IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>Plaintiff,<br><br>and<br><br>AHMET DEMIRELLI<br><br>Plaintiff-Intervener,<br><br>vs.<br><br>CONVERGYS CUSTOMER MANAGEMENT GROUP, INC.,<br><br>Defendant. | ) | Case No. 4:04CV00846 CAS |

**PLAINTIFF EEOC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

## I. STATEMENT OF THE CASE

In this lawsuit, the EEOC alleges that Convergys Customer Management Group, Inc. ("Defendant" or "Convergys") discriminated against Ahmet Yigit Demirelli when it fired him because of his disability, in violation of the ADA. In response, Defendant recently has asked this Court to allow it to amend its Answer to assert two affirmative defenses that fail as a matter of law.

Specifically, Defendant wishes to assert two after-acquired evidence defenses, claiming that these defenses are based upon facts learned since Demirelli was dismissed. The two defenses are that Demirelli "accumulated additional attendance violations not known at the time of his dismissal" and that he "lacked employment authorization for approximately eight (8)

months during his eighteen (18) month employment with Convergys," both of which "would have warranted [his] dismissal had they been known at the time he was employed." (Def's Motion for Leave to File Amended Answer.) Defendant has incorrectly articulated the standard; it is not simply whether a dismissal was warranted, but whether, in fact, it can also meet its substantial burden to establish that it would have discharged any employee solely because he engaged in the same claimed wrongdoing.

The EEOC has opposed defendant's motion to amend its Answer. If the Court nevertheless grants that motion, the EEOC respectfully requests the Court to grant it partial summary judgment and strike these two affirmative defenses.

## II. ARGUMENT

### A. LEGAL STANDARD

The EEOC brings this motion for partial summary judgment under Fed. R. Civ. P. 56(c). Summary judgment is appropriate where, viewing the record in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, there exist no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of proving that the facts are undisputed. *Bradley v. Widnall*, 232 F.3d 626, 630 (8th Cir. 2000).

Although the EEOC's motion seeks to strike Defendant's affirmative defenses, the motion is not brought under Fed. R. Civ. P. 12(f)[1] because the motion involves substantial

[1] A motion to strike under Rule 12(f) can be made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party, or upon the court's own initiative at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). Although

questions of law, and involves evidence beyond the pleadings. *See Abramson v. Florida Gas Transmission Co.*, 908 F. Supp. 1383, 1387 (E.D. La. 1995) (court converted motion to strike affirmative defenses under Rule 12(f) to a motion for summary judgment, holding that substantial questions of law are better addressed on a motion for summary judgment, which is equivalent to a determination on the merits.) Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Courts have routinely held that affirmative defenses are subject to summary judgment. *See Travelers Express Co. v. American Express Integrated Payment Systems, Inc.*, 80 F. Supp. 2d 1033, 1037-38 (D. Minn. 1999) (court ruled on parties' motions for summary judgment to strike affirmative defenses under Rule 56(c)); *Bieter Co. v. Blomquist, et. al*, 848 F. Supp. 1446, 1448 (D. Minn. 1994) (court ruled on plaintiff's motion for partial summary judgment that affirmative defense of unclean hands was not available as a matter of law); *EEOC v. Exxon Corp.*, 1 F. Supp. 2d 635, 638 (N.D. Tex. 1998), *rev'd on other grounds*, 203 F. 3d 871 (5th Cir. 2000) (court held that the legal viability of defendant's affirmative defenses was more appropriately determined pursuant to a motion for summary judgment under Rule 56 than a motion to strike under Rule 12(f)); *Hoglund v. Daimler Chrysler Corp.*, 2000 WL 760958, *3 (D. Me. 2000) (court held that resolution of an affirmative defense is integral to resolution of a claim, therefore, in moving for summary judgment on an affirmative defense, a plaintiff is in fact

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motions to strike are disfavored, the court has discretion to strike an affirmative defense if the defense is insufficient as a matter of law. *FDIC v. Cheng et. al.*, 832 F.Supp. 181, 185 (N.D. Tx. 1993).

moving for summary judgment on a part of his claim).

An affirmative defense is legally insufficient if, in light of sound precedent, it cannot succeed under any factual circumstance. *FDIC*, 832 F. Supp. at 185. *See Singley v. Illinois & Midland*

*Railroad, Inc.*, 24 F. Supp. 2d 900, 904 (C.D. Ill. 1998) (court struck affirmative defenses, holding that the defendant could not succeed on its affirmative defenses as a matter of law).

**B. DEFENDANT'S AFFIRMATIVE DEFENSE THAT AFTER-ACQUIRED ATTENDANCE EVIDENCE MUST FAIL**

Convergys' defense regarding Demirelli's attendance must be barred because it does not meet the requirements of the after-acquired evidence doctrine.

The Supreme Court first addressed after acquired evidence doctrine in the employment discrimination context in *McKennon v. Nashville Banner*, 513 U.S. 352 (1995). The question that case presented was whether all relief must be denied when the employer discovered, after terminating the employee, that the employee had engaged in some wrongful conduct that would have led to discharge if it had been discovered earlier. The Court refused to articulate a rule denying all relief. Instead, the Court required that defendants asserting reliance on after-acquired evidence of employee wrongdoing must

> "first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *Id*. at 362-3.

The After-Acquired Evidence Defense is Inapplicable in This Case Because the Evidence

of Demirelli's Attendance Was Not "After Acquired"

Convergys cannot rely on the after-acquired evidence defense because the evidence it relies on was not "after acquired." Convergys claims that Demirelli "accumulated additional attendance violations not known at the time of his dismissal." But Convergys cannot and does not dispute that it alone has had sole and continuous custody of all records that relate to Demirelli's attendance while he was a Convergys employee. Evidence available to an employer at the time of a discharge is

not after-acquired evidence. *See Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1232 (11th Cir. 2004), *cert. denied*, __ U.S. __ , 125 S. Ct. 811 (2004).

Moreover, Convergys had complete and detailed knowledge of Demirelli's attendance, including tardiness and absences, long before it fired him, because his successive immediate supervisors Hill, Mitchell and Aldridge, knew his attendance and discussed it with the Operations Manager, Brookins. Aldridge, pp. 10, 51-53, 106-108; Hill, pp. 13, 17, 27-32; Mitchell, pp. 49-50; Brookins, pp. 18, 27-28, 58-60, 99-101. Demirelli's last immediate supervisor, LaShonda Aldridge, also admitted that she knew of occasions when Demirelli was tardy, but chose not to record those instances as instances of charged tardiness. Aldridge, pp. 241-244, 284. Aldridge admitted that she periodically discussed doing this with the Operations Manager, Brookins. *Id.* Brookins admitted that supervisors sometimes decided not to mark employees tardy when they were tardy. Brookins, p. 106.

Aldridge's testimony is an admission (Aldridge, p. 10) that Convergys knew about Demirelli's actual attendance before his discharge, including the precise details of Demirelli's

daily arrival, departure, break and lunch times at work during the time he worked for Convergys, and Convergys chose not to act upon that knowledge. Aldridge's admission deprives Convergys of its claim that it did not know of some aspect of Demirelli's attendance until after it had already fired him for attendance, or that he was more tardy or absent than it knew when it fired him for tardiness. Nor can defendant truthfully claim that it would have fired him at some other unspecified time for some additional but unspecified, and perhaps unrecorded, incidents of absence or tardiness. The very idea is inherently absurd.

Convergys supervisor Aldridge chose the reasons to fire Demirelli when she made the recommendation to fire Demirelli because he had more than 14 charged instances of tardiness. Aldridge, p. 274. She made the decision and elected to rely on some incidents of tardiness among all those known to her. *Id.* Any remaining alleged incidents of tardiness or absenteeism either did not happen, were excused, or were known but rejected as a basis for termination. In no event can they be truthfully labeled "after-acquired."

Claims of Additional Tardiness or Absence Lack Foundation

Beyond being unable to prove that it learned of Demirelli's attendance after it fired him from his job, Convergys also cannot establish by admissible evidence that Demirelli had any additional tardiness or incidents of "no-call no-show." This is so because Convergys does not have more than a few weeks of records that show that show Demirelli's scheduled start and end times. 30(b)(6) deponent (Match), pp. 44-45. Without knowing his scheduled start and end times, it is impossible to say whether Demirelli was tardy or absent. *Id*. The testimony of a witness it produced for a Rule 30(b)(6) deposition is conclusive evidence against Convergys.

Further, defendant's former Senior Human Resources Manager admits that any

conclusions about whether Demirelli was tardy or not, except where schedules exist, would be based on assumption. *Id.*, Horstmann, p. 230-231. Assumptions lack the requisite foundation and are not admissible evidence. Mere guesswork does not constitute any evidence that Demirelli's attendance was other than it appears on his termination report.

Records Purporting to Show Additional Attendance and Tardiness Are Hearsay, Are Not Business Records and Are Not Otherwise Reliable or Trustworthy

Defendant produced two documents created after it fired Demirelli that purport to show that Demirelli was tardy for work on more occasions than those upon which it relied to terminate him. Horstmann, Ex. 15, Ex. 36. These documents are inadmissible hearsay to the extent Convergys attempts to offer them to prove that Demirelli was absent or tardy on certain occasions. Rules 801, 802 F.R.E. The undisputed testimony of Defendant's former Senior Human Resources Manager is that these documents were not records of a regularly conducted activity and were not made at or near the time of the events they record, but were made long after, in order to respond to Demirelli's charge of discrimination filed after he was fired, and that these documents were made at the request of counsel. Horstmann pp. 8, 12-13, 164-167, 228-232. Thus these records are not within the hearsay exception for business records and are inadmissible. Rule 803(6), F. R. E. Moreover, these exhibits contain information that is based on assumptions or guesses about Demirelli's scheduled start time, and thus lack the element of trustworthiness necessary to their admission. *Id.*

Convergys Cannot Show That It Would Have Fired Demirelli for Tardiness or No-Call No-Show

*McKennon* held that an employer must establish that the employee's wrongdoing was sufficiently severe that it would have in fact terminated the employee on those grounds alone if it had known at the time of the discharge. *McKennon*, 513 U.S. at 362-3. Seeking to apply this

rule, the 8th Circuit has prescribed that the District Court "must look to the employer's actual employment practices and not merely the standards articulated in its employment manuals, for things are often observed in the breach but not in the keeping." *Sellers v. Mineta*, 358 F.3d 1058, 1064 (8th Cir. 2004). Accord, *Ricky v. Mapco, Inc*., 50 F.3d 874 (10th Cir. 1995) (court held that *McKennon* makes clear that defendant must demonstrate not only that it was unaware of the misconduct when it terminated plaintiff, but also that the misconduct was serious enough to justify discharge and that defendant would have discharged plaintiff on that basis alone had it known); *O'Day v. McDonnell Douglas Helicopter Corp.,* 79 F.3d 756, 759 (9th Cir.1996); *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004), *cert. denied* __ U.S.__, 125 S. Ct. 1603 (2005). The employer bears a "substantial burden" and must show that such a firing would have taken place

as a matter of "settled" company policy. See *Welch v. Liberty Mach. Works, Inc.*, 23 F.3d 1403, 1406 (8th Cir. 1994); *Waag v. Thomas, Buick, GMC*, 930 F. Supp. 393 (D. Mn. 1996).

Convergys cannot establish that Demirelli engaged in wrongdoing so severe it would have fired him if it had known. First, as detailed above, Convergys undisputably knew of Demirelli's alleged additional tardiness and attendance before it fired him.

In addition, however, Convergys' actual practice was to retain employees whose tardiness and attendance records far eclipsed Demirelli's. For instance, Convergys' own records of other employees fired for attendance violations are records show it retained three employees, one who had 49 charged tardies before Convergys fired him, one with 61 charged tardies before Convergys fired him, and another who had accumulated 78 charged tardies before Convergys

fired him. Exs. K, L and P. This is evidence of the "actual employment practices" Convergys followed for other employees who worked under the same Operations Manager as Demirelli. Convergys fired Demirelli when, it claimed, he had accumulated 20 instances of charged tardiness. Ex. 50. Convergys cannot meet its burden given its actual employment practices.

Convergys recently made an added claim it has now discovered evidence that Demirelli had an additional occurrence of no-call, no-show before his termination. (Defendant's Reply Memorandum in Support of Motion for Leave to File Amended Answer, p. 3) But the "actual employment practice" of Convergys includes evidence that it retained an employee until she had accumulated 7 no-call, no-show occurrences. Ex. J.

Given this evidence, defendant cannot succeed in establishing that its actual practice would have resulted in Demirelli's discharge for having other instances of tardiness or having two instances of no-call no-show.

## C. DEFENDANT'S AFFIRMATIVE DEFENSE OF AFTER-ACQUIRED EVIDENCE OF DEMIRELLI'S EXPIRED WORK AUTHORIZATION MUST FAIL

Evidence Regarding Demirelli's Work Authorization was Not "After-Acquired"

Convergys' defense regarding Demirelli's attendance must be barred because it does not meet the requirements of the after-acquired evidence doctrine.

Convergys claims that Demirelli "lacked employment authorization for approximately eight (8) months during his eighteen (18) month employment with Convergys," which "would have warranted [his] dismissal had they been known at the time he was employed." (Def's Motion for Leave to File Amended Answer.) But just as with its attendance records, Convergys does not and cannot dispute that it had Demirelli's I-9 form containing the expiration date of

Demirelli's work authorization. Both Demirelli and Convergys wrote on his I-9 form when Convergys hired him that on September 9, 2001 his then-current work authorization would expire. 30(b)(6) deponent (Etheridge) page 42, Ex. 3. Convergys thus knew at the time it hired Demirelli that his work authorization was for a limited period of time and would expire some eight months later. Convergys did not acquire this knowledge after it fired Demirelli because it already had both the records and the actual knowledge of the expiration date. Records that Convergys had at the time of the termination decision are not after-acquired evidence. *See Conroy* , 375 F.3d at 1232.

Convergys Has Unclean Hands on the Matter of Work Authorization

Convergys admits that its policy is to comply with the Immigration Reform and Control Act and not employ persons who lack proper documentation of the right to work in this country, including persons whose work authorizations have expired. 30(b)(6) deponent (Etheridge), pp. 17-18, 20-21, Ex. 2. But Convergys also admits that it did not complete that portion of Demirelli's I-9 calling for the employer to re-verify his work authorizations. 30(b)(6) deponent (Etheridge) pp. 42- 43. Compliance with the Immigration Reform and Control Act required Convergys to re-verify work authorization. Moyer, pp. 44-45. And it is undisputed that Convergys continued to employ Demirelli, despite failing to obtain evidence of his right to work, in violation of immigration law and its own policy to comply with immigration law. Convergys was subject to penalties under immigration law for failing to comply with re-verification requirements. Moyer, pp. 45-46.

Yet despite its admission Demirelli did not violate any policy regarding re-verifying his work authorization (because it had no such policy), 30(b)(6) deponent (Etheridge), p. 69; despite

admitting that it made a mistake by not letting him know that his work authorization was about to expire, 30(b)(6) deponent (Etheridge), p. 41; and despite failing to meet its own obligations under both the law and its own policy, Convergys now attempts to argue that Demirelli has unclean hands and should be barred from relief.

Courts have recognized that in the area of immigration, employers who violate immigration laws sometimes attempt to use the same laws against aliens.

> "Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain. *Rivera v. NIBCO, Inc.*, 364 F.3d at 1072.

It is defendant who has unclean hands in this transaction. Convergys violated immigration law by failing to obtain re-verification evidence and continuing to employ a person it knew or believed had an expired work authorization. Equity demands that the defendant's unclean hands not provide it with a sword to use against Demirelli. *See Rivera v. NIBCO*, 364 F. 3d at 1071 (party who invokes the aid of the court with unclean hands has limited remedy, and court must play a critical role to assure that a defendant not misuse the after-acquired defense as a sword rather than a shield.)

<u>Convergys Cannot Show That It Would Have Fired Demirelli for Expired Work Authorization Because It Has Not Fired Anyone Else for This Reason</u>

*McKennon* teaches that "where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon*, 513 U.S. at 362-63. As described above, this Circuit's rule

requires that defendant prove by reference to its actual practices that it would have fired Demirelli once it knew his work authorization had expired. *Sellers*, 358 F.3d at 1064. Speculative testimony about would have happened does not suffice. *Rasmussen v. Quaker Chemical Corp.*, 993 F. Supp 677, 681-2 (N.D. Ia. 1998).

Convergys has admitted that it has not fired any employee with an expired work authorization and, in fact, has not had an employee with an expired work authorization other than Demirelli. 30(b)(6) deponent Etheridge, pp. 33, 63. The absence of evidence that defendant has terminated anyone for having an expired work authorization prevents Convergys from meeting it burden to establish that it would have fired Demirelli for having an expired work authorization. *Sheehan*, 173 F.3d at 1047-8.

Had Convergys Followed Its Policy It Would Have Notified Demirelli Before His Work Authorization Was to Expire and He Would Have Renewed it Timely

Convergys' policy in the event of an expired work authorization is to notify the employee in advance so the employee can handle the matter and Convergys can maintain its employees and avoid unnecessary turnover, but Convergys admits it did not notify Demirelli. 30(b)(6) deponent (Etheridge), pp. 41, 46-48, 50-51. Its written Immigration and Employment Policy provides for either suspension or termination of an employee whose work authorization has expired. 30(b)(6) deponent (Etheridge), p. 59, Ex. 2. But Convergys admits it would suspend the employee, not terminate him, if he could get renewal of work authorization in a reasonable period of time. *Id.*

Testimony and records from the Department of Homeland Security, Customs and Immigration Branch Manager establish that when Demirelli applied for work authorizations, CIS would give him work authorizations on the same day he applied for it, and that even if his work

authorization had expired, his application for new work authorization would be approved. Moyer, pp. 16-17, 23-24, 34-38, 48.

Thus, had Convergys followed its own policy and notified Demirelli that his work authorization was due to expire, so that he could have obtained extension of his work authorization, he likely would have been able to do this in a quickly, with no break in his employment. Had Convergys complied with its obligations under immigration law to rev-verify, at most, it might have suspended Demirelli until he got work authorization.

Convergys cannot carry its burden to establish that it would have fired Demirelli for the alleged expired work authorization because it cannot produce any evidence that Demirelli would have failed to obtained new work authorization had Convergys met its legal obligation to re-verify his work authorization. *See Carr et al. v. Woodbury County Juvenile Detention Center et al.*, 905 F. Supp. 619, 629 (N.D. Ia. 1995).

## III. CONCLUSION

The EEOC respectfully requests the Court to grant partial summary judgment and strike Defendant's Affirmative Defenses based on alleged after-acquired evidence.

Respectfully submitted,

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