IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID GROOMS, Plaintiff, v. BARRY S. MARAM, Director, Illinois Department of Healthcare and Family Services, Defendant.	)	No. 06 C 2211 Judge Rebecca R. Pallmeyer Magistrate Judge Martin C. Ashman

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Now Comes Defendant, BARRY S. MARAM, in his official capacity as Director of the Illinois Department of Healthcare and Family Services, by and through his attorney, LISA MADIGAN, Attorney General of Illinois, and hereby responds to Plaintiff's Motion for Partial Summary Judgment, stating as follows:

ARGUMENT

I. THE COURT CANNOT ENTER JUDGMENT IN FAVOR OF PLAINTIFF PURSUANT TO FED. R. CIV. P. 56 BECAUSE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT PARTITIONS THE CLAIM CONTAINED IN EACH OF DEFENDANT'S AFFIRMATIVE DEFENSES 1 AND 2.

The Plaintiff here is asking for a judgment without specifying which subparagraph of Fed. R. Civ. P. 56 purports to authorize the court to render such a judgment. *See*, Plaintiff's Motion for Partial Summary Judgment. As Defendant will show, no portion of Rule 56 empowers the court to award relief to Plaintiff in the form of a judgment. Additionally, the court should decline to treat Plaintiff's Motion for Partial Summary Judgment as one seeking a pretrial adjudication on a certain limited issue pursuant to Fed. Rule Civ. P. 16(c).

First, it is well settled that Rule 56 does not permit a court to enter a judgment on less than an entire claim. *Leonard v. Socony-Vacuum Oil Co.,* 130 F.2d 535, 536-37 (7th Cir. 1942) (granting of summary judgment on a certain element of a claim is an

interlocutory pretrial order in the nature of granting a motion to strike); *Biggins v. Oltmer Iron Works,* 154 F.2d 214, 216, 217 (7th Cir. 1946) (Rule 56 does not contemplate a summary judgment for any portion of a single claim less than the whole); *Capitol Records, Inc. v. Progress Record Distributing, Inc*., 106 F.R.D. 25, 28 (N.D. Ill. 1985). The rationale for this result is that Rule 56 refers to "judgments" which are, in turn, defined as orders from which appeals lie.

In *Biggins*, a sales representative brought suit to recover compensation for services he rendered to defendant during a certain time period. He sought to recover a sum certain which was broken down into five constituent items. Plaintiff was awarded, on his motion, a partial summary judgment on two items of his enumerated damages. The defendant appealed. The Seventh Circuit found that the concept of partial summary judgment under those circumstances was both a misnomer and improper. *Biggins*, 154 F.2d 216-17. The Court found that the judgment improperly split Biggins' single claim – to enforce compensation for services rendered – into separate and distinct elements. *Id.* at 216. The items of compensation were of "an evidentiary nature and in fact and reality were mere elements on which a single claim was predicated." *Id.*

Both *Biggins* and *Capitol Records* demand the conclusion that the court cannot entertain this motion under Rule 56(a). Both Plaintiff's Statement of Material Facts and his Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment misstate the substance of Defendant's affirmative defenses. As disclosed to Plaintiff through discovery, both of Defendant's affirmative defenses rest on more than the Expert Witness Report of Todd Menenberg, the Defendant's retained expert. Both of the affirmative defenses each consist of one claim that rests on three discrete evidentiary threads. (Defendant's SAMF No. 20, 21; Defendant's Exhibit A at pp. 9-22, B, C). Were this court to award the relief Plaintiff seeks here, such relief would not dispose of the entire claim contained in affirmative defenses 1 and 2.

With regard to those affirmative defenses, Defendant asserts, on the one hand, that if Plaintiff were to prevail and Defendant is required to ignore the costs caps of the Persons with Disabilities Medicaid Waiver Program, then the cost caps would have to be eliminated for other persons, both those currently enrolled in the Persons with Disabilities Medicaid Waiver Program and persons currently in long term care facilities who could

move into the community under a more generous Medicaid Waiver Program. Defendant asserts that such a removal of the program's cost caps results in programmatic changes to the Persons with Disabilities Medicaid Waiver Program that constitute fundamental alterations (or result in inequitably harsh results to the State's programs). This assertion rests, in part, on the testimony of a fact witness, HFS employee Barbara Ginder, together with the Persons with Disabilities Medicaid Waiver Program document approved by the federal government. (Defendant's SAMF Nos. 20, 21, 22, 23; Defendant's Exhibit C at pp. Bates numbered 3025, 3027).

Next, Defendant asserts that the programmatic changes that result would require expenditures of public funds that are not reasonable. Two discrete evidentiary bases support this aspect of Defendant's claim. One basis is contained in the Expert Witness Report of Mr. Menenberg together with his anticipated in-court testimony and his Rebuttal Report. (Plaintiff's SMF No. 10; Defendant's SAMF Nos. 20, 26). The second evidentiary basis consists of the analysis performed by Defendant's fact and opinion witness, HFS employee, Matt Werner, together with his in-court testimony about the costs to the Persons with Disabilities Medicaid Waiver Program were Plaintiff to prevail. Mr. Werner's evidence is not merely cumulative of Mr. Menenberg's since the methodologies used by these witnesses differ markedly. Mr. Werner is also expected to opine about the negative impact on the supply of registered nurses if Plaintiff is successful. (Defendant's SAMF Nos. 21, 21; Defendant's Exhibit B at pp. Bates numbered HFS301460-301468, MW 500042-500053).

As shown above, Plaintiff's Motion for Partial Summary Judgment partitioned a single claim contained in each of Defendant's affirmative defenses, and confined itself to seeking judgment on the evidence contained in Mr. Menenberg's Expert Witness Report. *See*, Plaintiff's Rule 56.1(a)(3) Statement of Material Facts and Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment. It is evident that Plaintiff is proceeding in a piecemeal fashion and seeking nothing more than a factual adjudication on the Menenberg Expert Witness Report. Fed. R. Civ. P. 56(a) does not countenance this result.

Second, the Plaintiff cannot rely on Fed. R. Civ. P. 56(d) because this rule does not permit the court to make a mere factual adjudication in the absence of a proper

motion for summary judgment having been denied in whole or in part. *Capitol Records*, 106 F.R.D. at 29-30. Defendant adopts all the arguments and authorities set forth concerning Rule 56(a) as his argument here. As stated, *Biggins* and *Capitol Re*cords hold that Rule 56(d) cannot be used to grant judgment on an element of a single claim. Moreover, the court should follow the rule articulated in *Capitol Records* that the court can proceed to frame and narrow the triable issues pursuant to Rule 56(d), but only when a proper motion for summary judgment has been denied in whole or in part, and the court also finds that such an order would be helpful to the progress of the litigation. Were the rule otherwise, parties would bring numerous and repetitive motions seeking to resolve limited factual issues that would not dispose of a claim, would not become final until trial and would waste judicial resources in almost every case. *Id*. Since Plaintiff has not moved for true summary judgment, he cannot ask this court to make a mere factual adjudication concerning the Menenberg Expert Witness Report pursuant to Rule 56(d).

Third, by its plain language, Rule 56(c) does not apply here. Plaintiff's Motion for Partial Summary Judgment is not asking for an interlocutory order concerning Defendant's liability.

Fourth, the court can properly deny Plaintiff's Motion for Partial Summary Judgment as an untimely motion to strike. Fed. R. Civ. P. 12(f); *Leonard v. Socony-Vacuum Oil Co.,* 130 F.2d 535, 537 (7th Cir. 1942); *Petroff Trucking Co, Inc. v. Envirocon, Inc*., 2006 WL 2938666 * 2 (Dist. Ct. S.D. Ill. October 13, 2006).

Finally, for all the reasons set forth in Arguments II and III of this Response, the court should simply decline to treat Plaintiff's Motion for Partial Summary Judgment as a request for a pretrial order pursuant to Fed. R. Civ. P. 16(c).

II. WHETHER PLAINTIFF HAS PROPERLY INVOKED FED. R. CIV. P. 56 OR WHETHER PLAINTIFF IS SEEKING A PRETRIAL ORDER PURSUANT TO FED. R. CIV. P. 16(c), PLAINTIFF'S MOTION IS NOT RIPE FOR ADJUDICATION BY THIS COURT.

Plaintiff's Complaint sets forth three separate claims. First, Plaintiff claims that Defendant violated the Americans with Disabilities Act, 42 U.S.C. § 12132, hereinafter referred to as the "ADA." (Complaint at ¶¶ 4, 7, 37, 39, 40, 41 and 44). Next, Plaintiff claims that Defendant violated the Rehabilitation Act, 29 U.S.C. § 794(a), hereinafter referred to as "Section 504." (Complaint at ¶¶ 4, 7, 37, 39, 40, 41 and 44). Lastly,

Plaintiff claims that Defendant violated rules promulgated by the Attorney General in reference to the ADA and by the Department of Health and Human Services in reference to Section 504, in particular, 28 C.F.R. §§ 35.130(d) and 41.51(d), referred to as "the integration mandates." (Complaint at ¶¶ 38, 41 and 44).

According to the argument in the so-called Plaintiff's Motion for Partial Summary Judgment, Plaintiff has abandoned his claims under the ADA and Section 504 and, instead, pursues a claim that Defendant violated the integration mandates. *See*, Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment at pp. 1, 2. Under these rules, Sections 35.130(d) and 41.51(d), a public entity (or the program receiving federal financial assistance) is required to administer services and programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities. The Seventh Circuit's decisions in *Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th Cir. 2003) and *Radaszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) do not recognize an independent claim for relief under the integration mandates. Both decisions reversed dismissals of ADA and Section 504 claims and remanded the cases for further proceedings.

First, Defendant disputes whether the integration mandates apply to Plaintiff. According to the Complaint, and to the information that is available to Defendant, Plaintiff David Grooms has, at all times relevant, lived in the most integrated setting appropriate to his needs. According to the information available to Defendant, David Grooms lives in his parents' home in the community, participates in Defendants' home and community–based Medicaid services program, specifically, the Persons with Disabilities Medicaid Waiver Program, and receives services through that program in the most integrated setting appropriate to his needs. Before the court need concern itself with whether any relief to Plaintiff is justified and would cause fundamental alteration to Defendant's Medicaid programs (or, cause inequitably harsh results), the court will have to first find that David Grooms has a claim under the integration mandates. Since the so-called Plaintiff's Motion for Partial Summary Judgment does not seek relief on any of Plaintiff's claims, Defendant need not now present any evidence that goes to the merits of

Plaintiff's claim under the integration mandates, or arguments of law concerning the rules' meaning and applicability to Plaintiff.[1]

Moreover, the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581, 592-93, 598 (1999) did not decide whether the regulations promulgated under the ADA (and, by analogy, under Section 504) exceed the Acts of Congress themselves, or were entitled to the degree of deference described in *Chevron, U.S.A. Inc. v. National Resource Defense Council*, 467 U.S. 837 (1984), or simply "respect." The Seventh Circuit in *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006) discussing the "reasonable accommodation" rule promulgated by the Attorney General pursuant to the ADA, noted that the Supreme Court never determined whether the rules are entitled to *Chevron*-type deference and the Seventh Circuit did not so hold. *Wisconsin Community Services*, *Id*. at 751 n.10.

Thus, in addition to deciding whether Plaintiff has a claim under the pertinent rules, the court will also have to resolve arguments concerning the degree of deference to accord these rules, and indeed, whether the rules exceeded the authority granted by Congress. Significantly, Defendant's fourth affirmative defense claims that the integration mandates exceed the Acts of Congress, but since the so-called Plaintiff's Motion for Partial Summary Judgment does not seek relief in reference to that affirmative defense, those arguments are not properly made here.

As previously stated, Plaintiff has abandoned his claims under the ADA and Section 504. Even if he has not, then his so-called Motion for Partial Summary Judgment is not ripe in light of the elements Plaintiff must first prove in reference to those statutes (and the integration mandates if such a claim is cognizable) before issues of whether the relief results in a fundamental alteration to Defendant's programs is properly before the court.

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[1] Defendant is aware of the ruling in *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1181 (10th Cir. 2003) that a person need not be institutionalized in order to sue under the ADA's integration mandate. Defendant, here, is not suggesting that Plaintiff can sue only if he is in an institution; rather, Defendant asserts that evidence of Plaintiff Grooms' successful participation in the Defendant's program negates his claim under the integration mandates on the merits. In any event, as stated above, the Seventh Circuit has not recognized an independent claim under these regulations and Defendant disputes that these rules create such an independent claim.

Turning, first, to the ADA, Section 12132 provides in pertinent part that ". . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." To establish a violation of Title II of the ADA, the Plaintiff must show that 1) he is a qualified individual with a disability, 2) he was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and 3) such an exclusion was by reason of his disability. *Sandison v. Michigan High School Athletic Ass'n., Inc*., 64 F.3d 1026, 1036 (6th Cir. 1995).

Under *Olmstead v. L.C*., 527 U.S. 581 (1999), officials of the State of Georgia were found to have violated Title II of the ADA by failing to grant a reasonable modification to the State's Medicaid program in the form of placing institutionalized persons into existing and unfilled community-based services programs. *Olmstead*, 527 U.S. at 601-03. Nevertheless, the Court held that the State is permitted to resist modifications that entail fundamental alterations of the State's services and programs. *Id*. 527 U.S. at 603-08. The Supreme Court pointed out that if placing one or two people in a community-based services program is measured for reasonableness against the State's entire health budget, then the State will never win on its fundamental alteration defense. *Id*. at 603-04. Sensibly construed, the fundamental alteration component of the reasonable modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities. *Id*. at 604.

Under the law of the Seventh Circuit, the public entity's failure to grant a reasonable accommodation is a theory of liability separate from intentional discrimination. *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 561-64 (7th Cir. 2003); *Wisconsin Community Services*, 465 F.3d at 753. In this Circuit, a plaintiff pursuing a reasonable accommodation claim under Title II need not allege either disparate treatment or disparate impact.

Without waiving any objections to any evidence David Grooms may attempt to place before the court and without waiving any motions *in limine* or motions to bar for

discovery sanctions, Defendant only states that his burden of going forward and proving the fundamental alteration defense will not arise until Plaintiff proves that he meets ". . . the essential eligibility requirements for the receipt of services or the participation in [Defendant's] programs with or without reasonable modifications to the rules policies or practices." Since Plaintiff is not moving for summary judgment on his ADA claim, Defendant need not present or discuss any evidence or legal argument as to whether David Grooms meets the statutory requirements of the ADA generally. *Olmstead*, 527 U.S. at 603-08; *Sandison v. Michigan High School Athletic Association, Inc.*, 64 F.3d 1026, 1036-37 (6th Cir. 1995). Until David Grooms goes forward and establishes his ADA claim, any questions concerning the sufficiency and merits of Defendant's affirmative defenses 1 and 2 are not properly before this court.

Turning, next, to Section 504, Section 504 provides in pertinent part that, ". . . [n]o otherwise qualified individual with a disability. . .shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . ." 29 U.S.C. § 794(a). To establish a violation of Section 504, the Plaintiff must show that 1) he is handicapped within the meaning of Section 504, 2) he is otherwise qualified for the benefit or services sought, 3) he was denied the benefit solely by reason of his handicap, and 4) the program providing the benefit or services received federal financial assistance. *Plummer by Plummer v. Branstad*, 731 F.2d 574, 577 (8th Cir. 1984); *Sandison*, 64 F.3d at 1030-31.

In *Alexander v. Choate*, 469 U.S. 287, 301-08 (1985), the Supreme Court held that meaningful access to Medicaid services for the disabled did not restrict the State's discretion under federal Medicaid law to choose the proper amount, scope and duration limitations on covered services. The Court observed that Section 504 does not require the State to alter the benefits offered under its Medicaid program simply to meet the reality that disabled persons have greater medical needs because, to conclude otherwise, would be to find that the Rehabilitation Act requires that States view certain medical conditions as more important than others and more worthy of cure through government subsidization. *Alexander*, 469 U.S. at 303-04. The Court went on to find that Tennessee's limitation on hospital days covered by Medicaid does not offend Section 504

because the denial of benefits, even when left unmodified, was not linked in any way to those plaintiffs' particular disabilities. *Accord*: *Frances J. by Murphy v. Bradley*, 1992 WL 390875 * 7 (N.D. Ill. 1992) *vacated on other grounds* 19 F.3d 337 (7th Cir. 1994) (elderly disabled who claimed that they did not receive enough in benefits under certain home and community-based Medicaid waiver program because of the program caps linked to the assessment tool the State used to grant those benefits, failed to state a claim under Section 504; plaintiffs were not deprived of meaningful access to the benefits because the Medicaid Act gives the states substantial discretion in defining the allocation of benefits).

In *Alexander*, the Supreme Court found a duty to accommodate in Section 504 generally when it explained that "under some circumstances, a 'refusal to modify an existing program might become unreasonable and discriminatory.'" *Alexander*, 469 U.S. at 300 citing *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979). *See*, *also*, *Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737 746-48 (7th Cir. 2006); *Washington v. Indiana High Scholl Athletic Ass'n., Inc*., 181 F.3d 840, 847-48 (7th Cir. 1999). As a corollary, the Supreme Court found that the *Alexander* plaintiffs' request to modify the Tennessee's Medicaid program by removing the cap on the duration of hospital days covered "would be far from minimal" and well beyond the accommodations that were required under *Davis*. *Alexander*, 469 U.S. at 308. The Court also noted that similar treatment would have to be accorded other groups. *Id*. The Supreme Court, thus, recognized that the equities permitted the State to resist the broad-based distributive decision that would be required. *Id*. The Eighth Circuit has recognized that for Section 504 purposes, accommodations are not reasonable if they impose undue financial burdens or if they require a fundamental alteration in the nature of the program. *Timothy H. v. Cedar Rapids Community School District*, 178 F.3d 968, 972 (8th Cir. 1999).

Without waiving any objections to any evidence David Grooms may attempt to place before the court and without waiving any motions *in limine* or motions to bar for discovery sanctions, Defendant only states that his burden of going forward and proving the fundamental alteration defense or the affirmative defense that the relief would be inequitable will not arise until Plaintiff proves that he is ". . . otherwise qualified for the

benefit or service sought." Under *Alexander* and *Wisconsin Community Services*, this inquiry encompasses the propriety of the modifications David Grooms seeks to the Defendant's program. The answer to this question, in most cases, requires the district court to conduct an individualized inquiry and make appropriate findings of fact. *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 (1987). Since Plaintiff is not moving for summary judgment on his Section 504 claim, Defendant need not present or discuss any evidence or legal argument as to whether David Grooms meets the statutory requirements of Section 504 generally. *Arline, Id.; Sandison v. Michigan High School Athletic Association, Inc.*, 64 F.3d 1026, 1030-35 (6th Cir. 1995). Until David Grooms goes forward and establishes his Section 504 claim, any questions concerning the sufficiency and merits of Defendant's affirmative defenses 1 and 2 are not properly before this court. *See*, *Alexander*, 469 U.S. at 603-08.

III. ASSUMING THAT PLAINTIFF HAS PROPERLY INVOKED FED. R. CIV. P. 56, PLAINTIFF HAS NOT MADE THE REQUISITE SHOWING THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT HE IS ENTITLED TO JUDGMENT ON THE MENENBERG EXPERT WITNESS REPORT AS A MATTER OF LAW.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569, 573 (7th Cir. 2003) (citing Fed.R.Civ.P. 56(c)). When evaluating a motion for summary judgment, the court views the evidence in the light most favorable to the non-moving party and makes all reasonable inferences in his or her favor. *See Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 529 (7th Cir. 2003). The court accepts the nonmoving party's version of any disputed facts, but only if those facts are supported by relevant, admissible evidence. *Bombard v. Ft. Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). The moving party has the burden of demonstrating the absence of genuine issues of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must set forth specific facts that demonstrate the existence of a genuine issue of material fact for trial. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. To successfully oppose the motion

for summary judgment, the nonmoving party cannot rest on the pleadings alone, but must designate specific facts in affidavits, depositions, answers to interrogatories or admissions that establish that there is a genuine, triable issue. *Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992).

Where, as here, a plaintiff uses a summary judgment motion to challenge the legal sufficiency of an affirmative defense on which the defendant bears the burden of proof at trial, a plaintiff may satisfy its Rule 56 burden by showing that there is an absence of evidence to support an essential element of the non-moving party's case. *F.D.I.C. v. Giammettei*, 34 F.3d 51, 54-55 (2nd Cir. 1994); *DiCola v. SwissRe Holding (North America), Inc*., 996 F.2d 30 (2nd Cir. 1993) (quoting *Celotex*, 477 U.S. at 325); *Haywood*, *Id*. at p. 562. The rationale is that where there is an absence of evidence to support an essential element of an affirmative defense, with respect to that affirmative defense there can be no genuine issue as to any material fact because a complete failure of proof concerning an essential element of the defendant's affirmative defense necessarily renders all other facts immaterial. *Giammettei*, *Id*., (quoting *Celotex*, 477 U.S. at 323). A party seeking summary judgment on a defendant's affirmative defense is not required to come up with evidence to disprove the affirmative defense. Applying these principles to the so-called Plaintiff's Motion for Partial Summary Judgment demands the conclusion that Plaintiff's Motion is ill-conceived, fails to understand Rule 56, constitutes an improper use of Rule 56, and that the Motion must be denied.

First, the Plaintiff here has not met his burden under *Celotex* because he has not established that there is an absence of evidence on an essential element of Defendant's affirmative defenses 1 and 2, or that Defendant's proof on those affirmative defenses will fail. Plaintiff, both as a matter of fact and as a matter of law, did the exact opposite. According to Plaintiff's Rule 56.1(a)(3) Statement of Material Facts and Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, the Plaintiff is simply disputing facts and conclusions contained in Menenberg's evidence. The so-called Plaintiff's Motion for Summary Judgment, in its entirety, is arguing that Plaintiff has a claim under the integration mandates and that some undisclosed and unidentified evidence that he will someday attempt to put before the court will show that Menenberg's Expert Witness Report is wrong. *See*, Memorandum in Support of Motion for Partial

Summary Judgment at pp. 6, 7, 8, 10. Plaintiff called certain facts "undisputed" as Local Rule 56.1(a)(3) requires him to do, and then went on to dispute those very facts himself through his Memorandum in Support of his motion. As yet, Plaintiff's purported evidence is not before the court and Defendant is not obligated under Rule 56 or *Celotex* to try and anticipate how Plaintiff will disprove what Defendant, by law, must prove.[2]

Furthermore, Plaintiff's Rule 56.1(a)(3) Statement of Material Facts cites the Menenberg Expert Witness Report as evidence supporting Plaintiff's SMFs Nos. 11 and 17 through 19. Plaintiff has nowhere challenged the admissibility of this evidence and, instead, relies on Menenberg Expert Witness Report as evidence to support a so-called Plaintiff's Motion for Partial Summary Judgment. As previously stated, Plaintiff, to prevail on a motion for summary judgment as to Defendant's affirmative defenses 1 and 2, must show that Defendant does not have evidence to support an essential element of his claim. Plaintiff has not done this; rather, Plaintiff argues that evidence that Plaintiff will put on at trial in support of his integration mandates claim will show that Menenberg's evidence is wrong. Plaintiff is simply asking the court to reject the conclusions contained in the Expert Witness Report for reasons that go entirely to the weight to accord it and not to its admissibility under Fed. R. Ev. 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and to cases applying *Daubert.*[3] The Plaintiff's use of Rule 56 in this fashion is not countenanced by Rule 56 itself and *Celotex.*

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[2] As previously stated, Defendant is not waiving any objections, motions *in limine* or motions to bar Plaintiff's evidence. Nevertheless, the court should note that, in anticipation of the information that his retained expert would need, Defendant asked Plaintiff by interrogatory how Plaintiff wanted the Persons with Disabilities Medicaid Waiver Program modified. Plaintiff refused to supply an answer and now claims that Mr. Menenberg does not understand what Plaintiff wants out of this lawsuit. ". . . Mr. Menenberg's Report is based on a misapprehension of the relief that David is actually seeking in this case. . ." *See*, Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment at p. 6; (Defendant's SAMF No. 24; Defendant's Exhibit D at Interrogatory 19, p. 18).

[3] Plaintiff waived a challenge to the admissibility of the Menenberg Expert Witness Report under Fed. Rule Ev. 702 and *Daubert* and its progeny. A party cannot treat evidence as admissible for Rule 56(e) purposes and then challenge its admissibility at trial because the whole purpose of summary judgment is to determine whether there is any material dispute of fact for trial and the parties have the burden of identifying the evidence to facilitate that assessment. *Malec*, *Id.*, 191 F.R.D. at pp. 582-83.

In addition, Plaintiff's Local Rule 56.1(a)(3) Statement of Material Facts is required to set forth allegations of material facts that contain specific references to the exact pieces of the record that support the factual contention contained in the paragraph. Local Rule 56.1(a)(3); *Malec v. Sanford*, 191 F.R.D. 581, 583 (N.D. Ill. 2000). It is improper to cite to a Complaint as support for a Local Rule 56.1(a)(3) Statement of Facts. *Najieb v. Chrysler-Plymouth*, 2002 WL 31906466 * 1 (N.D. Ill. December 31, 2002). Under these authorities, Plaintiff's SMFs Nos. 3, 9 and 12 through 15 are improper and must be disregarded, regardless of whether they are true statements of fact or conclusions of law.

Also, the portion of Plaintiff's Memorandum in Support of his Motion for Partial Summary Judgment under the heading "Introduction and Factual Background," at pages 1 through 3, is replete with "facts" and argument that are not properly before this court and should be stricken. The facts that are material to a resolution of this matter should have been set forth with proper evidentiary support in the Plaintiff's Statement of Material Fact with specific citations to evidence. *Malec*, *Id*., 191 F.R.D. at p. 583.

Second, Defendant does not concede that Plaintiff has met his burden under Rule 56 and *Celotex*. Nevertheless, if he has, given that Defendant has the burden of proof on both affirmative defenses 1 and 2, the Menenberg Expert Witness Report satisfies Defendant's burden as the non-moving party to defeat summary judgment by establishing that there are genuine issues of material facts on Defendant's affirmative defenses. Defendant does not contend that the fundamental alteration defense can be broken down into discrete elements that Defendant must prove like the statutory elements contained in the ADA and Section 504. Rather, as set forth in Argument I, even if the Menenberg Expert Witness Report is not enough to establish genuine issues of fact as to Defendant's affirmative defenses, Defendant demonstrated that those affirmative defenses rest on evidentiary pieces that are not the subject of Plaintiff's Motion for Partial Summary Judgment including, Mr. Werner's documents (Defendant's SAMF Nos. 20, 21; Defendant's Exhibits A, B), documents that will be admitted through Ms. Ginder's testimony (Defendant's SAMF Nos. 20, 21, 22, 23 and Defendant's Exhibit C), and Mr. Menenberg's Rebuttal Report. (Defendant's SAMF No. 26; Defendant's Exhibit F). Although Plaintiff makes no mention in his Motion for Partial Summary Judgment, he

retained an expert to contest the Menenberg Expert Witness Report. (Defendant's SAMF No. 25 and Defendant's Exhibit E). Defendant refers this court to Dr. Flint's Report only for the purpose of this Response and, by so doing, does not concede that Plaintiff's expert's opinions are admissible under Fed. R. Ev. 104, 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). It is evident that Defendant's affirmative defnses 1 and 2 are replete with genuine issues of material facts for trial.

In summary, under Rule 56 and *Celotex*, Defendant, as the non-moving party, is not required to come forward with evidence to dispute "facts" on a claim that is not the subject of a motion for summary judgment. In other words, all of the Plaintiff's challenges to the Menenberg Expert Witness Report depend on facts or arguments that are part of the operative facts under his integration mandates claim, or under Dr. Flint's purported expert opinions. Plaintiff himself admits this. *See*, Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment at p. 2. ("When the erroneous legal assumptions are removed from the analysis, and the report is viewed in light of the relief David Grooms actually seeks, Defendant's fundamental alteration and inequitable burden defenses collapse.") Since Plaintiff's claim under the integration mandates (or the ADA or Section 504) are not before this court on anyone's motion for summary judgment, Defendant need not controvert nor address any facts and arguments that would establish Plaintiff's right to relief under these statutes and regulations. Rule 56; *Celotex*.

WHEREFORE, for the foregoing reasons, Defendant prays that:

1) Plaintiff's Motion for Partial Summary Judgment be denied; and

2) The court decline to treat Plaintiff's Motion for Partial Summary Judgment as a request for a pretrial order pursuant to Fed. R. Civ. P. 16(c); and

3) The court award Defendant the costs of responding to this Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56(g).

Respectfully submitted,

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