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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

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NOTICE OF ORDERS OR JUDGMENTS Fed. R. Civ. P. 77(d)

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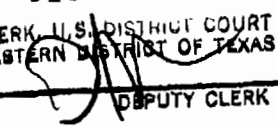
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

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WESTERN DISTRICT OF TEXAS
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Peggy Knapp Wise,)
)
 Plaintiff,)
)
 VS.)
)
 AKAL Security, INC., et al.,)
)
 Defendants.)

Civil Action No: SA-04-CA-1142-XR

ORDER

On this day came on to be considered Wise's motion to dismiss counterclaim (docket no. 56).
The motion is granted.

Background

The United States Marshals Service (USMS) has the primary responsibility for ensuring the safety of the federal judiciary including judicial officers, court employees, and judicial facilities. The USMS relies on a contract guard force known as Court Security Officers (CSOs) to assist with the protection of federal judicial facilities. CSOs are employees of private security companies under contract to the USMS. The judiciary, through its Court Security appropriation, reimburses the USMS for the cost of CSO services.

In November 2002, Gilberto Wise was hired to work as a CSO by Akal Security, Inc. ("Akal"). Wise was designated to work at the John H. Wood, Jr. Courthouse in San Antonio, Texas. Prior to his employment as a CSO, Wise was employed for almost 30 years as an agent in the Immigration and Naturalization Service.

Sometime in 1997, the United States Judicial Conference Committee on Security and



Facilities addressed concerns that CSOs should be medically and physically fit so that they be able to perform all the duties associated with their position.¹

At some point in 1999, members of the Committee on Security and Facilities decided to implement a medical review system to ensure that CSOs could perform all the demands of their job, to include responding quickly and effectively in any violent disturbances. The Committee retained Richard Miller, M.D.² to conduct a study of the CSO position. Dr. Miller interviewed U.S. Marshal employees and personally observed CSOs perform their jobs. The Committee met with Dr. Miller two or three times during the course of his study. Dr. Miller presented his report to the Committee

¹CSO duties can vary from one district to another. The listing below gives a brief description of duties a CSO is authorized to perform: (1) Entrance Control - Includes operating and enforcing a personnel identification system, operating security screening equipment, checking items such as handbags, packages, baby carriages, wheel chairs, etc., in order to detect hidden weapons or contraband; (2) Roving Patrol - Includes patrolling areas inside and outside court facilities in accordance with the routes and schedules outlined in the district's standard operating procedures; (3) Post Coverage - Includes maintaining stationary and other posts to prevent unauthorized entrance. Includes monitoring closed circuit television, duress alarm systems or other such equipment, courtrooms, judges' chambers, jury rooms, and other court-related offices; (4) Escort Duties - Includes armed escort services for judges, court designated individuals. Also includes escorting judicial personnel from one room to another, one floor to another, or one facility to another, including to a garage or parking area. Assignments may also include escorting judges to a court facility in another city or district.; (5) Law and Order - Includes apprehending and detaining any person attempting to gain unauthorized access to Government property or court proceedings. This requires the CSO to take whatever action is necessary to stop and detain any individuals attempting to commit any acts that imperil the safety and security of government employees, property, and the public. After apprehending an individual suspected of committing a criminal offense, the CSO is required to turn the suspect over to the U.S. marshal, or their designee, for transporting and processing. The CSO is also required to prepare incident reports and to serve as a witness, if necessary; (6) Traffic Control - Includes directing vehicle and pedestrian traffic and controlling and enforcing parking regulations as described in the district's standard operating procedures; and (7) Lost and Found - Includes receiving found articles and delivering such property into the custody of the proper personnel.

²Director of Law Enforcement Medical Programs, United States Public Health Service, Office of Federal Occupational Health.

in June 2000, and the Committee accepted the report, concluding that Dr. Miller had satisfactorily determined the essential functions of the CSO position and that the standards he recommended would accurately assess the ability of CSOs to perform those functions. Subsequently, the Committee approved the Office of Federal Occupational Health's implementation of the report and setting up a medical review process.

As a result of these guidelines and a medical examination, Gilberto Wise was deemed ineligible to serve as a CSO. The U.S. Marshal's Office advised Akal that Wise was medically disqualified because of his diabetic condition and that Akal was required to remove him from his CSO position. Thereafter, Akal discharged Wise on or about September 30, 2003.

Plaintiff³ brings this lawsuit alleging that Akal violated the Americans with Disabilities Act and that the Attorney General violated the Rehabilitation Act of 1973. Plaintiff argues that the Defendants' conduct in discharging Plaintiff constitutes discrimination in employment on the basis of a disability or perceived disability.

In its Answer, Akal asserts a counterclaim alleging that effective June 13, 2003, Akal and the United Government Security Officers of America, Local #85 entered into a collective bargaining agreement (CBA). Akal asserts that Section 6 of the CBA provides that an employee can be discharged only for just cause, and that just cause includes "any action or order of removal of an employee from working under the contract by the U.S. Government, or revocation of required CSO credentials by the USMS.... The 'final decision' on the employee's removal shall be determined by the Government, and the Employer shall be held harmless by the Union and the employee for any

³Mr. Wise was killed in a motor vehicle accident. His widow, Peggy Wise, now proceeds with this lawsuit.

further claims made after this final determination.”

Akal asserts that Wise breached Section 6 of the CBA by filing suit against it and seeks a declaration that Wise is precluded from bringing suit against it. Akal also seeks indemnification for any attorney’s fees and costs associated with its defense of this suit.

Wise argues that, as a matter of law, the CBA cannot preclude an employee seeking relief under the ADA and Akal is prevented both by statute and CBA, Section 1.8 from engaging in discriminatory acts.

Analysis

42 U.S.C. § 12112(a) provides that “no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

As used in subsection (a), the term "discriminate" includes – “participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs).” 42 U.S.C. § 12112(b)(2).

In this case Wise was employed by Akal to work as a CSO. Akal is an employer for purposes of the ADA. The USMS no longer wanted Wise assigned as a CSO. Since it could not deploy Wise

to his assigned duties, Akal dismissed Wise from its employ.⁴ The Court acknowledges that Akal is in a bind. The USMS will not allow Wise to work and Akal cannot maintain an individual on its payroll who is not deployable. The Court acknowledges that Akal discharged Wise pursuant to section 6 of the CBA, however, Akal cannot wrest itself out of its predicament in the manner it suggests.

Akal's attempt to use section 6 of the CBA as a shield is misplaced. It attempts to read section 6 as a waiver of an employee's right to assert his statutory rights. However, such waivers or releases that waive prospective Title VII/ADA/ADEA rights are invalid as violative of public policy. *Fairs v. Williams WPC-I, Inc.*, 332 F.3d 316, 321 (5th Cir. 2003). In addition, in Section 1.8 of the CBA, Akal committed to not discriminating against any employee because of their disability.

The Court is further persuaded that a reading of the implementing ADA regulations justifies dismissing Akal's counterclaim. 29 CFR Pt. 1630.6 states, in part, that "an employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly."

In a somewhat analogous case, the court in *Holiday v. City of Chattanooga*, 206 F. 3d 637 (6th Cir. 2000) addressed a situation where Holiday sought a position with the city police force. The city extended him an employment offer contingent upon his passing a physical examination required by state statute. The city contracted out with outside health care providers to perform the post-offer physical examinations. One of these doctors examined Holiday, at which time Holiday informed the

⁴The Court has not been advised as to whether Akal had other non-CSO job positions available to which it could have assigned Wise.

physician that he was infected with HIV. The doctor subsequently completed a report that stated Holiday was not physically fit to perform strenuous activity. Based upon the medical opinion the conditional offer of employment was withdrawn by the city. On appeal, the Sixth Circuit concluded that the physician "failed to undertake the individualized determination that the ADA requires and instead disqualified Holiday because of his HIV status - without any indication that Holiday's condition actually impeded his ability to perform as a police officer."⁵ In concluding that the city did not have the right to rely upon unsubstantiated and cursory medical opinions, the Sixth Circuit noted that "employers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties." *Id.* at 645 (citing 42 U.S.C. § 12112(b)(2) and *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 973 (S.D. Tex. 1996). *See also Rodriguez v. Conagra Grocery Products Co.*, ___ F. 3d ___, 2005 WL 3036318 (5th Cir. Nov. 14, 2005)(ConAgra offered Rodriguez a permanent position as a production utility employee contingent upon passing a physical exam and was sent to a physician who had a standing contractual agreement to perform a physical exam. Based on a urinalysis which showed an elevated concentration of glucose and the fact that Rodriguez could not remember the name of his treating physician, the doctor concluded that Rodriguez's diabetes was uncontrolled. Based on the physical exam, ConAgra withdrew the job offer. On appeal the Fifth Circuit concluded that the examining physician failed to base his assessment on the individualized review that the ADA requires. When ConAgra attempted to argue that the examining doctor's testimony could not be used to establish that it regarded Rodriguez as

⁵The Court further noted that there was no evidence that Holiday's HIV condition had progressed beyond the asymptomatic stage, or that Holiday actually suffered from any AIDS-related health problems. There was also no evidence that the physician attempted to determine whether Holiday suffered from any symptoms of physical weakness or lack of endurance.

substantially limited in a major life activity, the Fifth Circuit noted that “employers cannot escape their legal obligations under the ADA by contracting out hiring and personnel functions to third parties.”).

In *Holiday and Rodriguez*, the employers could not rely upon third party physicians to withdraw their job offers. Although in this case, the USMS imposed the medical screenings upon Akal and its employees, Akal is prohibited from relying upon the physician retained by the USMS and its contractual agreements with both the USMS and Union to avoid its ADA obligations. A party including an illegal provision in a collective bargaining agreement or other contractual agreement bears the risk that the provision will be struck down. *See Transport Workers Union of America, Local 100, AFL-CIO v. New York City*, 342 F. Supp.2d 160 (S.D. N.Y. 2004)(CBA requiring workers who sought sick leave to produce documentation including diagnosis and treatment plan was violative of ADA prohibition against employer's requiring medical examination or inquiry into disability absent showing that examination or inquiry is job-related and consistent with business necessity).

Akal's argument that Plaintiff's motion is premature because discovery has not yet been completed and a finding of disability discrimination has not been made is without merit. This issue involves solely a question of law. Plaintiff's motion to dismiss Akal's counterclaim (docket no. 56) is GRANTED.

SIGNED this 21st day of December, 2005.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE