IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

CHRISTIN LOONEY,	)	
	)	
Plaintiff,	)	Case No. 1:05CV00053
	)	
v.	)	**OPINION AND ORDER**
	)	
ITALIAN VILLAGE,	)	By: James P. Jones
	)	Chief United States District Judge
Defendant.	)	

Hilary K. Johnson, Abingdon, Virginia, for Plaintiff; Steven R. Minor, Elliott Lawson & Minor, Bristol, Virginia, for Defendant.

In this employment case arising under the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 2005) ("ADA"), the defendant employer has moved for summary judgment. I will reserve decision on the motion under Rule 56(f).

I

The plaintiff, Christin Looney, alleges that she was employed by the defendant as a cook in a restaurant from August 2004 until February 5, 2005. She claims that she suffered from hepatitis C and when this history became known, her employer fired her.[1] The employer denies that Looney was fired at all, and claims that she was

[1] Hepatitis is an inflamation of the liver. Hepatitis C, caused by a virus, is usually spread through direct contact with infected blood, and not through casual contact. *See* American Academy of Family Physicians, *Hepatitis C* 1 (updated June 2006), http://

temporarily suspended for reasons that had nothing to do with hepatitis and never returned from her suspension after it had expired.

The employer has now moved for summary judgment, contending that the business has too few employees to meet the required threshold under the ADA. The Motion for Summary Judgment has been briefed and is ripe for decision.

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Commc'ns Satellite Corp.,* 759 F.2d 355, 364 (4th Cir. 1985), *overruled on other grounds*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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familydoctor.org/071.xml. While Looney does not claim that she is actually disabled from hepatitis C, she does contend that she was "regarded as having such an impairment" and thus is entitled to relief. *See* 42 U.S.C.A. § 12102(2)(C) (defining "disability"). To recover on this basis, the plaintiff must show that

> (1) her employer "mistakenly believed that [she] has a physical impairment that substantially limits one or more major life activities," or (2) her employer "mistakenly believed that an actual, nonlimiting impairment substantially limits one or more major life activities."

Rhoads v. FDIC, 257 F.3d 373, 390 (4th Cir. 2001) (quoting *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 703 (4th Cir. 2001)).

II

An employer is defined under the ADA as a person "who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceeding calendar year." 42 U.S.C.A. § 12111(5)(A). This requirement is a necessary element of the plaintiff's ADA claim and if there is a dispute over the relevant facts, the jury must decide. *See Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1244 (2006) (Title VII action).

The defendant has filed declarations averring that the business did not meet this employee-numerosity requirement. The plaintiff, in turn, has filed a declaration asserting that the defendant's exhibit list of employees is incomplete and contending that at least one of the enterprises's employees was shared with another restaurant operating under a similar trade name. The plaintiff requests additional time pursuant to Federal Rule of Civil Procedure 56(f) to conduct discovery before responding to the defendant's factual contentions.

Rule 56(f) permits the court to hold in abeyance a motion for summary judgment where the nonmovant shows that additional discovery is needed in order to properly respond. While the defendant argues that even if the alleged employees missing from its list were added, the numerosity requirement still would not be met, I find that the sworn testimony alleging that the defendant's list is inaccurate makes

a sufficient showing justifying the plaintiff's request for more time.

As has been noted, "[s]ufficient time for discovery [pursuant to Rule 56(f)] is considered especially important when the relevant facts are exclusively in the control of the opposing party." 10B Charles Alan Wright, et al., *Federal Practice and Procedure* § 2741 (3d ed. 1998). It would be unjust in the present case not to permit the plaintiff to engage in further discovery.

III

For the foregoing reasons, it is **ORDERED** that the defendant's Motion for Summary Judgment is held in abeyance for a period of 30 days to allow further discovery. The plaintiff is granted leave to file within such time any further affidavits, depositions, or other material permitted by Rule 56(c) in opposition to the pending Motion for Summary Judgment, as well as a further brief in opposition. If the plaintiff does file such further materials, the defendant may respond thereto within 10 days. If the plaintiff does not file such further materials within the time permitted, the court will thereafter decide the Motion for Summary Judgment.

ENTER: July 20, 2006

/s/ JAMES P. JONES
Chief United States District Judge