UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, as Parent and Natural Guardian, on behalf of ADAM DOE, a Minor, Plaintiff, v. DEER MOUNTAIN DAY CAMP, INC. and DEER MOUNTAIN BASKETBALL ACADEMY, Defendants.	:	07-Civ-5495 (WCC) (GAY) ECF Case

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

For the Plaintiff:

Lewis J. Liman
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Of Counsel:
Jorge G. Tenreiro
Scott G. Thompson

Sally Friedman
Renee Martinez
Legal Action Center
225 Varick Street, 4th Floor
New York, New York 10014
(212) 243-1313

Howard Sherwin
Legal Aid Society of Rockland County, Inc.
2 Congers Road
New City, New York 10956
(845) 634-3627

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Plaintiff Jane Doe, as parent and natural guardian of Adam Doe, a minor, respectfully submits this memorandum of law in further support of her motion for summary judgment, granting relief on her claims against defendants Deer Mountain Day Camp, Inc. and Deer Mountain Basketball Academy (the "Camps") under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and the New York Human Rights Laws, N.Y. Exec. Law § 292, et seq.[1]

PRELIMINARY STATEMENT

In their response to plaintiff's motion for summary judgment, the Camps did not identify a single material disputed fact that warrants denial of plaintiff's motion. The Camps concede that concerns with HIV transmission motivated the decision to deny Adam admission. Because, as the Camps recognize, the impermissible disability-based motive need only be a motivating factor under the ADA, this suffices to establish the Camps' liability as a matter of law.

To avoid this outcome, the Camps attempt to muddle the issues by arguing that their concern with HIV was about a hypothetical person on Adam's HIV medications, not about Adam himself. The Court should ignore this senseless distinction, as it is impossible to fathom how a concern with a hypothetical HIV-positive person was not a concern about Adam himself, particularly given that this concern was a reason for denying Adam admission.[2] The Camps also state in a conclusory manner that even though Roberta Katz viewed Plaintiff as a "liar" for initially withholding her child's HIV status, that perception did not factor into the Camps'

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[1] All capitalized terms used herein have the same meaning as in Mem. of L. in Supp. of Pl.'s Mot. for Summ. J., dated Feb. 13, 2009 (No. 22) ("Pltf.'s Br."), and Pl.'s Statement of Undisputed Facts Pursuant to Local Civil Rule 56.1, dated Feb. 13, 2009 (No. 21) ("Pltf.'s 56. 1"). Other documents referenced herein are Compl., dated May 29, 2007 (No. 1) ("Compl."), Pl.'s Mem. Of Law in Opp'n to Defs.' Mot. for Summ. J., dated Mar. 6, 2009 (No. 29) ("Pltf.'s Resp. Br."), Pl.'s Counter-Statement of Material Facts in Dispute Pursuant to Local Civil Rule 56.1, dated Mar. 6, 2009 (No. 30) ("Pltf.'s Counter 56.1"), Defs.' Memo. of Law in Opp'n to Pl.' Mot. for Summ. J., dated Mar. 6, 2009 (No. 32) ("Defts.' Resp. Br."), and Defs.' Resp. to Pl.'s Statement of Material Facts and Defs.' Statement of Additional Material Facts Pursuant to Local Rule 56.1, dated Mar. 6, 2009 (No. 35) ("Defts.' Counter 56.1").

[2] The Camps also use this convoluted argument in an attempt to create an issue of fact with respect to whether they "regarded" Adam as "disabled" under the ADA. It should be rejected for the same reasons.

decision – a statement not supported by any citation to the record and in fact contradicted by the record. None of the Camps' remaining factual disputes warrants denying plaintiff's summary judgment because they are not material to the legal argument presented here.

The Camps also revisit the argument that this Court should evaluate their conduct under some undefined "insufficient time/subjective" standard instead of the "objective" standard spelled out clearly in the regulations and caselaw, yet cite no cases contradicting those plaintiff has cited. Nor have defendants offered any rationale for an accredited camp with a nursing staff to be able to plead ignorance of well-accepted medical standards concerning HIV transmission. The Court should reject this effort at rewriting the ADA.

Defendants also do not dispute the material facts necessary to establish that Adam Doe had a disability as a matter of law: that Adam Doe was hospitalized several times during his first years of life for HIV-related complications that substantially limited his major life activities, see Defts.' Counter 56.1 ¶¶ 2-5, thereby establishing a "record of" a disability, and that the Camps regarded him as requiring a separate pool and toilet to prevent HIV transmission.

ARGUMENT

I. ADAM DOE IS DISABLED UNDER THE ADAAA, THE ADA, AND THE NYHRL AS A MATTER OF LAW

A. The ADAAA Applies Because Plaintiff Seeks Prospective Relief

The Camps do not dispute that under the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008), ("ADAAA"), Adam Doe is disabled as a matter of law. Nor could they, because under the ADAAA the definition of disability, which must be "construed in favor of broad coverage of individuals," 42 U.S.C. § 12102(4)(A) (2009), specifically includes the functioning of the immune system as a major life activity and precludes a court from taking

into account mitigating measures when determining whether that activity is substantially limited. Id. §§ 12102(2)(B), (4)(D)-(E). See also Pltf.'s Resp. Br. at 19.

The Camps merely argue that the ADAAA does not apply to this case "because the events giving rise to this action occurred before [the ADAAA's] effective date." See Defts.' Resp. Br. at 5-6, n. 5 (emphasis in original). The Camps, however, ignore that plaintiff seeks prospective relief under Title III and thus that application of the ADAAA to this suit is proper. See Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994). The Camps' reliance on dicta in Tish v. Magee-Women's Hosp., No. 06-Civ-820 (TFM), 2008 U.S. Dist. LEXIS 87010, *14-15, n. 5, (W.D. Pa. Oct. 27, 2008), is inapposite because the plaintiff there sought damages for past employment decisions. Plaintiff here seeks only prospective relief under Title III. See Compl. at p. 12, ¶ 3.

B. Adam is Disabled Under the ADA

Adam's HIV-infection qualifies as a disability even under the ADA's original definition of the term for the reasons explained in plaintiff's opening and response briefs. See Pltf.'s Br. at 10-14; Plft.'s Resp. Br. at 18-20.

Defendants do not dispute that Adam's impairment (HIV) substantially limited his major life activities of eating, breathing, and caring for oneself when he was very young. Defendants only argue that Adam cannot satisfy the "record of" disability prong under 42 U.S.C. § 12102(1) (2009) because the Camps did not know of Adam's childhood hospitalizations for HIV-related complications. See Defts.' Resp. Br. at 9-10. To support their argument, the Camps rely on two cases that are not binding on this Court and that are wrongly decided on this point. See United States v. Happy Time Day Care Ctr., 6 F. Supp. 2d 1073, 1082 (W.D. Wis. 1998) (ruling without discussion that plaintiff did not satisfy "record of" prong because defendant did not know of

hospitalizations); see also DeMar v. Car-Freshner Corp., 49 F. Supp. 2d 84, 93 (N.D.N.Y. 1999) (Title I case).

The Court should not read into the "record of" language in the statute a knowledge requirement, particularly when the Title III cases cited by plaintiff do not require it. See Pltf.'s Br. at 11-12.[3] Moreover, the DOJ regulations provide that "[t]he phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 28 C.F.R. § 36.104 (2009). The DOJ preamble elaborates that "[t]his provision is included . . . to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity", citing histories of mental illness, heart disease or cancer as examples. 28 C.F.R. Pt. 36, App. B (2009). Nowhere is there a requirement that to establish this threshold for coverage under the ADA, a plaintiff must also show that the defendant knew that the plaintiff's current impairment once was more severe. Adding such a requirement serves no purpose and ignores the general mandate to construe the ADA broadly because it is a remedial statute, Henrietta D. v. Bloomberg, 331 F.3d 261, 279 (2d Cir. 2003).[4]

Finally, defendants split hairs by arguing that they did not "regard" Adam as disabled because they had no opinions about Adam given that they obtained no specific information about

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[3] Moreover, in Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987) the Supreme Court held that the plaintiff had a "record of" a disability due to hospitalizations for tuberculosis 30 years before the event in question. There was no indication that the defendants knew of this when they decided to fire plaintiff and, in fact, there was indication that the defendants did not know of this history of hospitalizations because plaintiff had not disclosed it in her job application. Moreover, defendants admitted they fired plaintiff on the basis of her remission; there was no indication that they discriminated against her on the basis of past records. See Brief for the Petitioners, Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (No. 85-Civ-1277), 1986 WL 728010, at ** 2-3.

[4] The ADAAA, which instructs that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals", 42 U.S.C. § 12102(4)(A) (2009), "sheds light on Congress' original intent when it enacted the ADA." Rohr v. Salt River Project Agric. Imp. and Power Dist., 555 F.3d 850, 861 (9th Cir. 2009). As the Second Circuit has noted, "[b]y invoking [a new Act] as evidence of Congress's purpose [to reach the desired result under an old Act], [the court] do[es] not retroactively apply that Act to [this case]." Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116, 125-26 (2d Cir. 2000).

him, only about a hypothetical HIV-positive individual.[5] See Defts.' Resp. Br. at 12. This strained distinction is meaningless. To the extent that the Camps mistakenly believed that a "hypothetical" person taking Adam's HIV medications could potentially transmit HIV via a pool or toilet, they necessarily held that misperception about *every* individual with HIV, including Adam. The Camps' complaint that they lacked the time to provide Adam with the required separate pool and toilet, conclusively demonstrates that they applied their misperceptions about "hypothetical" individuals on Adam's HIV medications to Adam himself. See id. at 4. In any event, this distinction is contradicted by the Camps' earlier accounts where they repeatedly characterized Dr. Levi's advice as pertaining to Adam himself.[6]

C. Adam is Disabled Under the NYHRL

Defendants' insistence that plaintiff's claim under the NYHRL "survives or fails on the same basis as her ADA claim," Defts.' Resp. Br. at 5, n. 3, is in plain contravention of Second Circuit and New York Court of Appeals precedent. In Treglia v. Town of Manlius, 313 F.3d 713, 723 (2d Cir. 2002), the court noted that "[t]he New York Court of Appeals has held that 'in New York, the term 'disability' is more broadly defined [than in typical disability statutes]'", (quoting New York Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 218-19 (1985)), and that "unlike the federal statute, the state statute does not require [plaintiffs] to identify a major life activity that is substantially limited by [their] impairment." Id. (quoting Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 154 (2d Cir. 1998)).

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[5] This is akin to their argument that because Dr. Levi recommended separate pool and toilet facilities for "a hypothetical person on Adam's medications," defendants' decision to deny Adam admission was only because of such "hypothetical" individual, and not because of Adam's HIV status. See Defts.' Resp. Br. at 15, n. 21.

[6] See Defs.' Answers and Objections to Pl.'s First Set of Interrogs., dated May 2, 2008, submitted as Ex. D to Further Decl. in Supp. of Pl.'s Mot. for Sum. J., dated Mar. 13, 2009 ("Further Decl."), at 19 ("Dr. Levy told Ms. Katz . . . that it could be potentially unsafe if Adam Doe secreted blood into the pool, …and that it would be best to provide a separate pool *for Adam Doe*."), 21 (the "DMBA was advised [by Dr. Levi] to provide for separate pool facilities, and that its bathroom facilities would need to be inspected and cleaned after every use *by Adam Doe*") (emphasis added). Defendants cannot create an issue of fact with conclusory allegations that contradict their previous representations.

II. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE CAMPS DO NOT DISPUTE THE FACTS UNDERLYING THE CONCLUSION THAT ADAM'S HIV-INFECTION PLAYED A ROLE IN THEIR DECISION

Defendants do not dispute that in a Title III action, the plaintiff need only show that the plaintiff's disability was "a motivating factor" in denying admission. See Defts.' Resp. Br. at 13; see also Pltf.'s Br. at 16-17. They also do not dispute the facts necessary to conclude that HIV motivated the Camps' decision in at least two ways: (1) defendants' reliance on Dr. Levi's purported recommendation for a separate pool and toilet to prevent HIV transmission, and (2) Ms. Katz' belief that plaintiff was a liar because she wished to maintain the confidentiality of Adam's HIV status. Instead, defendants raise new factual assertions that are of no legal consequence and contradict admissions in the record. Plaintiff is entitled to summary judgment.

Defendants do not dispute that one of their motivating factors was their inability to implement Dr. Levi's purported recommendation for separate pool and toilet facilities in order to prevent HIV transmission. See Defts.' Resp. Br. at 14-15, n. 21. They only argue only that it was not concern with *Adam's* HIV, but rather a concern with a *hypothetical person* with HIV, that led them to deny him admission. See id. This argument should be rejected for the reasons stated supra at pp. 4-5.[7]

Defendants also do not dispute that Roberta Katz perceived plaintiff as a liar for wanting to keep Adam's HIV status confidential. Instead, they argue that this did not motivate their decision, see id. at 16-20, nn. 23, 25, 29, with the conclusory assertion that "there is clearly no causal relationship between Jane Doe's desire for non-disclosure and the denial of admission" Id.

[7] The Camps' claim that Nurse Gloskin was only concerned with whether Adam had suffered a prior virus, see Defts.' Resp. Br. at 15, is irrelevant because Adam's HIV need not be the only motivating factor and because the record establishes that Nurse Gloskin was not the decision-maker. See EG 96:4-97:6. The actual decision-maker was Roberta Katz, see RK 96:4-12, who undisputedly understood Dr. Levi's recommendations to be about HIV transmission, RK 91:13-21.

at n. 23. However, the Camps cite nothing in the record to support this assertion, nor could they given that it is flatly contradicted by Roberta Katz's repeated statements that "a credibility issue" was one of the "number of things" that motivated the Camps' decision. See RK 102:20-105:6.[8]

Defendants suggest that even if perception of plaintiff's dishonesty did factor into her decision, such conduct was not discriminatory because a camp needs to know every medical condition and medication of a child. See Defts.' Counter 56.1 ¶¶ 124, 127. However, this position contradicts prevailing medical standards that govern the participation of HIV-positive children in educational and athletic programs. See Pltf.'s 56.1 ¶¶ 105-109. In addition, the American Camping Association ("ACA") accreditation standards applicable in 2004 did not require member camps to ask about *all* of an applicant's medical history, but rather, about "current health conditions requiring medication, treatment, or special restrictions or considerations *while at camp*." See AMERICAN CAMPING ASSOCIATION, ACCREDITATION STANDARDS FOR CAMP PROGRAMS AND SERVICES 54 (1998), submitted as Ex. C to Further Decl. ("ACA Standards") (emphasis added).

Plaintiff does not argue that any inquiry into HIV or related medications violates the ADA or that the Camps were prohibited from asking follow-up questions.[9] Rather, plaintiff argues that the ADA prohibits camps from denying admission to an HIV-positive child because

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[8] In describing the conversations she had with her sister about whether to admit Adam, Roberta Katz noted that "[they] had a parent who, again, tried to sort of hide things from us. So going into a conversation with the parent was like, okay, so there was a credibility issue there." RK 103:23-104:3. Later in her answer, she stated "[s]o there was just a number of things." Id. at 104:24-25. When Ms. Katz described the events on Friday that led up to the Camps' decision, she described her "concern" about plaintiff's dishonesty three times. See RK 77:15-16 ("And I still had a concern that she wanted to – the mom had wanted to not tell us."); RK 100:18-22 ("So general research on HIV . . . didn't really speak to, you know, the concern about the lack of honesty on the part of the parent initially"); RK 101:14-23 ("And there was also the issue, you know, that she lied on the application. . . . And she was planning, if she could, to not let us know about any of these medications and/or his HIV status. So that was a concern.").

[9] Indeed, plaintiff's brief cited DOJ's guidance that the ADA only prohibits "*unnecessary* inquiries into the existence of a disability" and that, even when questions are legitimate, the camp may not use the information to screen out individuals with disabilities. See Pltf.'s Br. at 23 (quoting TAM § III-4.13000) (emphasis added).

the child's parent and/or physician have followed the prevailing medical standard and decided not to disclose the information to the camp.[10] Such a view is consistent with the ADA's prohibition on acting on the basis of ill-informed stereotypes about a disability, such as the view that people who guard their child's HIV confidentiality are "liars." Neither does plaintiff argue that any disease that causes "a level of social discomfort" should not be disclosed to a camp. See Defts.' Resp. Br. at 17, n. 25. To the contrary, plaintiff argues that whether a camp may exclude a child with such a condition because of the parent's non-disclosure turns on the prevailing medical standards about that condition. Thus if the prevailing medical standards called for children with seizure disorders (or their doctors) to notify camps about the disorder, it would not be discriminatory for the camp to deny the child admission for failure to provide such necessary information. Such is not the case with HIV. See Pltf.'s Br. at 22; Pltf.'s 56.1 ¶¶ 105-109.

For these reasons plaintiff is entitled to summary judgment: no rational jury can find, given defendants' admissions, that HIV was *not* "a motivating factor" in the Camps' decision.

III. DEFENDANTS' "INSUFFICIENT TIME/GOOD FAITH" VERSION OF THE DIRECT THREAT DEFENSE MUST FAIL

Unable to deny that reasons related to Adam's HIV-infection played at least a role in their decision to deny him admission, the Camps return to their "lack of time/subjective good faith" version of the direct threat defense as a last resort. See Defts.' Resp. Br. at 17-22. As stated previously, the Court should reject the attempt to convert the "objective" standard of the "direct threat" defense of the ADA into a subjective standard that has no parameters and that would render the defense meaningless. See Pltf.'s Br. at 19-21; Pltf.'s Resp. Br. at 5-11. The Camps' only response to the many cases cited by plaintiff, rejecting the "honest belief" defense,

[10] The fact that the opinion of Adam's pediatrician, Dr. Bernstein, is at odds with the prevailing standard about respecting the confidentiality of HIV-positive children does not affect the legality of the Camps' decision because the Camps offer no evidence that they acted based on Dr. Bernstein's views. Moreover, Dr. Bernstein himself admitted that his opinions contradict the prevailing medical standards. See WB 28:10-29:12, 30:17-24.

is that the cases are factually distinguishable because the doctors in those cases did not conduct a proper individualized assessment. See Defts.' Resp. Br. at 23, n. 34. If anything this distinction supports plaintiff's position because that is precisely what defendants claim about Dr. Levi's opinion (upon which they admit relying): that it was only about a "hypothetical" person taking Adam's medications and not based on a proper individualized assessment of Adam's conditions. See id. at 11-12; Defts.' Counter 56.1 ¶¶ 75-82, 192-194.

Neither do defendants provide any evidence why the information that the Camps needed for an "individualized assessment" based on a "reasonable judgment" was not readily available. See Pltf.'s Br. at 19-21; Pltf.'s Resp. Br. at 11-17. Instead, they argue that because camps are not "experts in medical matters," Defts.' Resp. Br. at 24, the ADA permits them to be ignorant of (or ignore) the prevailing medical opinion for over 20 years – that HIV is not transmissible through pools and toilets. See Defts.' Counter 56.1 ¶ 136.

Plaintiff does not argue that camps should possess encyclopedic knowledge of diseases, or that the ADA requires them to act as doctors, but even lay businesses like restaurants and health clubs are charged by the ADA with knowing that HIV is not transmissible through toilets and pools. For example, in the Department of Justice (DOJ)'s 1994 Supplement to its 1993 Technical Assistance Manual, the DOJ notes that denying health club membership to an HIV-positive person would violate the ADA "because current medical evidence indicates that the HIV virus cannot be contracted through casual contact, perspiration, or *urine* in an exercise room, sauna room, or *pool*." U.S. Dept. of Justice, Civil Rights Division, Americans with Disabilities Act: ADA Title III Technical Assistance Manual 1994 Supplement § III-3.8000, available at http://www.ada.gov/taman3up.html (last visited Mar. 10, 2009) (emphasis added).[11]

[11] Also see the example involving restaurants and HIV-positive customers. Pltf's Resp. Br. at 9-10. Common sense also should have led the Camps to conclude that if HIV transmission were possible through pools and toilets,

These examples require no expertise and no need to consult complicated or scholarly articles; they do, however, charge places of public accommodation with some basic knowledge about an infectious disease like HIV. The fact that the ADA prohibits actions based on unfounded stereotypes, fears, myths, or ignorance, see, e.g., Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000), Pltf.'s Br. at 15-16, necessarily implies that places of public accommodation must be informed about transmission risks associated with a public health epidemic like HIV and be able to make the quick decisions that defendants claim they had no time to make.

Moreover, the ACA accreditation standards applicable to defendants in 2004 put the lie to their self-characterization as medical ignoramuses. These standards required camps to have a health care administrator to oversee the training of the medical personnel, and the provision of a "well-thought-out health care plan" for, inter alia, on-site and off-site health care, medication management, and monitoring sanitation in camp. See ACA Standards at 51-52, 55. The Camps trained their staff in universal precautions, see CK 30:14-23, the very purpose of which is to prevent exposure to blood-borne pathogens such as HIV.[12]

CONCLUSION

For the foregoing reasons, the Court should grant plaintiff's motion for summary judgment.

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the Camps would have, throughout the years, already placed untold campers and staff at risk of exposure by employees or other campers who had not disclosed their HIV status – or had not even known that they were HIV-positive – given that the Camps do not require proof of HIV-negative status as part of employment or admission.

[12] Even if they had not already known that HIV was not transmissible through the camp pool and toilets, defendants' argument that the "span of a few hours" was insufficient to determine whether Adam posed a direct threat, see Defts.' Resp. Br. at 23-24, is unavailing. First, it ignores the fact that they learned his status from Dr. Bernstein earlier in the week. Defendants had since at least Wednesday afternoon to begin their research but did not do so. See Pltf.'s Counter 56.1 ¶¶ 41, 60. Had defendants called plaintiff, they could have found out about Adam's HIV specialist, Dr. Neu. But they did not do so despite the fact that it was their policy to ask these questions to a child's parents and to begin their medical research even before the medical forms came in. See id. Defendants' argument also ignores the fact that the medical literature cited in plaintiff's papers was primarily addressed to a lay audience and was readily available with a few clicks on the Internet or a phone call or two. See http://www.ada.gov.

Dated: New York, New York
March 13, 2009

Respectfully submitted,

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Plaintiff

/s/ Lewis J. Liman

Lewis J. Liman
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Of Counsel:
Jorge G. Tenreiro
Scott G. Thompson

LEGAL ACTION CENTER
Attorneys for Plaintiff
Sally Friedman
Renee Martinez
225 Varick Street, 4th Floor
New York, New York 10014
(212) 243-1313

LEGAL AID SOCIETY OF ROCKLAND COUNTY, INC.
Attorneys for Plaintiff
Howard Sherwin
2 Congers Road
New City, New York 10956
(845) 634-3627