintiff Notice of A Challenge to His Qualifications Separate and Distinct From Purported Concerns Relating to Direct Threat.

In its motion for summary judgment, COA made one—and only one—argument regarding Roe's purported inability to show he is qualified to perform the job of police officer—that Roe could not show he could safely perform the essential functions[1] of the job of police officer because of a supposed direct threat presented by his HIV. Because this is the only issue COA identified regarding Roe's qualifications in its motion for summary judgment, it is the only purported

[1] COA uses the terms "essential elements" and "essential functions" interchangeably.

deficiency regarding his qualifications to which Roe was obligated to respond to avoid summary judgment.[2] Roe refuted the argument COA actually made regarding direct threat (*see* Section VI.B. of Roe's opening brief on appeal), and he should not be penalized for failing to respond to an "essential functions" argument COA did not make in its initial motion for summary judgment.[3]

Despite COA's attempts to misdirect this Court's attention to subsequent briefing and orders, the only document that matters in determining what arguments COA actually made regarding Roe's purported inability to establish that he is qualified is COA's brief in support of its motion for summary judgment. Roe is confident that if this Court focuses upon that brief—and, in particular, the section

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[2] COA repeatedly argues that, "to avoid summary judgment the nonmoving party bears the burden of coming forward with evidence of *each* essential element of his claims, such that a reasonable jury could find in her favor." (Appellee's Brief at 18 and n.44 (emphasis added); *id.* at 9 and n.13.) This Court, however, held nearly identical language to be an "erroneous proposition" in *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 609 (11th Cir. 1991), because the plaintiff is obligated to respond only to the issue identified by the movant. (*See* Appellant's Brief at 21.)

[3] Any suggestion that a court should construe broadly the grounds urged by the party seeking summary judgment, and thus increase the burden on the non-moving party to present more evidence, has no basis in FRCP 56 or federal antidiscrimination law—or in the goals of efficiency, fairness and justice those provisions seeks to achieve. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, 1065 S. Ct. at 2548, 2553 (1986) ("One of the principal purposes of the summary judgment rule is *to isolate* and dispose of factually unsupported claims or defenses[.]") (emphasis supplied); *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 765 (7th Cir. 2006) ("[T]he number of potential grounds for (and arguments against) summary judgment may be large, and litigation is costly enough without requiring parties to respond to issues that have not been raised on pain of forfeiting their position.").

setting forth COA's argument regarding the second element of the prima facie case—that this Court will reach the same conclusion Roe did in responding to this motion: that COA was arguing Roe was not qualified to perform the essential functions of the job of police officer *because of the purported direct threat presented by his HIV.*

Section VI.A. of Roe's opening brief explains why Roe understood this to be the only argument COA was advancing regarding his qualifications, so Roe will not repeat those arguments here. There is, however, one point of clarification that may be helpful to this Court in understanding Roe's argument: a defendant's assertion that the plaintiff presents a direct threat *is* an assertion that the plaintiff is not able to perform the essential functions of the job safely.

See, e.g., Lowe v. Ala. Power Co., 244 F.3d 1305, 1308 (11th Cir. 2001) ("[T]he determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability *to safely perform the essential functions* of the job." (quoting 29 C.F.R. § 1630.2(r) (emphasis supplied). Therefore, Roe understood COA to be asserting a purported "direct threat" as the basis for its motion on this element of his prima facie case, and that COA was using the established nomenclature to set forth a direct threat argument with references to his ability to perform "essential elements/functions" of the job; those

references do not change the fact that COA's substantive argument under that subheading was focused specifically and *solely* on direct threat.

Because it cannot point to anything in its summary judgment motion challenging Roe's qualifications, COA argues a party may remain vague in articulating the bases on which it is moving for summary judgment, contending that "Plaintiff has failed to cite case law regarding the specificity of Defendants articulating an 'issue' proper for summary judgment which contradicts the *Celetox* [sic] standard." (Appellee's Brief at 29.) This is simply not so. Roe cited *John Deere Co. v. American Nat'l Bank*, 809 F.2d 1190 (5th Cir. 1987), which held that a mere 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." *Id*. at 1191 (cited in Appellant's Brief at 24); *see also Ferini v. Denver Publ'g Co.*, No. 97-1470, 1998 U.S. App. LEXIS 16368, at *4-6 (10th Cir. July 17, 1998); *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 157-158 (3d Cir. 1985); *Fisher v. Ciba Specialty Chems. Corp.*, 2007 U.S. Dist. LEXIS 76174, 38-39 (S.D. Ala. 2007).

The approach of the Tenth Circuit in *Ferini* is particularly instructive. The defendant in that ADA case argued the plaintiff could not establish he was a "qualified individual with a disability," because he was estopped from making that argument based on plaintiff's claim for disability benefits. Plaintiff responded to that argument, the trial court ruled estoppel applied, and the Tenth Circuit reversed that ruling. Defendant then argued the judgment could be upheld on the alternative ground that the plaintiff presented no evidence he was a "qualified individual with a disability" in response to defendant's motion for summary judgment. The Tenth Circuit rejected that proposition, holding that it "would be unfair," and that the defendant's motion and brief in support did not obligate the plaintiff "to present one scintilla of evidence" he was a qualified individual with a disability, but merely to refute the legal contention that receiving social security benefits estops one from claiming to be qualified in an ADA lawsuit. *Ferini*, 1998 U.S. App. LEXIS 16368, at *4-6. In remanding, the *Ferini* court noted that nothing precluded the defendant from filing another summary judgment motion that would provide the plaintiff with notice of the defendant's contentions and an opportunity to respond.

Of course, COA could have made other arguments regarding Roe's ability to perform the essential functions of the job—but it did not.[4] In fact, Roe challenges this Court to find any instance in COA's summary judgment brief in which it identifies a problem or issue not related to a purported direct threat presented by Roe's HIV.[5] There simply are no specific references to problems with Roe's basic qualifications and/or his ability to perform the job *other than the supposed direct threat presented by his HIV*.[6]

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[4] Roe does not contend that COA must present *evidence* to support its arguments on summary judgment; rather, Roe argues that, under *Celotex*, COA must actually articulate in its brief in support of summary judgment where COA believes there is an absence of evidence to support Roe's prima facie case. If there were no such requirement, a plaintiff would be required to present on summary judgment *all* of the evidence , just to cover all of the possible bases on which plaintiff's claim might be defeated. This is not the law. *See Russ v. Int'l Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991) ("Simply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward with evidence demonstrating material issues of fact as to every element of its case.").

[5] In its opinion order, the district court characterizes COA's argument that it had a nondiscriminatory reason for refusing to hire Roe because he did not disclose his HIV status (and related medical conditions) during the application process as an argument that Roe was not "qualified" to serve as a police officer. (*See* Doc. 175 at 8; COA's Brief in Support of MSJ (Doc. 119) at 10-12.) However, this point is not found in the section of its brief regarding Roe's purported inability to establish he is a "qualified individual." Regardless of whether it was appropriate for the district court to re-characterize COA's argument in this fashion, Roe's alleged nondisclosure is not at issue on appeal because the district court held that COA's reliance upon any alleged nondisclosure was barred by the after-acquired evidence rule—and COA did not cross-appeal this ruling. (*See* Doc. 175 at 9-10.)

[6] In its brief on appeal, COA seemingly attempts to assert that it made non-direct threat arguments regarding essential functions based on the requirement that police officers engage in "duties that are inherently aggressive and physical in nature"

COA raises several new arguments attempting to posit Roe did not meet basic qualifications to be a police officer. This approach simply cements Roe's point that COA did not make these arguments below. For the first time, COA asserts that "completion of an agility test" is a qualification Roe could not establish he would be able to meet.[7] But this Court should not be misled by COA's post-hoc attempt to make an argument regarding qualifications unrelated to direct threat.[8] The Court instead should ask itself this question: if COA had actually intended to

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and that all successful applicants attend and pass the police academy, where they must "engage in physical contact[.]" However, mention of these requirements was very clearly intended to support its argument related to a purported direct threat posed by HIV. (*See* Doc. 119 at 15, n.24 ("It was the determination of [] medical personnel . . . that Roe did not meet the medical standards regarding the position. [footnote 24] Therefore, Plaintiff was not a qualified individual pursuant to the ADA's 'direct threat' exception.")). This Court should reject COA's shameless attempt to ignore the context in which it originally appeared and recast it as a challenge to Roe's basic qualifications for the job.

[7] In its appellate brief, COA makes much of the fact that Roe never took its agility test. It is unclear, however, why COA thinks Roe would proceed to take the agility test after being told by the doctor COA authorized to make medical fitness for duty determinations that COA does not hire people with HIV to be police officers. (*See* Roe Dep. at 126:1-13; Greene Dep. at 102:1-7). Regardless, there was nothing done in discovery precluding Roe from presenting non-expert testimony at trial—or on summary judgment, had he known this was a basis for COA's motion—regarding the amount of time it takes him to run 1.5 miles or the number of consecutive push-ups or pull-ups he can complete.

[8] Similarly, following the district court's lead, COA also asserts for the first time in its appeal brief that Roe's "documented physical issues [sic] asthma, hypertension, diabetes and a history of gout in his right foot" (this last condition was not even mentioned by the district court in its opinion) could have affected his ability to successfully complete the agility test. (Appellee's Brief at 33.) *None* of these things was mentioned in conjunction with the essential functions argument articulated in COA's motion for summary judgment.

move on the basis of Roe's purported inability to show he could pass this agility test, then why is no mention made in its motion for summary judgment? The answer is simple: COA did not intend to make such an argument on summary judgment, and it was not until the district court reached out and articulated this as a basis for its decision on summary judgment that COA decided to take advantage of this improper, windfall alternative.[9] Plaintiff is confident this Court will reach the same conclusion when the Court conducts its own objective review of COA's brief in support of its motion for summary judgment.

B. Roe Has Established It Was Improper to Grant Summary Judgment Based on Direct Threat.

In his opening brief, Roe explained that the district court erred in its direct threat ruling, citing COA's judicial admissions, the unavailability of summary judgment under *Lowe*, and the court's improper application of the prima facie burden of proof on summary judgment. COA fails to refute these propositions.

[9] Indeed, because COA both refused to identify the essential functions of a police officer during discovery and declined to articulate them in summary judgment—because its focus was on professed safety concerns, not Plaintiff's qualifications—there is virtually no limit to the list of prerequisites for which the district court could have penalized Roe for not submitting readily available evidence: a high school diploma, clean criminal record, English proficiency, solvency, etc. (Appellant's Brief at 21-22 and n.6.) An affirmance would not only reward COA's chicanery and deluge future courts with unnecessary evidence from nervous plaintiffs, but would be patently unfair to Plaintiff—particularly because COA did not merely make a vague statement regarding qualifications, but instead affirmatively led Roe to believe that the basis for its "inability to perform the essential functions of the job" argument was its (unfounded) assumption that Roe's HIV would present a direct threat.

1. City of Atlanta Cannot Hold Contradictory Positions Regarding Direct Threat in This Litigation.

Roe's threshold point on direct threat is that COA's multiple judicial admissions denying the significance of HIV in this case should have precluded COA from seeking summary judgment based on Roe's HIV status. COA's first response is to adopt the district court's rationale: that COA's concession it does not consider HIV to be a disqualifying condition does not mean that any particular officer with HIV, including Roe, is automatically not a direct threat. (Appellee's Brief at 35 (citing Doc. 175).) But that logic is irrelevant to this case, where the only direct threat basis COA urged was Roe's HIV status. Based on its judicial admissions, this is the very argument the district court should have barred.

COA fares no better in its other argument against the effect of its admissions: that its summary judgment position merely reflected the opinions reached by Dr. Alton Greene. Assuming this is true (COA does not cite to any deposition testimony from Dr. Greene), this argument does not address the issue at all, as it explains how COA took one position, but not how it took two different positions; especially when COA's admission that it did not consider HIV to be a disqualifying condition contradicted Greene and was made more than three years after Greene failed Roe on his medical exam based solely on Roe's HIV status and six months after Greene explained his action in his deposition.

This is essentially what COA thinks it should be able to say (and do): "*We* do not consider HIV to be a disqualifying condition for the position of police officer. The doctor we authorized to conduct our medical testing and make these decisions for us, *pursuant to the essential functions we outlined and the specific guidelines we provided*, believes HIV is a disqualifying condition to be a police officer. But, of course, this court cannot hold us responsible for the employment decision made by this doctor. However, we *are* going to stand up in court and assert that we agree with the doctor that HIV is a disqualifying condition for the position of police officer."[10] The problem here seems almost too obvious, but COA has specifically asked Plaintiff to spell out his analysis: COA cannot maintain two diametrically opposed positions—that HIV is and is not a disqualifying condition for the job of police officer—before this court, particularly within the same case.

Roe is not questioning the admissibility of Dr. Greene's testimony; it is understood COA should, and often must, consult with doctors when conducting individualized assessments. However, the district court was correct in disdaining

[10] Lest there be any confusion on this point, COA clearly takes the position in its summary judgment papers that HIV is a disqualifying condition for the position of police officer. In its brief in support of its motion, COA contends that attending the police academy and working as a patrol officer are essential requirements of the job and that a person with HIV would present a direct threat to the health or safety of others during the physically aggressive activities necessary during the required training and apprenticeship periods.

the purported "individualized assessment" Dr. Greene performed here "without knowing, at a minimum, how long Roe had HIV, whether he was taking any medications for HIV, whether his immune system was suppressed, or what job duties he would be performing." (Order (Doc. 175) at 14.) Furthermore, as explained by the district court, while COA can consult with doctors, "COA cannot escape its duty under the ADA by contracting with third parties…to provide physical examinations." (Doc. 175 at 14 (citing *Holiday v. Chattanooga*, 206 F.3d 637, 645 (6th Cir. 2000) ("[E]mployers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties.") (citing 42 U.S.C. 12112(b)(2)).)

COA's purported reliance on Dr. Greene cannot justify its making an admission and then taking the opposite position as the basis for summary judgment. Roe posed his requests for admission as part of the discovery process in a discrimination case before a court of law. COA knew Roe was making these requests in an effort to understand and establish the positions COA would be taking at trial. Therefore, COA's admission —that COA does not consider HIV to be a disqualifying condition for a police officer—coupled with its willingness to assert in court papers that it agrees with the doctor it hired to conduct medical examinations when he says it is a disqualifying condition, is simply untenable. After admitting in discovery that HIV is not a disqualifying condition for the

position of police officer, COA must be precluded from coming into court and arguing that it is.

2. Because It Is the More Recent and Factually Tailored Case Regarding the Individualized Inquiry Required Under the ADA, COA Cannot Avoid Application of *Lowe.*

In his opening brief, Plaintiff asserts that the district court correctly identified the most relevant controlling authority on the issue of direct threat, but failed to apply *Lowe's* holding regarding the consequence to the employer of having failed to make the necessary particularized inquiry – specifically, that the employer is not entitled to summary judgment based on direct threat. (Appellant's Brief at 28-32; *Lowe*, 244 F.3d at 1308.) COA fails to distinguish *Lowe* and pull this Court's focus back to *Moses*, a case primarily concerning investigation into reasonable accommodations. *Lowe* is a refinement of *Moses*, based in large part on Supreme Court precedent handed down two years after *Moses. See Lowe*, 244 F.3d at 1308-09 (relying heavily on *Bragdon v. Abbott*, 524 U.S. 624, 649, 118 S. Ct. 2196, 2210 (1998)). Because *Lowe* is the more recent, factually similar and on-point case, it should be applied here.

COA's response actually clarifies the minimal nature of the burden imposed upon a plaintiff in making his prima facie case that he can safely perform the essential functions of the job (*i.e.*, he is not a "direct threat"). Defendant attempts to distinguish the consequence of *Lowe's* holding by claiming that "the lower court

found that [Lowe] had established a prima facie case of discrimination[.]" (Appellee's Brief at 37 (emphasis added/removed).) But the lower court in *Lowe* made no such finding, specifically reserved deciding whether the plaintiff was "qualified" for the job, and merely "*assumed* for purposes of argument that Lowe was qualified and had adequately established a prima facie case[.]" *Lowe*, 244 F.3d at 1307 (emphasis added).

In fact, the opinion makes clear the lower court in *Lowe* looked at evidence *from both sides* regarding the essential functions of a mechanic (which comports with Roe's claim here that the employer-defendant should identify which of the job functions are "essential" and plaintiff is purportedly is unable to perform) and decided a number of questions of fact needed to be resolved before a determination could be reached as to whether the plaintiff was qualified. *See id.* Faced with conflicting evidence regarding the plaintiff's qualifications (and in the case at bar, Roe presented evidence on this topic while COA presented none) the lower court in *Lowe* moved on to the question of whether the defendant-employer could establish that the plaintiff presented a direct threat. *Id.* at 1308. Because the defendant-employer had failed to conduct the necessary particularized inquiry regarding direct threat, this Court held that the defendant-employer was not entitled to summary judgment. *Id.* at 1309. It is apparent from the *Lowe* decision that when the supposed existence of a "direct threat" is the disqualifier for the

position, a plaintiff will not need to present very much evidence on summary judgment—and certainly does not need to show he would *prevail* to make his prima facie case.

Defendant's arguments regarding *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), are similarly unavailing. *Moses* is not analogous to *Lowe* or the circumstances presented by the case at bar. *Moses* did not include an admission from the defendant-employer that plaintiff's disability was not a disqualifying condition for the job, and indeed Moses all but conceded that his epilepsy posed a direct threat without an accommodation.[11] Roe has an admission from COA, along with other probative evidence, allowing Plaintiff to make his prima facie showing that he does not present a direct threat. (*See* Appellant's Brief at 36-42.) In *Lowe*, as in this case, the employer failed to conduct a particularized inquiry concerning the plaintiff, and the plaintiff produced evidence he was not a direct threat. Summary judgment for the employer was reversed in *Lowe*, despite the employer's producing some evidence the plaintiff was a direct threat; here, where the employer produced no evidence Plaintiff was a direct threat, summary judgment is plainly improper under *Lowe*.

[11] *See id.* at 447-48 (noting that the plaintiff did not deny there was a significant risk that he would have had seizures on the job and argued only that there was one machine that he operated where he could be positioned differently and be less dangerous).

Furthermore, COA misdirects this Court to a portion of the *Moses* opinion irrelevant to this case. (*See* Appellee's Brief at 39.) The focus of *Moses* was whether there were reasonable accommodations that would allow the plaintiff to safely perform the essential functions of the job. *Moses*, 97 F.3d at 448 ("We are persuaded that [employer's] failure to investigate did not relieve [applicant's] burden of producing probative evidence *that reasonable accommodations were available*.") (emphasis added). If the existence of a direct threat is all but conceded—which was the case in *Moses*, but not here—there is perhaps greater justification for placing a more onerous burden on the plaintiff to identify reasonable accommodations that would allow him safely to perform the essential functions of the job. *See Moses*, 97 F.3d at 447-48. But Roe's case was *never* about reasonable accommodations.[12] Nothing in *Moses* suggests an employer can escape its obligation to perform the individualized assessment required before disqualifying an applicant as a direct threat; moreover, such a holding would be inconsistent with *Bragdon*, as *Lowe* recognized.

[12] Because showing the sufficiency of a "reasonable accommodation" is an *alternative* the ADA provides plaintiffs, this Court should reject summarily COA's suggestion that Roe's eschewing of this option is somehow a failure in Roe's case that provides an independent basis for affirmance. (*See* Appellee's Brief at 11 (referring to the reasonable accommodation as a "separate ground" supporting summary judgment); *id.* at 43 (same; a "separate independent basis").)

COA is correct that *Lowe* did not address the overarching problems created by requiring the plaintiff to bear the burden on direct threat, nor did it recommend *en banc* review so that *Moses* might be overruled. Instead, the panel in *Lowe* chose to refine the decision in *Moses* to allow a plaintiff to prevail under circumstances similar to those presented here, despite the seemingly broad holding of *Moses*. Clearly, it is possible to apply the holding of *Moses* and still end up with a result like the one in *Lowe*. The most relevant, controlling authority in this case is *Lowe*, and its proper application precludes summary judgment for COA.

3. COA's Overly Broad—and Largely Unfounded--Attack on Portions of Roe's Evidence Does Not Undercut the Evidence to Which Roe Actually Cites in Support of His Argument That He Discharged His Prima Facie Burden on Direct Threat.

In its response, COA does not directly address Roe's argument that the district court charged him with an improperly high prima facie burden on the direct threat issue and then incorrectly evaluated the evidence presented to discharge that burden.[13] Instead, COA makes a number of generalized—and generally unsupported—arguments regarding the admissibility and/or quality of the evidence submitted by Roe on summary judgment. Because COA's contentions regarding the admissibility and value of Roe's evidence are mostly incorrect—and, more

[13] (*See* Appellant's Brief at 22-23, 33-34 (citing *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005).)

importantly, generally target evidence on which Roe does not rely in his opening brief on appeal—Roe's argument on this point goes largely unanswered.

It is astonishing that COA did not bother to address directly a key argument to which Plaintiff devoted almost ten pages of his brief. (Appellant's Brief at 33-42.) Because this argument is set forth in some detail in Plaintiff's opening brief, and went largely unanswered by COA, Plaintiff will not reiterate those arguments. It suffices to say Plaintiff believes it is imperative the Court carefully consider the arguments set forth in this section of his opening brief. Nonetheless, Plaintiff must address COA's briefing devoted to attacking the admissibility and quality of Plaintiff's evidence generally, because it seems some of these arguments are intended to question the sufficiency of the evidence Plaintiff presented to discharge his prima facie burden. (*See* Appellee's Brief at 18-23.)

First, COA overstates and/or misstates the conclusions the district court reached—and actions it took—with respect to the evidence Roe submitted on summary judgment. Providing frustratingly few specifics or citations, COA makes sweeping statements regarding Roe's evidence, the district court's review of that evidence, and the actions the court took related to that evidence. (Appellee's Brief at 18-22.) For instance, COA contends that "portions" (plural) of Roe's affidavit were "stricken" and that "Plaintiff's affidavit was properly not relied upon as evidence." But the reality is the district court's assessment was much more

detailed and nuanced. There was in fact only one statement in Roe's affidavit the district court found would be inadmissible (and could arguably be characterized as having been "stricken") which was his statement regarding the suppression of his HIV viral load. The district court did not reject Roe's affidavit—and certainly not for the reasons articulated by COA—but rather considered it and heavily discounted statements the court perceived as unsupported by "objective" evidence or sufficiently detailed.[14] As Plaintiff argues in his opening brief, the district court improperly assessed portions of this evidence (*see* Appellant's Brief at 38, n.11), but that is not the same thing as "striking" and/or disregarding it as incompetent.[15]

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[14] *See*, *e.g.*, Doc. 175 at 10-11 (inappropriately discounting Roe's testimony regarding his ability to perform the tasks required by the agility test as merely his opinion unsupported by "objective" evidence); *id.* at 16 (inappropriately denigrating Roe's statement that "[m]y HIV treatments have enabled me to remain essentially healthy" as merely his opinion).

[15] To set the record straight , Roe clarifies and/or corrects contentions in COA's brief on appeal regarding the evidence Roe presented on summary judgment:

1) On appeal, a party may to cite to evidence that the district court finds "insufficient," just (perhaps) not to evidence the court rules is inadmissible. (Appellee's Brief at 18.)

2) Plaintiff submitted a "separate, concise, numbered statement of the material facts" which he contended were both undisputed and presented a genuine issue for trial. (Appellant's Brief at 18; Roe Additional Statement of Facts (Doc. 168-21).)

3) Plaintiff submitted an affidavit in which he established he was competent to testify and set forth facts, based on his personal knowledge, that would be admissible. The fact the district court subsequently found *one* statement regarding suppression of his viral load to be hearsay does not nullify that entire document. (Appellee's Brief at 19, 22; Doc. 168-2.)

The most glaring flaw, however, with respect to COA's arguments concerning the admissibility and/or sufficiency of Roe's evidence generally—and this is absolutely critical—is that those arguments do not address and/or undercut the evidence on which Roe relies to support his argument that he has discharged his prima facie burden on direct threat. If this Court reviews the evidence to which Roe *actually* cites to support his argument he has discharged the relatively light

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4) The district court did not find that the affidavit "did not constitute competent evidence," the court merely stated Plaintiff could not rely *solely* on his own conclusions. (Appellee's Brief at 19; Doc. 175 at 16.)

5) It is entirely permissible to submit evidence on summary judgment "by way of affidavit," despite the fact that the parties have engaged in discovery and the affiant has been previously deposed, so long as the affidavit does not contradict the deposition. (Appellee's Brief at 19; FRCP 56(e)(2) (stating that the party opposing summary judgment may do so "by affidavits or as otherwise provided in this rule").)

6) Statements based on a person's "perceptions" (i.e., the things he perceives with his own senses) are within his personal knowledge, and therefore, appropriate subjects for testimony. (Appellee's Brief at 20.)

7) Roe's affidavit was not "merely a verbatim restatement" of his complaint. (*Compare* Amended Compl. (Doc. 26) *with* Roe Second Affidavit (Doc. 168-2 (Exh. A)).) Furthermore, to place truly conclusory statements (e.g., "Roe was, and is, fully qualified to be a police officer with the Atlanta Police Department") in the same category as statements that draw conclusions based on personal knowledge (e.g., "I was (still am) capable of passing each of the requirements of the [APD's] physical fitness test") is inappropriate. (Appellee's Brief at 20-22.)

8) COA does not cite a single one of Defendants' material facts that Roe's affidavit "merely sought to deny[.]" (Appellee's Brief at 21.)

9) The District Court did not rule that "Roe failed to conform to the Federal Rules of Civil Procedure" and did not strike Roe's affidavit or refuse to rely upon any portion of it as evidence. (Appellee's Brief at 22; Doc. 175 at 10-11, 16.)

prima facie burden he has on direct threat, this Court will discover it remains unscathed by COA's shotgun attack.[16] (*See* Appellant's Brief at 36-42.) COA's excessive focus on purported inadmissibility or weight of a few pieces of evidence does not change the fact Plaintiff should prevail on this ground for appeal, because the evidence to which he actually cites is solid and handedly discharges his prima facie burden on direct threat.

C. COA Cannot Justify the Unlawful Sequencing of the Medical Examination in Its Hiring.

In his opening brief, Roe explained that COA's failure to extend him a conditional offer of employment prior to directing him to undergo a medical examination constituted a clear violation of the ADA under *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206 (11th Cir. 2010), and that the district court must be reversed for ignoring that argument. (Appellant's Brief at 42-46). In response to an argument about illegal sequencing of the medical exam,

[16] As part of his argument setting forth the evidence that discharges his prima facie burden, Plaintiff acknowledges the deficiencies the district court found with respect to one piece of evidence—his affidavit statements 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—and explains why he contends that this evidence should be accorded at least some amount of value in assessing whether his HIV would present a direct threat. But Plaintiff does not rely on this evidence to discharge his burden—and it could truly be characterized as mere "icing on the cake," given the other evidence to which Plaintiff cites. (*See* Appellant's Brief at 38, n.11.) Furthermore, Plaintiff mentions, but does not rely upon, Dr. Katner's affidavit—acknowledging its inadmissibility and referencing it only to explain his willingness to engage on the issue of direct threat on remand. (*See* Appellee's Brief at 40, n.13.)

COA raises the uncontested and insufficient point that the examinations are job-related and necessary under state and local law. (*Compare* Appellee's Brief at 44 *with* Appellant's Brief at 44 n.14.)

COA's main argument—that "Roe Consented to All Pre-Employment Medical Examinations [*sic*] As Such the Court Properly Ruled On This Issue," is not only factually misleading and legally frivolous, but it inaccurately depicts the proceedings below. The district court did not decide Roe waived any claim related to the medical exam occurring unlawfully without a conditional offer, but instead completely ignored this argument despite its being raised on summary judgment and reconsideration. (Appellant's Brief at 53.) The words "conditional" and "offer" do not appear in either order.

COA misleadingly characterizes the documents signed by Roe as "a consent and waiver as to all medical examinations." (Appellant's Brief at 44.) As reflected in COA's Statement of Facts, while Roe acknowledged that his application process would include a medical exam and COA's collection of medical records, these documents contain no waiver of any federal statutory rights, including the right to challenge COA's acquisition of medical information about Roe before allowed to do so under the ADA. Thus, the documents Roe signed are simply irrelevant, because, they do not even purport to waive his claim under 42 U.S.C. § 12112(d)(3). *See Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 906

(11th Cir. 1987) (refusing to read a settlement agreement as "waiving claims of discrimination arising after" its signing when "agreement says nothing about" such claims).

Finally, even if COA had the waiver it imagines, it would face the legal problem of enforcing a document a job applicant is asked to sign that waives claims for acts of discrimination the employer might engage in during the hiring process (or possibly thereafter). Unsurprisingly, COA cites no case that would support such a result, and there is a mountain of law to the contrary, invalidating any prospective waiver of an employee's federal discrimination claims. *See, e.g.*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52, 94 S. Ct. 1011, 1021 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices."); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1062 (11th Cir. 1998) ("This clause defeats the statute's remedial purposes because it insulates Avnet from Title VII damages and equitable relief. . . . [W]e treat this clause as an impermissible waiver of Title VII rights.") (citing *Alexander* and *Schwartz*); *Schwartz*, 807 F.2d at 906 ("There can be no prospective waiver of an employee's rights under Title VII, [citing *Alexander*] . . . because this would 'nullify the purposes' of the statute and thwart the legislative policies it was

designed to effectuate."); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 854 (5th Cir. 1975); *see also Richardson v. Sugg*, 448 F.3d 1046, 1054-55 (8th Cir. 2006) ("[A]llowing employers to ink a deal with an employee to waive prospective claims strikes at the heart of Congress' aim to deter discriminatory conduct by employers."); *Salisbury v. Art Van Furniture*, 938 F. Supp. 435, 438 (W.D. Mich. 1996) (nullifying "contractual limitation, [that] certainly effected a 'practical abrogation' of the right to file [an] ADA claim.").

The very purpose of the ADA's requirement with respect to the sequencing of the medical examination within the hiring process is to ensure applicants "know that, absent an inability to meet the medical requirements, they will be hired, and that if they are not hired, the true reason for the employer's decision will be transparent," freeing applicants from having to refute baseless, *post-hoc* claims the applicant was not really qualified for the job in the first place. *Leonel v. American Airlines, Inc.*, 400 F.3d 702, 711 (9th Cir. 2005). That is precisely what COA has attempted to do in this case. As such, it would truly be a miscarriage of justice if this Court failed—as did the district court—even to address Roe's meritorious claim for relief under §12112(d) of the ADA.

D. It Is Appropriate to Revisit and Reconsider a Previously Decided Point of Law That Has Been Refined or Questioned in Most Other Circuits.

Plaintiff reiterates his request that, in the alternative, this Court revisit and reconsider its position with respect to which party bears the burden on establishing

the existence or absence of a direct threat.[17] COA's unsupported claim that Roe's request that this Court do so constitutes a "gross misuse" of the appellate process is nonsensical.

COA claims Roe is asking this Court to "just ignore its own precedent," when the opposite is true. Roe presents a thorough analysis of his case under existing precedent. Roe is asking, alternatively, that this Court review *en banc* its prior precedent on this subject in light of what transpired in this case and reconsider its position on placement of the burden from *Moses*, a relatively short opinion that examines the issue cursorily. Since *Moses*, a clear intercircuit conflict has developed regarding placement of the burden on direct threat, with the Eleventh Circuit (in what was one of the very first opinions to address the issue directly) having taken what now appears to be a position at the other end of the spectrum from most of the other circuits. With the passage of time—and the benefit of the legal developments in sister circuits—it is quite reasonable for an *en*

[17] It seems that COA misconstrued the argument Roe made in sections VI.B. and VI.C of his opening brief. (*See* Appellee's Brief at 40 ("Despite arguing at length that the District Court erred by placing the burden of proof with the employee to establish that he was not a direct threat . . .").) In those sections of his brief, Roe did *not* argue that under current Eleventh Circuit case law, the district court incorrectly held that the plaintiff bears the initial burden on direct threat, only that the plaintiff's burden is a light one and that Roe easily discharged it based on the evidence he presented. It is not until section VI.D. of his brief that Roe requests that, *in the alternative*, this Court revisit and reconsider its position on the placement of the burden on direct threat, so as to ensure that the problems these parties encountered does not recur for others in the future.

banc panel of this Court to revisit this issue and reconsider its position with respect to it. Rather than a "gross misuse" of the appellate process, it strikes Plaintiff as entirely appropriate to bring this problem to the attention of this Court, so it may provide necessary redress and resolve this problem not just for Plaintiff, but for future Eleventh Circuit litigants for whom the concept of "direct threat" is legally relevant.

Because COA does not engage regarding the merits on this topic, Roe again requests that the three-member panel of this Court carefully review the arguments set forth in Section VI.D. of his brief and refer this case for hearing by the Eleventh Circuit sitting *en banc*, where the issue can be properly vetted through further briefing. To do so will allow for this critical protective mechanism for disabled people to be carefully reconsidered in light of developments in the law, and provide the opportunity for this Court to harmonize its precedent with the majority of its sister circuits.

CONCLUSION

Reversal is compelled to further both the interests of justice and the purposes of the ADA. The ADA forbids an employer from ordering a medical exam without first signing off on an applicant's other qualifications; yet, COA tries to do exactly that with impunity. Worse yet, COA attempts to do so via a summary judgment motion in which it never referred to a single qualification for a police officer that,

had Roe been HIV-negative, Roe could not meet, nor any essential function of the job he could not perform. Moreover, COA's procedural game-playing of asserting HIV is not a disqualifying condition and then arguing it is, should not be countenanced by any court. Roe respectfully prays that this Court reverse.

Respectfully submitted,

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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 6,970** 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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of Appellant's Reply Brief 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:

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