



# I

On July 27, 2000, the plaintiff filed the instant suit in which he claims that due to his blindness he was denied employment with the defendant in violation of the Act<sup>1</sup>. After discovery was conducted, the defendant filed, on May 16, 2001, a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(b). Jurisdiction is vested in this court pursuant to 28 U.S.C.A. § 1331 (West 1993). The parties have briefed the issues, oral argument was presented, and the motion is now ripe for decision.

The facts, either uncontradicted or viewed in the light most favorable to the plaintiff on the summary judgment record, are as follows:

During the summer of 1998, the plaintiff began working at the Junction Center for Independent Living (“Junction Center”) as a peer counselor to persons with disabilities. At the same time, he began serving on an exploratory committee charged with the responsibility of creating another such center, the defendant Clinch Independent Living Services Center (“CILS”).

Upon CILS’s opening in October of 1998, the plaintiff continued to work there as a peer counselor. CILS, a state and federally funded agency, focused upon

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<sup>1</sup> “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .” 29 U.S.C.A. § 794(a) (West 1999).

encouraging those with disabilities to strive for an independent lifestyle. To this end peer counselors, themselves disabled, served as mentors to their clients and taught them the use of new technological advances. The plaintiff also taught the use of braille to the visually disabled.

After working at CILS for approximately eight months in a temporary capacity, the plaintiff learned of a full-time, permanent peer counselor position that had become available at CILS. The plaintiff approached Betty Bevins, the executive director of CILS, and inquired about the position. Bevins responded that if the plaintiff applied, he would be considered for the position.

The plaintiff also mentioned to Bevins that he was aware of employees at CILS taking turns working in the vacant position until it was filled. When he expressed interest in sharing those responsibilities, Bevins stated that he could not because the plaintiff's position at CILS, endowed by the Rehabilitative Services Incentive Fund ("RSIF"), existed pursuant to a grant of certain sums of money from the Commonwealth of Virginia. Once those funds were expended, the plaintiff's position would be terminated.<sup>2</sup>

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<sup>2</sup> While the plaintiff did not further expound upon the reason, it is presumed that Bevins' comment indicated a concern with assigning excessive amounts of work to the plaintiff, thus causing the money allocated to his position by the state to be spent more quickly.

The peer counselor position was then advertised in the newspaper. However, the plaintiff only learned of the advertisement through his brother, who informed the plaintiff that he had seen the position posted in the classified section. Had his brother not brought it to his attention, the plaintiff contends that he would not have known about the interview for the position.<sup>3</sup>

The advertisement, as it originally appeared, required all applicants to have “a valid driver’s license.” (Pl.’s Resp. Br. Attach.) The plaintiff, feeling that this requirement would exclude him from consideration for the position, approached Bevins to discuss the advertisement. Bevins stated that she had used that particular wording because other centers had used similar phrasing in their advertisements. Nevertheless, she stated that the language at issue would be changed. The following week, the advertisement was revised to state that applicants “must have a reliable means of transportation.” (Pl.’s Resp. Br. Attach.)<sup>4</sup>

The plaintiff applied for the position and was one of thirteen persons who were granted an interview. Believing that he was told to appear at the Grundy, Virginia

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<sup>3</sup> A provision of the CILS Policies and Procedures Manual states that “CILS employees will be notified of all job openings so they may apply if interested.” (CILS Policy and Procedures Manual at 25.)

<sup>4</sup> The position listing in both advertisements was for an “Independent Living Specialist/Peer Counselor” and stated that qualified individuals needed at a “[m]inimum [a] high school education and at least 2 years experience in human resources field.” Similarly, in a Board Training Manual, the position was listed as preferring experience with disabled persons. (Pl.’s Resp. Br. Attachs.)

office of CILS for his interview, the plaintiff arrived there but was told that all interviews were being conducted at the Tazewell, Virginia office. The plaintiff insisted that he had been told to appear in Grundy, and an employee called the Tazewell office and spoke with Bevins, who was conducting the interviews. Bevins instructed the plaintiff to come to the Tazewell office, approximately an hour's drive from Grundy, and Bevins would try to fit him in.

When the plaintiff arrived in Tazewell, he was surprised to learn that he needed to fill out another application. Because he already had an application on file with CILS, the plaintiff had not anticipated the need to complete the application process again. Thus, he had no information with him to help complete the application, nor any equipment that would assist him in manipulating the forms.<sup>5</sup> While Bevins likewise never supplied plaintiff with any assistive equipment, she contends that he never asked for any such accommodation. The plaintiff states that it was the policy of CILS to always have such assistance available.

Several times during his interview, Bevins questioned the plaintiff regarding his ability to travel. The plaintiff consistently stated that transportation would not be a problem for him, because of the availability of both public transportation and the

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<sup>5</sup> The plaintiff identified a tool called the "JAWS" system, whereby a computer package would manipulate written words through a voice processor and speak text out loud to its user. The plaintiff was unable to recall what the acronym stood for.

assistance of his wife, who is sighted. Bevins also called into question the plaintiff's ability to complete paperwork required of a peer counselor, such as contact logs and intake forms for clients. Again, the plaintiff emphasized the availability of the JAWS system, tape recording, or other assistance technologies. According to the plaintiff, Bevins was not receptive to any of these suggestions.

Three days later, the plaintiff received a letter in the mail informing him that William Hess had received the job as peer counselor. The plaintiff recalled being told of a sign on the wall at the Tazewell office, while he was there for his interview, that read "William Hess, peer counselor specialist." (Pl.'s Dep. at 38.) This caused the plaintiff to believe that Hess had been slated to fill the position before interviews were ever conducted.

Hess, who is hearing disabled and had been working part-time in the Tazewell office for a month and a half prior to the availability of the peer counselor's position, came to CILS from the postal service where he worked as an automation clerk for ten years. During that time, Hess also served as a trainer for new employees. Prior to that, he worked for nearly ten years at the Norfolk Naval Supply Center as an equipment operator. As part of his duties, Hess served as crew leader for all summer employees. He also worked previously as a welder. Hess was a high school graduate from the Staunton School for the Deaf and Blind.

When asked by the plaintiff why he was less qualified than Hess for the position, Bevins stated that such information was private and none of the plaintiff's business. In support of the present motion, Bevins tendered an affidavit in which she stated that Hess was a "qualified independent living specialist and peer counselor," and that he was "the best qualified candidate" for the job of peer counselor. (Bevins Aff. ¶ 12.)

At the age of three, the plaintiff was struck by a rare disease which deprived him of his eyesight. After graduating from the Staunton school, he went on to study for one semester at Southwest Virginia Community College where he took one class each in psychology and counseling. He then attended a six month minister's internship program at Lee University, in Tennessee, from which he obtained a degree in counseling. Subsequently, the plaintiff attended Enterprises for the Blind in Little Rock, Arkansas for one year where he learned various independent living skills.

Afterwards, the plaintiff worked as a physical therapist for twenty-two years. For five years, he served as pastor of the Patterson Church of God. He also received his broadcasting license, sold advertising space, and managed a radio station from 1988 to 1991. The plaintiff was additionally certified by the Commonwealth of Virginia as a trainer on the JAWS computer program.

The plaintiff contends that he was not hired for the full-time peer counselor position because he is blind. He further asserts that Bevins, who made the hiring

decisions, was not fond of those with visual disabilities. In addition to the facts already advanced, the plaintiff contends that Bevins was unwilling to escort the visually impaired. The plaintiff also states that he was never provided with braille materials at any type of meeting or session held at the center, though Bevins states that “Clinch provided every accommodation that Mr. Justus requested, and accommodated him in several ways that he had not requested.” (Bevins Aff. ¶ 7.)

After the plaintiff failed to secure the peer counselor position, his position at CILS was scheduled to expire on September 30, 1999. According to the plaintiff, he was told by Bevins that she was trying to find funds so that he could continue to work there. The plaintiff found that his weekly hours decreased from forty to twenty before his position was terminated.

Bevins subsequently approached the plaintiff and told him that she had found additional money and that, at a rate of \$7.00 per hour, she could continue to employ the plaintiff for thirty-five hours per week. Bevins handed the plaintiff a written contract that had blanks for essential terms, such as the pay rate and work hour schedule. The plaintiff, not wanting to sign anything until all details were memorialized in writing, refused to sign the contract. According to him, such written verification was never provided. Bevins, not disputing that aspect of the plaintiff’s claim, stated that she told the plaintiff that he had approximately three days to give her a response to the offer.

When she did not hear from the plaintiff and had nothing signed by him, Bevins claims that she was unable to submit a request for funds. The plaintiff's position with CILS was subsequently terminated. Bevins never stated why she refused to supply the plaintiff with the essential terms of the contract in writing.

## II

The defendant advances two arguments in support of its motion for summary judgment. First, it contends that because it is not covered by the Act, it is not subject to its prohibitions. Second, it argues that even if it is covered by the Act, the plaintiff has not established a prima facie case for discrimination based upon his disability. Summary judgment is appropriate only "if 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." Fed. R. Civ. P. 56(c). The evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Against this legal backdrop, I will consider each of the defendant's arguments in turn.

## A

In support of its first contention, the defendant directs the court's attention to 29 U.S.C.A. § 794(f)(1) (West 1999), which provides that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990. . . ."<sup>6</sup> The ADA, in turn, provides that an "employer" subject to its requirements is one "who has 15 or more employees for each working day in each of 20 or more weeks in the current or preceding calendar year." 42 U.S.C.A. § 12111(5)(A). Thus, according to the defendant's interpretation of § 794(f)(1), the Act likewise applies only to employers who maintain a work force of at least fifteen people.

Resting upon that assumption, the defendant further maintains that the plaintiff's deposition testimony establishes that the challenged conduct here is not covered by the Act. During his deposition, the plaintiff was asked, "How many employees do you think worked at Clinch?" to which the plaintiff responded, "At that time, I'm going to say eight or something like that." (Pl.'s Dep. at 63.)

The defendant's argument regarding the inapplicability of § 794(f)(1) to the plaintiff's suit is unpersuasive. I conclude that Congress did not intend for the ADA's

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<sup>6</sup> 42 U.S.C.A. §§ 12101-12213 (West 1995) ("ADA").

definition of “employer” to restrict application of the Act in the manner suggested by the defendant. The Act states that the ADA’s standards are to be used only “to determine whether [the Act] has been violated,” not whether an employer is even subject to the Act in the first instance. Put another way, the ADA is used under the Act to scrutinize the conduct, not the actor. This interpretation is consistent with the very purpose of the ADA, which was “to expand the scope of the Rehabilitation Act’s coverage beyond the federal government and to provide protection for people with disabilities throughout society, including individuals employed by employers that do not receive federal funds.” *Johnson v. New York Hosp.*, 897 F. Supp. 83, 86 (S.D.N.Y. 1995), *aff’d on other grounds*, 96 F.3d 33 (2d Cir. 1996). Thus, it does not seem likely that Congress would expand the Act’s coverage to employers that do not receive federal financial aid and simultaneously circumscribe its coverage of fund recipients to those that employ more than fourteen workers. *See id.* Consequently, an employer can be liable under the Act while exempt from liability under the ADA.

Moreover, even if the ADA’s limitation did apply in this instance, the deposition testimony relied upon by the defendant would not warrant a finding that the plaintiff’s claim was unenforceable under the Act. The plaintiff stated that “at that time,” when he was working at CILS, there were eight employees. This statement did not establish

that CILS had less than fifteen employees for twenty weeks in either that year or the one preceding it. Accordingly, the defendant's motion will be denied.

## B

As previously discussed, an allegation of discrimination under the Act is considered in the same manner as one brought pursuant to the ADA. *See* 29 U.S.C.A. § 794(f)(1). In the Fourth Circuit, this means that such claims are scrutinized under the *McDonnell Douglas*<sup>7</sup> proof scheme. *See Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995).

That scheme was designed to circumvent, as is the case here, a factual dispute over the reasons for discharge and is thus the appropriate means by which to examine a claim of discrimination when "the defendant disavows any reliance on discriminatory reasons for its adverse employment action." *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 348 n.1 (4th Cir. 1996).

Under the *McDonnell Douglas* standard, the plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. If the plaintiff succeeds in satisfying that standard of proof, the burden shifts to the defendant to articulate some legitimate, non-discriminatory explanation which, if believed, would support a conclusion that unlawful discrimination in the employer's hiring practices was

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<sup>7</sup> *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

not the cause of the employment action at issue. If the defendant meets this burden of production, the presumption of discrimination created by the plaintiff's prima facie case "drops out of the picture" and the plaintiff bears the burden of proving that the defendant's proffered non-discriminatory employment decision was pretextual. *See Ennis*, 53 F.3d at 58. This paradigm should not be applied in a rigid, unbending manner but rather is a means of fine tuning the presentation of proof to determine "whether the plaintiff successfully demonstrated that the defendant intentionally discriminated against [him]." *Id.* at 59.

In order to establish a prima facie case of discrimination on the basis of disability, the plaintiff must prove: (1) that he has a disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment opportunity solely on the basis of his disability.<sup>8</sup> *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995). In general terms, a plaintiff establishes a prima facie case by proving a set of facts which would enable the finder of fact to conclude, in the absence of further explanation, that it is "more likely than

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<sup>8</sup> It should be noted that, although the Fourth Circuit recognizes the overall similarity of the ADA and § 504 of the Act, it nevertheless recognizes the "significant" dissimilarity regarding the causative links that must be proved under each to successfully establish a claim of unlawful discrimination. *See Baird v. Rose*, 192 F.3d 462, 469 (4th Cir. 1999) (comparing the "solely by reason of [a] disability" language from § 504 of the Act with the "because of a disability" language from 42 U.S.C.A. § 12112(a) (West 1995)).

not” that the adverse employment action at issue was the product of discrimination. *See Ennis*, 53 F.3d at 58.

Because the plaintiff clearly satisfies the first prong and there being no contention that he does not satisfy the second, the only issue before me is whether the plaintiff can sufficiently establish, in response to a motion for summary judgment, that the adverse employment decision in this case was made solely on the basis of his disability.

Viewing the facts in the light most favorable to the plaintiff and drawing all reasonable inferences in his favor, I find that he has established a prima facie case for discrimination on the part of CILS in the challenged employment decisions. The record before the court evinces a history of bias on the part of Bevins, CILS’ executive director, towards those with visual handicaps, that she harbored personal discomfort in assisting the visually impaired, was unwilling to provide technological assistance or braille materials to them, and viewed those persons as less capable than others in the office of performing routine tasks.

In addition, the plaintiff has submitted a letter from the Visually Impaired Support Group, signed by thirty-four of its members, in which all allege that they were treated dissimilarly from those with different handicaps by Bevins. The letter also recites an incident in which Bevins, in response to finding out that the group would be

holding a meeting, stated, “You blind people will fall over each other in that . . . [r]oom.” (Pl.’s Resp. Br. Attach.)

This arguable history of animus towards the visually impaired, coupled with the circumstances surrounding the employment action at issue in this case, creates a genuine issue of material fact as to whether the plaintiff was not hired for the position of peer counselor solely on account of his blindness.

The defendant counters, in part, that the evidence does not support a finding of discrimination because CILS hired someone else with a disability. However, the plaintiff has sufficiently demonstrated that the alleged discrimination exhibited by the defendant was disability specific to persons who suffered from visual impairments.

Having set forth a prima facie case of discrimination, I must next determine whether the defendant has advanced a legitimate, non-discriminatory basis for its employment decision in this case. At this stage under *McDonnell Douglas*, the defendant is not required to prove an absence of any discriminatory motive by a preponderance of the evidence, *see Smith v. Univ. of N.C.*, 632 F.2d 316, 332-33 (4th Cir. 1980), but merely articulate some legitimate reason for its action. *See EEOC v. W. Elec. Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). I find that the defendant has articulated such a legitimate basis for its decision, namely, that Hess was not only himself qualified for the job but was also the most qualified candidate for the position.

The burden thus shifts back to the plaintiff to prove that the reason proffered by the defendant is actually a pretext. Under this prong of the *McDonnell Douglas* test, the plaintiff may demonstrate that he was the victim of intentional discrimination “by showing that the employer's proffered explanation is unworthy of credence.” *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In her affidavit, Bevins first states that Hess was a “qualified independent living specialist.” Other than the month and one half period spent working in a temporary position at CILS, there is nothing in Hess’s experience or training that suggests he was so qualified. His prior work experience demonstrates training as a clerk, an equipment operator, and a welder. There is no indication that Hess satisfied the requirements of the position as it was advertised in the local paper—two years of experience in the “human resources field”—or, as the CILS manual indicated, previous work with the disabled. Both descriptions betray Bevins’ contention that Hess was “qualified” for the job.

Second, Bevins contends that Hess was “the best qualified candidate” for the job. Aside from the fact that Bevins expounded no further upon the meaning of that term, simply comparing the resumes of the plaintiff and Hess contradicts any legitimate basis for reaching such a conclusion without further explanation. Not only was the

plaintiff more fully trained in the area of counseling and independent living, but he had done it longer and in more settings than Hess.

In light of all of the facts, there is a material question of fact as to what made Hess a qualified independent living specialist and, perhaps more importantly, what qualified him for the position more than the plaintiff. Thus, I find that the plaintiff has satisfied his burden of going forward under *McDonnell Douglas*.

### III

For the foregoing reasons, it is **ORDERED** that the defendant's Motion for Summary Judgment (Doc. No. 6) is denied.

ENTER: July 19, 2001

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United States District Judge