Mary Jo O'Neill AZ #005924
Sally C. Shanley AZ #012251
Valerie L. Meyer CA #228586
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHOENIX DISTRICT OFFICE
3300 N. Central Avenue, Suite 690
Phoenix, Arizona 85012
Telephone: 602-640-5020
Fax: 602-640-5009
Valerie.Meyer@eeoc.gov

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. C. R ENGLAND, INC. Defendant.	**Case No. 2:06-CV-00811-BSJ** Senior Judge Bruce S. Jenkins **PLAINTIFF EEOC'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF EEOC**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, Plaintiff Equal Employment Opportunity Commission ("Plaintiff" or "EEOC" or "Commission") hereby submits its Memorandum in Opposition to Defendant C.R. England's ("Defendant" or "England") Motion for Summary Judgment Against Plaintiff EEOC.

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INTRODUCTION

The EEOC asserts three causes of action pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA) on behalf of Walter Watson. The EEOC contends that England: (1) discriminated against Watson by disclosing and requiring Watson to disclose confidential medical information concerning his status as HIV-positive to trainees prior to permitting them to train with him in violation of Section 102(d), 42 U.S.C. § 12112(d); (2) discriminated against Watson by limiting, segregating, or classifying Watson in a way that adversely affected his opportunities or status because of his disability, HIV, in violation of Section 102(b)(1), 42 U.S.C. § 12112(b)(1); and (3) violated Section 503(b), 42 U.S.C. § 12203(b), by coercing, intimidating, threatening or interfering with Watson in the enjoyment of, or on account of his having exercised or enjoyed, any right granted or protected by the ADA. Defendant's Motion addresses only the first two of these three claims; therefore, its claim under Section 503(b) must survive.[1] As set forth below and in Plaintiff EEOC's Motion for Partial Summary Judgment (Doc. 65), incorporated herein by reference, Defendant England is not entitled to summary judgment as to any of these claims, as genuine issues of material fact exist as

[1] Defendant also limits its challenge to the EEOC's claims to its ability to establish a prima facie case, therefore, the EEOC similarly limits its discussion and response to the prima facie case.

to each of them. Watson was an employee of England, is a qualified individual with a disability, and was subjected by Defendant to violations of three separate provisions of the ADA, and Defendant cannot establish the absence of genuine issues of material fact regarding any of these three claims.

STATEMENT OF CONTESTED FACTS

Plaintiff EEOC hereby incorporates by reference its Sealed Supplemental Memorandum: Plaintiff EEOC's Sealed Disputation of Defendant's Statement of Facts in Support of Its Motion for Summary Judgment Against EEOC, filed this date under seal pursuant to the Court's March 12, 2007 Confidentiality Order (Doc. 21) and the Court's October 30, 2007 Order Sealing the Depositions of Walter Watson (Doc. 41).

PLAINTIFF'S SEPARATE STATEMENT OF UNDISPUTED FACTS

Plaintiff EEOC hereby incorporates by reference its Statement of Facts in Support of Its Motion for Partial Summary Judgment (Doc. 66) ("PSF"), its Sealed Statement of Facts in Support of Its Motion for Partial Summary Judgment (Doc. 67) ("SSF"), and Sealed Supplemental Memorandum: Plaintiff EEOC's Sealed Statement of Facts in Support of Its Response in Opposition to Defendant's Motion for Summary Judgment Against EEOC ("SSF2"), filed this date under seal pursuant to the Court's March 12, 2007 Confidentiality Order (Doc. 21) and the Court's October 30, 2007 Order Sealing the Depositions of Walter Watson (Doc. 41). The facts below, numbered 126 through 166, shall be cited as "PSF2."

Watson Was an Employee of England as a Lease-Operator Driver

126. Opportunity Leasing is a sister company of Defendant C.R. England. (Ex. 30, Deposition of Nelson Hayes, hereinafter Hayes Dep. 42:11-19). Both companies have the same owners. (Ex. 30, Hayes Dep. 62:4-19).

127. C.R. England was not a party to the Vehicle Lease Agreement between Opportunity Leasing and Watson. (Def.'s Ex. C, Vehicle Lease Agreement).

128. Allegedly pursuant to laws and regulations, Defendant imposed the following controls on Watson:

a. Watson was required to keep and maintain systematic records of his Equipment's repair and maintenance and forward such records to Defendant on request (Def's Ex. B, ICOA ¶ 6(A));

b. Watson was required to apply identification designed by Defendant to his Equipment (Def's Ex. B, ICOA ¶ 6(B));

c. Watson was required to adhere to limitations on his hours of service; (Def's Ex. B, ICOA ¶ 6(C))

d. Watson was not permitted to have any passengers ride in his Equipment unless Defendant authorized it in writing, in advance (Def's Ex. B, ICOA ¶ 6(F));

e. Watson was not permitted to operate his own Equipment for another motor carrier without Defendant's prior written consent. Defendant had "exclusive possession, control and use of the Equipment" for the duration of its lease agreement with Watson (Def's Ex. B, ICOA ¶ 8);

129. Defendant has the right to review all of Watson's documents and records relating to his use of Opportunity Leasing's equipment and to the services provided under the ICOA, but Watson has a limited right to view Defendant's documents relating to analogous documents of Defendant, including documents from which rates and charges are computed. (Def.'s Ex. B, ICOA ¶ 2).

130. Defendant required Watson to regularly submit documentation beyond that which was required by laws and regulations. (Def.'s Ex. B, ICOA ¶ 6(E)).

131. Defendant, not Watson, made all arrangements for the leasing of trailers. (Ex. 32, Rule 30(b)(6) Deposition of C.R.England, hereinafter C.R. England 30(b)(6) Dep., 6:12-21).

132. Watson must have all trailer maintenance performed at facilities designated or approved by Defendant. (Def.'s Ex. B, ICOA ¶ 5).

133. Watson was required to maintain his own equipment in accordance not only with laws and regulations, but also in accordance with Defendant's own safety policies. (Def.'s Ex. B, ICOA ¶ 6(A)).

134. Watson was required to make his own equipment available for inspection by Defendant "at any time upon reasonable request," not just on those occasions when inspections were required by federal regulations. (Def.'s Ex. B, ICOA ¶ 6(A)).

135. Watson was required to remove "any paint, decals, or other items" on his own equipment that Defendant believed would "*be otherwise offensive*," regardless of whether it interfered with the identifications on the equipment required by other authorities. (Def.'s Ex. B, ICOA ¶ 6(B)) (emphasis added). Watson was not permitted to place any "paint, artwork, logo, or design" on his own equipment without Defendant's prior written consent. *Id.*

136. Defendant had the right to require Watson to remark or repaint his own equipment at Watson's expense. (Def.'s Ex. B, ICOA ¶ 6(B)).

137. Any drivers hired by Watson to perform his work under the ICOA had to not only meet the requirements of regulations, but also Defendant's company qualifications. (Def.'s Ex. B, ICOA ¶ 6(D)). Defendant could disqualify any driver provided by Watson if the driver was, in its discretion, "unsafe, unqualified or disqualified pursuant to federal or state law, in violation of [Defendant's] minimum qualification standards, *or otherwise imcompetent*." (Def.'s Ex. B, ICOA ¶ 6(D)(iv)).

138. Defendant gives the same road tests to both company drivers and lease operators. (Ex. 32, C.R. England 30(b)(6) Dep. 12:14-13:9).

139. Defendant requires employment histories for both employee-drivers and lease operators. (Ex. 32, C.R. England 30(b)(6) Dep. 13:10-17).

140. Watson had access to health insurance through Defendant. (Ex. 31, Deposition of Carrie Johansen, hereinafter Johansen Dep., 76:15-18).

141. Defendant agreed to file an IRS Form 1099 for Watson if he received a certain amount of compensation. (Def.'s Ex. B, ICOA ¶ 8(D)).

142. Watson was required to cooperate and assist in the investigation, settlement, or litigation of any accident, claim, or potential claim by or against Defendant. (Def.'s Ex. B, ICOA ¶ 10). Watson was also required to maintain information about Defendant as confidential. (Def.'s Ex. B, ICOA ¶ 20).

143. Watson was required to provide unlimited indemnification to Defendant. (Def.'s Ex. B, ICOA ¶ 12).

144. Defendant stated that it terminated Watson's ICOA "for poor performance" when he "stayed home for an extended period of time." (Ex. 33, Deposition of Christie Wakeland, hereinafter Wakeland Dep., 40:13-41:2; Ex. 20, Wakeland Memo, EEOC-CRE-00125).

145. Defendant considered Watson to be in breach of his ICOA when he terminated his vehicle lease with Opportunity Leasing. (Ex. 30, Hayes Dep. 60:18-61:4).

146. The ICOA between Watson and Defendant states that it is terminable by either party "at any time for any reason by giving thirty (30) days' written notice to that effect to the other party." (Def's Ex. B, ICOA ¶ 13).

147. If Opportunity Leasing believed that repairs or maintenance were not being performed in accordance with its wishes, it had the right to have such work done at a shop it selected and to charge Watson for such work. (Def's Ex. C, VLA, ¶ 2(a)).

Watson Was Also a Job Applicant for the Trainer Position with England

148. Mr. Watson "made application with C.R. England to qualify as a trainer and provide training services." (Ex. 7, October 15, 2003 Hayes Letter at 2). Training status is different from employment status. (Ex. 33, Wakeland Dep., 42:13-16).

149. Watson's status as a trainer was terminated independently of his status as a driver. (Ex. 33, Wakeland Dep. 40:13-41:2, Ex. 20, Wakeland Memo, EEOC-CRE-00125).

Watson Was an Employee of C.R. England as a Trainer

150. When students first start out, the trainer has to be in the jump seat. At some point, the trainer can sleep while the student is driving. (Ex. 27, Deposition of Cynthia Horsley, hereinafter Horsley Dep., 27:5-14).

151. As a trainer, Watson was required by Defendant's policy to run a minimum number of miles per day. (Ex. 27, Horsley Dep. 22:4-8).

152. Defendant maintains personnel files for trainers in the personnel department. (Ex. 31, Johansen Dep. 78:19-79:7).

153. Defendant gives uniform shirts to trainers regardless of whether they are company drivers or lease operators. (Ex. 31, Johansen Dep. 65:8-25; Ex. 33, Wakeland Dep. 10:19-23).

154. Defendant disqualified Watson from the Trainer position because he refused a load and "deadheaded" home. (Ex. 33, Wakeland Dep. 40:13-41:2; Ex. 20, Wakeland Memo, EEOC-CRE-00125).

Watson Is a Qualified Individual With a Disability

See PSOF 1 through 13 and Sealed PSOF 14 through 46 and attached exhibits submitted in conjunction with Plaintiff's Motion for Partial Summary Judgment (Docs.65, 66, and 67), incorporated herein by reference.

England Was Required to Maintain Watson's Medical Information Confidentially

155. Johansen knew Watson was HIV-positive because he told her so. (Ex. 31, Johansen Dep. 71:19-24; DSF ¶ 31). Watson notified C.R. England that he was HIV-positive prior to February 2003. (Ex. 25, Defendant's Response to Plaintiff EEOC's First Set of Requests for Admission, Request No. 4).

England Required the Disclosure of Watson's Confidential Medical Information and Interfered with His Right to Confidentiality

156. Carrie Johansen had been a Human Resources Manager with C.R. England for more than eleven years as of July 2007. (Ex. 31, Johansen Dep. 35:5-9).

157. Mr. Hayes admits that he isn't sure that Mr. Watson could have continued in C.R. England's training program if he had said he didn't want to disclose his HIV status to trainees. (Ex. 30, Hayes Dep. 84:23-85:1).

158. Defendant admits that it "required a trainee or potential trainee to sign an acknowledgement before working with Walter Watson, stating: 'Trainee hereby specifically acknowledges that he/she has been fully informed that his/her Trainer suffers from a communicable health condition (HIV). Trainee agrees to fully inform himself/herself on the condition (HIV), including avoidance of communication of the disease. Trainee further agrees to keep confidential any and all information relating to Trainer's condition, except as required to protect the health and welfare of any person.' *See* EEOC-CRE0000012." (Ex. 25, Defendant's Response to Plaintiff EEOC's First Set of Requests for Admission, Request No. 7; Def's Ex. M, Acknowledgment Form).

159. The Acknowledgment Form did not further define or explain when disclosure of Watson's condition by a Trainee might be "required to protect the health and welfare of any person." (Def's Ex. M, Acknowledgment Form).

160. Defendant intended to show the disclosure form to trainees who were assigned to Watson. (DSF ¶¶ 40-41; Def.'s Ex. M, Acknowledgment Form).

161. Christie Wakeland, the Training Coordinator, also saw the Acknowledgment Form, and after being told that students assigned to Watson's truck needed to sign the form, she surmised that Watson had HIV based on that information. (Ex. 33, Wakeland Dep. 6:5-17, 15:19-16:5, 18:23-19:15).

162. Once a trainee signed the Acknowledgment Form stating their Trainer had HIV, they would be directed to meet with Watson, and would thereby know that Watson

had HIV. (Ex. 33, Wakeland Dep. 19:20-20:10; DSF ¶ 41; Def's Ex. M, Acknowledgment Form).

England "Limited, Segregated, or Classified" Watson Because of His Disability

163. Wakeland and Hayes understood a communicable disease to be anything contagious or that could be communicated from one person to another, including hepatitis and herpes. (Ex. 33, Wakeland Dep. 20:14-25; Ex. 30, Hayes Dep. 34:14-35:7).

164. Wakeland is not aware of any other instances where a student has been required to sign a form similar to the Acknowledgment Form. (Ex. 33, Wakeland Dep. 20:11-13).

165. Wakeland believed that Watson's students had to sign the Acknowledgment Form because he had a communicable disease. (Ex. 33, Wakeland Dep. 21:22-22:3).

166. Trainees had to agree not just to train with someone with a communicable disease, but specifically with someone with HIV. (Ex. 30, Hayes Dep. 36:17-21; Def's Ex. M, Acknowledgment Form).

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted only where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56. *Anderson Liberty Lobby, Inc.*, 477 U. S. 242, 249-250, 106 S.Ct. 2505 (1986); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit. . . . A dispute over a material fact is 'genuine' if a rational jury could find in favor of the nonmoving party on the evidence presented." *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 921, 926 (10th Cir. 2001) (reversing district court's grant of summary judgment for defendant because there were genuine issues of material fact) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In applying the summary judgment standard, the Court must view the evidence in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255. The nonmovant's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Id.*; *Anderson*, 477 U.S. at 255. All doubts should be resolved in favor of the presence of triable fact issues. *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985), cert denied, 474 U.S. 823 (1985). At summary judgment, the court's role "is simply to determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate factfinder, to sustain [plaintiff's] claim." *Stinnett v. Safeway, Inc.,* 337 F.3d 1213, 1216 (10th Cir. 2003).

II. THE ADA PROTECTS WATSON

Preliminarily, Defendant inaccurately suggests that the ADA protects only those individuals who are "employees" from discrimination the basis of disability. This is patently incorrect. While some provisions of the ADA prohibit discrimination against employees *and* job applicants, other provisions contain no such requirement. In this case, three separate provisions of the ADA are at issue: Section 102(d), 42 U.S.C. § 12112(d); Section 102(b)(1), 42 U.S.C. § 12112(b)(1), and Section 503(b), 42 U.S.C. § 12203(b).

Section 102(d), relating to the confidential maintenance of medical information obtained by employers, applies to job applicants and employees. In addition, there is no requirement that the job applicant or employee be a qualified individual with a disability in order to have his or her medical information treated confidentially. *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594-95 (10th Cir. 1998); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F. 3d 1221, 1229 (10th Cir. 1997); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999).

Section 102(b)(1) specifically prohibits "limiting, segregating, or classifying a *job applicant or employee* in a way that adversely affects the opportunities or status of such applicant or employee *because of the disability* of such applicant or employee." 42 U.S.C. § 12112(b)(1) (emphasis added). Under this provision, both job applicants and

employees who are qualified individuals with a disability are protected from discrimination because of their disability.

The language of Section 503(b) imposes no requirements that an individual be an employee, job applicant, or qualified individual with a disability in order to enjoy its protections. Pursuant to Section 503(b), "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with *any individual* in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." 42 U.S.C. § 12203(b) (emphasis added).

Thus, the questions of Watson's status as an employee and/or as a qualified individual with a disability are not dispositive of the EEOC's claims. Regardless, Watson was both an employee of England *and* a job applicant, as well as a qualified individual with a disability. Watson's status as such, as well as the impact of any such status on the EEOC's specific claims on his behalf, will be discussed further below.

a. THE HYBRID TEST IS THE APPROPRIATE STANDARD FOR DETERMINING WATSON'S EMPLOYMENT STATUS

Although Defendant correctly identifies the standard to be applied in determining whether Watson was an employee for the purposes of his Section 102(d) and Section 102(b)(1) claims, Defendant does not correctly apply the law to the facts at hand. When applied to the full panoply of relevant facts, the "hybrid test" reveals that Watson was an employee of England, not an independent contractor.

The hybrid test is a combination of the "right to control" and "economic realities" tests. *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303 (10th Cir. 1992). The "right to control" test, which looks to whether the employer had the "right to control the means and manner of the worker's performance," has been used extensively in deciding cases pursuant to the National Labor Relations Act (NLRA), *see, e.g., Atlantic Interstate Messengers*, 274 N.L.R.B. 1144 (1985) (discussing and applying right to control test).

While the hybrid test also considers other elements derived from the economic realities test[2], Defendant concedes that the *focus* of the inquiry is "the employer's right to control the means and manner of the worker's performance," (Def's Mot. at 16), or the right to control test. Therefore, cases arising under the NLRA and decided using the "right to control" framework are instructive. *See also Brown v. City of Tucson*, 336 F.3d 1181, (9th Cir. 2003) (discussing similarities between Section 503(b) of the ADA and the NLRA); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 570 (3d Cir. 2002) (finding that "interpretations of the NLRA can serve as a useful guide to interpreting similar language in the ADA" in reference to Section 503(b) of the ADA).[3]

When applying these tests, it is important to note that Watson was performing two roles for England; he was both a driver (or Lease Operator), and a Trainer. These two positions are separate; Watson had to apply and go through a "Train-the-Trainer" course to become a Trainer, and his status as a Trainer was terminated independently from his status as a Lease Operator. (PSF 2, SSF 19-21, 45, SF2 77-78). At the time that Defendant initiated its discussions with Watson concerning the required disclosure of his confidential medical information, Watson had not yet completed the Train-the-Trainer course (SSF2 76, 94-96), and therefore was a Lease Operator and a job applicant for the Trainer position. At the time Defendant actually disclosed Watson's confidential medical information to a Trainee, Eddie Seastrunk, Watson had completed the course and was both a Lease Operator and a Trainer. (SSF2 76). Therefore, whether or not Watson was

[2] The economic realities test examines whether a worker, "as a matter of economic fact," is in business for himself, and is usually applied in cases brought under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. *Oestman*, 958 F.2d at 305.

[3] Defendant attempts to rely on several previous administrative decisions that it offers at Def's Statement of Facts 22-25. These decisions are irrelevant, as they were decided under laws other than the NLRA, ADA, or other federal anti-discrimination laws, and because the discussion of the facts in the decisions is insufficient to determine if the facts were identical to those here. "The determination of whether a party is an employee or an independent contractor is a very fact-specific determination." *Gifford v. Farmers Ins. Exchange*, 2005 WL 3555928, No. Civ. 04-77-WYD-PAC (D. Colo. 2005).

an employee must be considered in light of the changing requirements and policies to which he was subject at different times during his relationship with England.

b. WATSON IS AN EMPLOYEE UNDER THE HYBRID TEST

i. Watson, as a Lease Operator, was an employee of England.

In December 2002, Watson completed paperwork to become a Lease Operator for England. (SSF 17-19, SSF2 48, 52-54) This paperwork included the Independent Contractor Operating Agreement (ICOA) (Def's Ex. B), Attachment 2 to the ICOA (attached hereto as Exhibit 15), the Operating Philosophy (attached hereto as Exhibit 16), Logging Procedures (attached hereto as Exhibit 13), and Logging Off Duty for Meal Stops (attached hereto as Exhibit 14).[4] *Id*. When taken together with deposition testimony in this case, the evidence establishes that Watson was an employee, and creates a genuine issue of material fact concerning Watson's employment status.

Defendant had the right to control the means and manner of Watson's performance. Watson signed the ICOA, and was also required to sign Defendant's Operating Philosophy document. (SSF2 48, 52-54). Under these agreements, Defendant required Watson to keep and maintain systematic records of his Equipment's repair and maintenance, apply Defendant's identification to his Equipment, and adhere to limitations on his hours of service, and was not permitted to have any passengers or to operate his own Equipment for another carrier without Defendant's consent. (PSF2 128). *See Atlantic Interstate Messengers*, 274 N.L.R.B. at 1148 (exclusive operation); *Roadway Package Sys., Inc.*, 292 N.L.R.B. 376, 377-78 (1989) (exclusive operation); *N.L.R.B. v. Deaton, Inc*., 502 F.2d 1221, 1226 (5th Cir. 1975) (same). Defendant contends that these elements of control are irrelevant to the employee/independent contractor determination,

[4] Defendant also relies on the terms of the Vehicle Lease Agreement (VLA) (Def's Ex. C) in support of its arguments in favor of independent contractor status. However, England was not a party to the VLA between Opportunity Leasing and Watson. (PSF2 127). Opportunity Leasing is only a sister company to England, (PSF2 126) and the terms of the VLA are irrelevant to determining the relationship between Watson and England.

as they are elements of control that a carrier is required to retain by laws and regulations. However, "it matters not whether the controls placed on the drivers emanate from [the carrier] independently, or whether these controls are imposed on [the carrier] which, in turn, imposes them on the drivers. Either way, these controls define the carrier's employment relationship with its drivers." *Atlantic Interstate Messengers*, 274 N.L.R.B. at 1148, *citing Mitchell Bros. Truck Lines*, 249 N.L.R.B. 476, 480-81 (1980). *See also Deaton*, 502 F.2d at 1226 ("[W]e cannot ignore or discount the items that are requirements imposed by federal regulations. As discussed above, we assess the total controls, including both ICC-mandated controls and additional controls."); *Propane Transport, Inc.*, 247 N.L.R.B. 966, 968 (1980); *George Transfer & Rigging Co.*, 208 N.L.R.B. 494, 498 (1974). The case relied upon by Defendant to suggest otherwise, *Universal Am-Can, Ltd. V. Workers' Comp. Appeal Bd.*, 762 A.2d 328 (Pa. 2000), is a state case dealing with employee status under the Pennsylvania Workers' Compensation Act, and is neither persuasive nor germane in the area of federal anti-discrimination law.

Defendant also imposed extensive additional controls on the means and manner in which Watson performed his duties. Watson was required to adhere not only to the ICOA and the requirements of all outside authorities, but also Defendant's own operating authorities, safety policies, and company policies. (SSF2 54). These policies dictated his minimum average daily speed and maximum speed and required that he portray himself in a responsible and respectable manner, including the use of "road courtesies." (SSF2 55, 57-58, 68-69). He was required to meet all customer requirements and standards of performance, including minimum miles per month, minimum on-time delivery percentages, and minimum truck utilization percentages. (SSF2 53). He was subject to a progressive disciplinary policy concerning hours-of-service reporting, and was subject to discipline for speeding, hours violations, and incorrect logging. (SSF2 56-57). Each of these requirements suggests Watson was an employee. *Propane Transport*, 247 N.L.R.B. at 968 (required adhere to company policy and imposition of discipline for infractions of

company policy); *Atlantic Interstate Messengers*, 274 N.L.R.B. at 1148 (disciplinary policy); *Time Auto Transportation, Inc. v. N.L.R.B.*, 377 F.3d 496, 499-500 (6th Cir. 2004) (heightened control over workers makes them employees), *citing Aetna Freight Lines, Inc. v. N.L.R.B.*, 520 F.2d 928, 930 (6th Cir. 1975) (subject to discipline).

In addition to the hours limitations imposed by regulations, Watson's time was further controlled by Defendant. For example, Watson was only permitted to log "off duty" for set amounts of time while transporting a load. (SSF2 59). Watson was required to coordinate requests and communicate "desires" for home time two weeks in advance. (SSF2 73). It was within Defendant's discretion whether or not to honor a request for home time or for leave to see a doctor, and in this case, Defendant twice denied requests by Watson for home time. (SSF2 74, 117-118). Ultimately, Defendant terminated Watson's ICOA "for poor performance" when he "stayed home for an extended period of time." (PSF2 144). Such controls over Watson's time off suggest that Watson was an employee, not an independent contractor. *Oestman*, 958 F.2d at 306 (freedom to take vacation whenever individual deemed appropriate suggested independent contractor status); *Norberg v. Tillamook County Creamery Ass'n*, 74 F. Supp. 2d 1002, 1006-1007 (D. Or. 1999) (timing of independent contractor's vacations not controlled by defendant).

Contrary to Defendant's assertions, Watson was not free to accept or reject loads as he saw fit. Watson was "assigned" loads, was required to cooperate in matching loads and equipment, and Defendant retained the power to force Watson to accept assigned loads based on Defendant's judgment. (SSF2 63-64). Defendant indicated that it would sever its relationship with drivers who refused loads, and refused to pay drivers for empty or "deadhead" miles to a loading point if the driver had refused the previous load. (SSF2 65-66). Defendant's exertion of such control over the assignment of loads renders Watson an employee. *Propane Transport,* 247 N.L.R.B at 968 (disciplinary action for refusal of loads); *Deaton*, 502 F.2d at 1226 (all dispatching services performed by

employer); *contra Norberg*, 74 F. Supp.2d. at 1007 (independent contractor allowed to accept or reject loads).

Watson was also required to submit documentation beyond that required by laws and regulations. (PSF2 130). Defendant had the right to review all of Watson's documents and records, but Watson had a limited right to view Defendant's documents and records. (PSF2 129). With respect to the submission of logs, Defendant's policies went far beyond the requirements of federal regulations. (SSF2 67). For instance, Defendant required that logs be completed only in a particular color ink, not be stapled, and be folded from side-to-side. *Id.* Watson was required to call his log auditor once a month, could not combine off-duty logs with working logs, and was required to log all fuel stops and arrival times at pickups and deliveries. *Id.* Such extensive paperwork instructions weigh in favor of employee status. *See Pilot Freight*, 208 N.L.R.B. at 857 (extensive instructions regarding waybills and when to call the terminal); *Propane Transport*, 247 N.L.R.B. at 968 (required furnishing of logsheets and other records); *Deaton*, 502 F.2d at 1226 (log submissions); *Roadway Package,* 292 N.L.R.B. at 377-78 (record-keeping); *see also Gifford*, 2005 WL 3555928 at *4 (systems for information and records collection).

Defendant also applied extensive requirements to Watson concerning equipment. Defendant made all arrangements for the leasing of trailers and required Watson to have all trailer maintenance performed at facilities designated or approved by Defendant. (PSF2 131-132). With respect to Watson's truck, he was required to maintain it in accordance not only with laws and regulations, but also with Defendant's own policies (PSF2 133), and to make it available for inspection by Defendant "at any time upon reasonable request," not just on those occasions when inspections were required by federal regulations (PSF2 134). Watson had to remove any paint, decals, or other items that Defendant believed would be "offensive," and otherwise controlled the appearance of his equipment. (PSF2 135-136). This weighs in favor of construing Watson as an

employee. *Deaton*, 502 F. 2d at 1226 (inspection requirement); *Propane Transport,* 247 N.L.R.B. at 968 (required inspection and repairs).

Defendant determined the amount of payment Watson received. Although Watson was paid by the mile, the mileage calculations were pre-determined by Defendant, and Watson was paid based on this mileage, not actual mileage driven. (SSF2 61). Therefore, although Watson could choose to take a longer route, he was still paid the same. *Id.* This suggests that Watson was an employee. *Propane Transport*, 247 N.L.R.B. at 967-68. In addition, Defendant unilaterally set the variable terms of the ICOA, such as the payment per mile. *Id*. at 968, n.9. (SSF2 60).

Defendant had the right to deduct certain costs directly from Watson's compensation. (SSF2 71). England deducted the costs owed to Opportunity Leasing directly from Watson's compensation. *Id*. In other words, Watson did not have any authority to determine the priority of obligations or the order in which to pay himself versus his lease or other obligations.

Watson performed under his ICOA as an individual, not as a corporation or other business organization, and he did not have any employees. (SSF2 52). He did not work for any other carriers during the time he worked for England. (SSF2 62). The Form 1099 issued to Watson for 2003 was issued to him as an individual. (SSF2 72, PSF2 141). Had Watson hired any drivers to perform his work, those drivers had to meet Defendant's company qualifications and Defendant could disqualify any driver at its discretion. (PSF2 137). These facts weigh against construing Watson as an independent contractor. *Deaton*, 502 F.2d at 1226 (employer's power to disqualify any driver); *contra Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986) (independent contractor simultaneously worked for 10 carriers, and defendant paid compensation to company, not individual driver); *Norberg*, 74 F. Supp. 2d at 1006-1007(independent contractor operated as a corporation, with employees).

Defendant treats its company drivers and lease operators the same, in that it gives the same road tests to both groups and requires the same employment histories of them. (PSF2 138-139). *See Pilot Freight*, 208 N.L.R.B. at 858 (relying in part on extensive amount of information required during hiring process to find that driver was employee); *Propane Transport*, 247 N.L.R.B. at 967 (physical examination and application requirements); *Deaton*, 502 F.2d at 1226 (employer determined all drivers' qualifications). Watson's insurance was set up with Defendant, so he is not aware of what insurance carrier was used, and he had access to health insurance through Defendant. (SSF2 70, PSF2 140) The extent to which company drivers and lease operators are treated in the same way indicates the lease operators are employees. *See Trainor v. Apollo Metal Specialties, Inc*., 318 F.3d 976, 980 (10th Cir. 2002).

Watson was required to cooperate and assist in the investigation, settlement, or litigation of any claims by or against Defendant, and had to maintain information about Defendant as confidential. (PSF2 142).

Defendant terminated Watson's lease without thirty days' notice, although the ICOA provides for thirty days' notice by either party. (SSF2 75, PSF2 146). *Atlantic Interstate Messengers*, 274 N.L.R.B. at 1148 (finding that where employer effectively has power to hire and fire drivers at will, whether lease provides for notice period is inconsequential).

In conclusion, it is clear that Defendant exercised near-total control over Watson's performance of his duties as a lease-operator. To the extent that any factors weigh against finding that Watson was an employee of Defendant, such factors are outweighed by the fact outlined above. Despite England's usage of the phrase "independent contractor" throughout its documents, the mere use of such a phrase is less significant that the content of the document. *Cf. Pilot Freight*, 208 N.L.R.B. at 858. This is especially true where Watson is not an attorney, and his assumptions about independent contractor status were based on nothing more than Defendant's advertisements. (SSF2

47, 49-51). It is clear that the nature of the relationship between Watson and England was so intertwined as to support ADA coverage. *Contra Lambertsen v. Utah Dep't of Corrections*, 922 F. Supp. 533 (D. Utah 1995) (finding that teacher was independent contractor of Department of Corrections where only control exercised was for security purposes when she was within confines of prison).

ii. Watson, as a Trainer and Lease Operator, was an employee of England.

Once Watson became a Trainer for England upon completion of the Train-the Trainer course and upon receipt of a trainee assignment, he was subject to additional controls by Defendant over the means and manner of his performance. Watson was not permitted to select his own trainees or to request a particular trainee (SSF2 79), Defendant controlled the trainee's rate of pay and deducted it from Watson's compensation (SSF2 80), Watson did not have the authority to dismiss a trainee from his truck (SSF2 84), and Watson was required to obtain his Training Coordinator's permission to drop a student off (SSF2 86). Watson still was required to abide by Defendant's company policies at all times. (SSF2 89). Defendant dictated the point at which trainers were permitted to sleep while the trainee was driving (PSF2 150), imposed a minimum number of miles-per-day to run (PSF2 151), required Watson to watch or attend all safety meetings (SSF2 82), and dictated the method (Qualcomm satellite text device or telephone) Watson was to use when contacting his Training Coordinator (SSF2 85). *Gifford*, 2005 WL 3555928, at *4 (telephone protocol & training session attendance dictated); *Pilot Freight*, 208 N.L.R.B. at 857-58 (required meeting attendance and extensive instructions regarding when to call the terminal).

Defendant required Watson to maintain a professional appearance and demeanor. (SSF2 87). Defendant provided uniform shirts to trainers regardless of whether they were lease operators or company drivers (PSF 153), and imposed other specific requirements on Watson concerning his appearance, including: the length and appearance of his hair

and beard, the size of any earrings, the nature of his hygiene, the use of "non-offensive language and conduct," and the maintenance of a "positive attitude." (SSF2 88). The imposition of such requirements clearly establishes that England had the right to control Watson when he was a Trainer. *Roadway Package,* 292 N.L.R.B. at 377-78 (personal appearance); .*Atlantic Interstate Messengers*, 274 N.L.R.B. at 1148 (personal grooming and uniforms); *Gifford*, 2005 WL 3555928 at *4 (personal attire); *contra Norberg*, 74 F. Supp. 2d at 1008 (dress of independent contractor not controlled).

Defendant maintains personnel files for trainers in the personnel department (PSF2 152), *Deaton*, 502 F.2d at 1226 (maintenance of personnel files), and gives trainers performance reviews every three months (SSF2 81). As a Trainer, Watson was subject to progressive discipline for any offenses, although some offenses could lead to immediate dismissal as a trainer. (SSF2 83). Wakeland testified that she would remove a trainer for any one of the following reasons: sitting up with a students and burning up hours, refusing a load, and deadheading home. (PSF2 90). In fact, Defendant actually disqualified Watson from the Trainer position because he refused a load when he needed to seek medical treatment and counseling, *Propane Transport,* 247 N.L.R.B at 968 (disciplinary action for refusal of loads suggests employee status), and "deadheaded" home. (PSF2 154, SSF2 120, 123).

Although the nature of the relationship between Watson and Defendant is clearly an employer-employee relationship based on Watson's lease-operator position, Watson's employee status becomes even more apparent when his Trainer position is also considered. To the extent Defendant's motion for summary judgment is based on the argument that there is no genuine issue of material fact as to whether Watson is an employee, it must be denied.

c. <u>WATSON IS ALSO A JOB APPLICANT</u>

As discussed above, the ADA also protects job applicants from discrimination. An individual may be both a current employee and a job applicant for another position

with the same employer. *Cf. Hendricks-Robinson v. Excel Corp*, 154 F.3d 685, 691-92 (7th Cir. 1998). Watson, in addition to being an employee both during his tenure as a lease operator and as a Trainer, was a job applicant for the Trainer position until his first Trainee was assigned on February 7, 2003, the last day of his Train-the-Trainer class. (DSF 33, 34). The decision to require Watson to disclose his medical status to Trainees was made prior to the conclusion of that course, while Watson was still a job applicant.

III. THE EEOC HAS ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION AGAINST WATSON

As is detailed below, Plaintiff EEOC has established genuine issues of material fact as to each of its three claims on behalf of Watson, and Defendant therefore is not entitled to summary judgment on any of the EEOC's claims.

a. Defendant Is Not Entitled to Summary Judgment on EEOC's Section 102(d) Claim (Disclosure of Medical Information)

In this claim, the EEOC seeks relief for Defendant's violation of Section 102(d) when it disclosed Watson's HIV-positive status to trainee Eddie Seastrunk on February 7, 2003. In order to establish a violation of Section 102(d) of the ADA, 42 U.S.C. § 12112(d), the EEOC need only establish that an employer obtained medical information through a pre-employment examination or inquiry, Section 102(d)(2), employment entrance examination, Section 102(d)(3), employee medical inquiry, Section 102(d)(4), *or voluntary disclosure*, then disclosed that information to someone other than a supervisor or manager, first aid or safety personnel, or government officials investigating ADA compliance. Sections 102(d)(3)(B)(i)-(iii), 102(d)(4)(C); see also 29 C.F.R. §§ 1630.14(b)(1), (c)(1) & (d)(1).

Here, Carrie Johansen (Defendant's Human Resources Manager), obtained information concerning Watson's HIV-positive status from him prior to February 2003. (SSF2 91, 93, PSF2 155-156). Once Johansen learned that Watson had applied to become a trainer, Defendant determined that Watson would have to disclose his HIV-

positive status to any trainees before they got into his truck. (SSF2 94) Defendant then prepared a disclosure form (Def's Ex.M) which informed the trainee that his or her trainer had HIV and permitted the trainee to further disclose Watson's medical condition in certain circumstances without fully defining those circumstances, asked trainee Seastrunk to sign the form, and then assigned Seastrunk to Watson. (SSF2 99, PSF2 159, 162, DSF 35-40). Thus, once Seastrunk met Watson, he had knowledge that Watson was the individual with HIV. *Id.* Seastrunk does not come within any of the categories of people to whom Defendant could have disclosed Watson's information pursuant to Sections 102(d)(3)(B)(i)-(iii), 102(d)(4)(C); Defendant does not contend that he is a manager, first aid or safety responder, or government official. Therefore, regardless of the Seastrunk's reaction to that information, Defendant violated Section 102(d) when it informed him of Watson's HIV-positive status.

Defendant's primary bases for seeking summary judgment on this claim are that: (1) Watson is not a qualified individual with a disability or an employee; (2) Watson voluntarily disclosed his medical information to Carrie Johansen, and such information is therefore not subject to Section 102(d); (3) Watson agreed to disclose his information to the trainee; and (4) the disclosure did not result in any adverse action. Defendant's arguments fail on all four bases.

First, as discussed previously, the EEOC is not required to demonstrate that Watson is a qualified individual with a disability in order to establish a claim under Section 102(d). *Griffin*, 160 F.3d at 594-95; *Cheyenne Mountain*, 124 F. 3d at 1229; *Fredenburg,* 172 F.3d at 1182. Other circuits have noted that "protecting only qualified individuals would defeat much of the usefulness of those sections," *Fredenburg,* 172 F.3d at 1182, and the Tenth Circuit noted that such a requirement "makes little sense." *Griffin*, 160 F.3d at 594. The EEOC has already demonstrated, above, that there is a genuine issue of material fact regarding Watson's status as an employee or job applicant.

Second, Defendant also contends that medical information that Defendant obtains through a voluntary disclosure by the individual himself need not be kept confidential. This is inaccurate. As EEOC Guidance makes clear, medical information obtained by an employer via voluntary disclosure is subject to the protections of Section 102(d). EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), 2000 WL 33407181, at * 4 (July 2000) ("The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination . . . *as well as any medical information voluntarily disclosed by an employee*, as a confidential medical record.") (emphasis added); *see also Belton-Youmans v. Potter,* 2006 WL 91526, *1 (E.E.O.C. Jan 6, 2006) ("medical information . . . voluntarily disclosed by employees, must be treated as confidential and may only be shared in limited circumstances . . . ."). EEOC interpretations are entitled to "great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971). It is also consistent with the aims of the ADA, which seeks to eliminate those practices which serve "no legitimate employer purpose, but simply serve[] to stigmatize the person with a disability." H. Rep. No. 101-485 (II), at 75, *reprinted in* 1990 U.S.C.C.A.N. 303, 357. For example, to hold otherwise would exclude from confidential treatment the information voluntarily provided by employees in connection with requests for reasonable accommodation. Such a result would only serve to chill early and open employee participation in the interactive process, and require employers to draw information out slowly, pursuant to multiple inquiries so that employee responses would be protected.

Moreover, the disclosure at issue in this case was not entirely voluntary in nature. Defendant concedes, for the purposes of summary judgment, "that during [Watson's] interview with Johansen, she told him that she had spoken with Franklin, and that Franklin had made "negative comments" about Watson. (DSF 31, n.5). Watson then asked her if their conversation was "confidential." (DSF 31, SSF2 91) When Johansen

said "yes," Watson asked her if Franklin had told her that Watson was HIV positive." (DSF 31). Under these circumstances, Watson's decision to inform Johansen of his HIV-positive status was borne not out of some desire to be open about his condition, but out of a desire to avoid any potential disciplinary proceedings as a result of his negative interactions with Franklin. This is similar to the situation in *Doe v. U.S. Postal Service*, where a postal worker chose to fill out a leave form disclosing his status as HIV-positive when he was informed that he would otherwise face disciplinary proceedings for medically-related absences. 317 F.3d 339, 344 (D.C. Cir. 2003).

Even under Johansen's differing version of events, Watson's disclosure cannot be said to be entirely voluntary. Johansen "testified that Watson called her from California after his altercation with Franklin to ask for money and transportation back to Salt Lake City. She testified that during his conversation with her, Watson told her that he was HIV positive. Johansen's contemporaneous notes are consistent with her testimony. *See* Watson Dep. at Exhibit 28, attached hereto as Exhibit A." (DSF 31, n.5) (internal citations omitted). Those contemporaneous notes state "Wanda at nights said don't remove belongings," "HIV Positive" "getting sick (cold)", and "belongings in Alan's truck & meds." (Def's Ex. A & Deposition Ex. 28 attached thereto). In light of those notes, Watson's disclosure of his HIV-positive status could be construed as part of a request for reasonable accommodation in the form of temporary funds to cover items left in Franklin's truck at Defendant's suggestion, including medications. Again, to exclude such a disclosure, made only after Watson asked if their conversation was "confidential," as outside of the confidentiality protections of Section 102(d), will serve only to discourage employee cooperation in the interactive process associated with reasonable accommodations. Watson would never have disclosed his HIV-positive status to Johansen had she not responded in the affirmative to his question about their conversation's confidentiality. (SSF2 91).

Third, the EEOC vehemently disputes that Watson consented to the disclosure in question. Watson suggested a general advisory be given to all trainees, in conjunction with the rest of their trainee paperwork, that their trainer might have a communicable disease such as HIV. (SSF2 95). Watson suggested such a form as an attempt to appease Defendant without anyone knowing that he had HIV. (SSF2 96). He never consented or agreed that Defendant could inform any trainees that *he* was HIV-positive (SSF2 92), never consented or agreed to any specific disclosure form (SSF2 97), and did not even see the Acknowledgment Form attached to Defendant's Motion as Exhibit M until Seastrunk had already signed the form. (SSF2 96).

The EEOC also need not prove that the disclosure resulted in some adverse action, and Defendant's citation of *Couture v. Belle Bonfils Memorial Blood Center*, 151 Fed. App'x 685, 690 (11th Cir. 2005), which discusses what constitutes an adverse action, is misplaced. The disclosure itself is an adverse action where a disability is revealed.[5] Congress specifically noted that an "individual with cancer may object merely to being identified, independent of the consequences." H. Rep. No. 101-485 (II), at 75, *reprinted in* 1990 U.S.C.C.A.N. at 358, *cited by Griffin*, 160 F.3d at 594. Watson is very circumspect about his status as HIV-positive. He does not want to wear a medical bracelet identifying him as HIV-positive and did not tell the doctor performing his Department of Transportation medical clearance that he is HIV-positive. (SSF2 101-102). He has only informed one of his subsequent of employers of his HIV-positive status, and then because of the need for accommodations, and did not disclose to any of his trainees at other employer Werner Enterprises that he was HIV-positive. (SSF2 103, 105). Regardless, whether or not Watson informed other individuals of his medical condition is irrelevant to establishing a violation of Section 102(d); it is for Watson, not Defendant, to

[5] It is not necessary to determine whether a disclosure of medical information of a non-disabled individual constitutes an adverse action, as Plaintiff has demonstrated that Watson is a qualified individual with a disabilility. *See* Plaintiff's Motion for Partial Summary Judgment at 6-13, incorporated herein by reference.

decide with whom he wishes to share that information. It is undisputed that Watson did not wish to share that information with Seastrunk, but was required to do so. (SSF2 92, 96, 108, PSF2 157, 158, 160-162)

As a result of Defendant's failure to keep that information confidential, Watson suffered more than "mere dissatisfaction," inconvenience, or unhappiness. *Contra Couture*,151 Fed. Appx. At 690. He expressed to Johansen that he was upset and disappointed by her concerns about him being a Trainer, and expressed to both Johansen and Ralph Vernon, the Train-the-Trainer course instructor, that he objected to and was uncomfortable with the disclosure of his HIV-positive status. (SSF2 104, 106-107). Watson was upset about the disclosure and the manner in which it was handled. (SSF2 108, 109). England made Watson feel as though he was putting everybody at risk and that he needed to live in a bubble. (SSF2 110). His experience at England was overwhelming, humiliating, shameful, embarrassing, sad, aggravating, and induced feelings of worthlessness. (SSF2 111). The ordeal consumed everything, and he couldn't focus. *Id.* After separating from England, he was afraid of re-living his experience and of being labeled a threat or "damaged goods." (SSF2 112-113). The stress of the events at England continues and will not go away. (SSF2 113-116). It affects him day-to-day and stays in his mind. *Id.* He thinks of it when he is awake and dreams of it when he is asleep. *Id.* He has periods of anxiety and sleeplessness, followed by periods of depression, crying, and sadness, when all he wants to do is sleep. *Id.*

b. Defendant Is Not Entitled to Summary Judgment on EEOC's Section 102(b)(1) Claim (Limiting, Segregating, or Classifying)

Plaintiff EEOC's second claim on behalf of Watson alleges that C.R. England classified, limited, and segregated Watson with adverse effects when it required him to disclose his HIV-positive status in order to become and remain a trainer. Plaintiff EEOC has discussed the evidence and law entitling it to summary judgment in its own favor at pages 6-13 (element of status as a qualified individual with a disability) and at pages 13-

17 (remaining elements of prima facie case under Section 102(b)(1)) of its Motion for Partial Summary Judgment (Doc. 65), incorporated herein by reference. The same evidence and arguments establish, at a minimum, sufficient facts to establish a genuine issue of material fact precluding Defendant from obtaining summary judgment on this claim. In the interest of efficiency, Plaintiff EEOC will not repeat those arguments in their entirety here, but will note the additional relevant facts that: Defendant's Training Coordinator, Christie Wakeland, is not aware of any other instances where a student has been required to sign a form similar to the Acknowledgment Form; Wakeland believed that Watson's students had to sign the Acknowledgment Form because he had a communicable disease; and Trainees had to agree not just to train with someone with a communicable disease, but specifically with someone with HIV. (PSF2 163-166) Each of these facts further supports the EEOC's claim that Defendant limited and/or segregated Watson because of his disability, HIV.

c. Defendant Is Not Entitled to Summary Judgment on EEOC's Section 503(b) Claim (Interference, Threats & Coercion)

Plaintiff EEOC's third claim on behalf of Watson arises under Section 503(b) of the ADA, which makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed . . . any right granted or protected by this chapter." 42 U.S.C. § 12203(b). Although Defendant has not specifically identified this claim as one on which it seeks summary judgment, because Defendant has not styled its motion as seeking partial summary judgment, but summary judgment on the EEOC's claims in their entirety, the EEOC will address the genuine issues of material fact that prevent summary judgment as to this claim.

To establish a prima facie case of discrimination under Section 503(b), the EEOC must demonstrate that Watson: (1) engaged in a protected activity; (2) suffered an adverse action in the form of coercion, intimidation, threats, or interference; and (3) there

was a causal link between the protected activity and adverse action.[6] *Brown*, 336 F.3d at 1192. It is important to note that this showing differs from the showing required under the ADA's retaliation provision, Section 503(a). *Id.* at 1991; *Fogleman*, 283 F.3d at 570 (noting that "the scope of this second anti-retaliation provision of the ADA 'arguably sweeps more broadly' than the first"). While courts apply a burden-shifting analysis that appears similar to the analysis used in Title VII cases, the "construction and application of § 503(b) ought to be guided by our treatment of the FHA's [Fair Housing Act] interference provision, 42 U.S.C. § 3617, as well as similar provisions in the FMLA [Family Medical Leave Act] and NLRA [National Labor Relations Act]." *Brown,* 336 F.3d at 1991; see also Fogleman, 283 F.3d at 567, 570. In determining what constitutes an adverse action, this Court should be "guided by the plain language of the statute, the Supreme Court's instruction that we treat 'the language of the [FHA as] broad and inclusive', as well as our own recognition in Hayward of the broad scope of the term 'interference.'" *Brown,* 336 F.3d at 1192, *citing Trafficante v. Metro Life Ins. Co.,* 409 U.S. 205, 209 (1972) *and United States v. Hayward*, 36 F.3d 832 (9th Cir. 1994) (internal citations omitted).

Here, Watson engaged in protected activity when he attempted to exercise and enjoy his right to the confidentiality of his medical information under the ADA. "Pursuing one's rights under the ADA constitutes protected activity." *Tater-Alexander v. Amerjan*, 2008 WL 961233, No. 08-cv-00372-OWW-SMS, (E.D.Cal. April 8, 2008). Watson never consented to Defendant's disclosure of his own status as HIV-positive to any trainee, (SSF2 92), never consented or agreed to any specific disclosure form, and never even saw the disclosure form used by Defendant until a trainee had already signed the form (SSF2 97). To the contrary, he instead suggested giving everyone in the school a general form warning them that their trainer might have HIV. (SSF2 96). Johansen

[6] As previously discussed, Section 503(b) imposes no requirements that an individual be an employee, job applicant, or qualified individual with a disability in order to enjoy its protections. 42 U.S.C. § 12203(b) (referring to "any individual").

knew that Watson was saddened in response to her concern about him being a trainer (SSF2 104), and Watson expressed to Johansen and his trainer, Ralph Vernon, his objections to and discomfort with the disclosure of his HIV status (SSF2 106). Thus, he attempted to exercise his right to have his medical information maintained in a confidential manner.

Defendant responded to this protected activity by requiring Watson to disclose his information. Johansen and Nelson Hayes, Defendant's in-house counsel, made a decision that Watson's HIV status needed to be disclosed to his trainees. (SSF 38-39, SSF2 94). Students would not be permitted to get on his truck unless they first signed a form notifying them that Watson has HIV. (PSF 9, SSF 41). Watson could not have continued as a Trainer if he had said he didn't want to disclose his HIV status to trainees (PSF 12, PSF2 157-158), and Hayes told Watson that England did not have to allow Watson to become a trainer (SSF 45, PSF2 147). Thus, it was clear that England threatened to bar Watson from the Trainer position in the absence of disclosure to trainees of his HIV status and interfered with his right to keep that status confidential. "In the context of employment cases, an adverse action is any action reasonably likely to deter employees from engaging in protected activity," *Tater-Alexander,* 2008 WL 961233 at * 8, and "[t]he plain language of § 503(b) clearly prohibits a supervisor from threatening an individual with a transfer, demotion, or forced retirement unless the individual forgoes a statutorily protected accommodation." *Brown*, 336 F.3d at 1193; *see also Baugher v. City of Ellensburg,* 2007 WL 858627, *3, No. cv-06-3026-RHW, (E.D. Wash. Mar. 19, 2007) (providing additional examples of coercion, intimidation, threats, and interference). EEOC Enforcement Guidance specifically notes that "an individual [may] voluntarily disclose his/her own medical information to persons beyond those to whom an employer can disclose such information . . . as long as it's really voluntary. The employer cannot request, persuade, coerce, or otherwise pressure the individual to get him/her to disclose medical information." EEOC Enforcement Guidance: Preemployment Disability-Related

Questions and Medical Examinations, 1995 WL 1789070, *13 (October 1995); *see also Griggs*, 401 U.S. at 434 (EEOC interpretations entitled to "great deference"). Even by asking Watson to disclose his medical information under Defendant's version of the facts (DSF 37-41), Defendant violated Section 503(b).

It is also clear that the disclosure of Watson's status as HIV-positive was because of his disability, HIV. Only students placed on Watson's truck were required to complete the disclosure form (PSF 10, PSF2 160) and they had to sign the form because Watson had a communicable disease (PSF2 163-165). Moreover, there is no doubt that Watson was injured as a result of the disclosure (see the discussion of Watson's injuries, *supra* at 26; SSF2 104-116). Therefore, at a minimum there are genuine issues of material fact preventing summary judgment on Plaintiff EEOC's Section 503(b) claim.

CONCLUSION

For the foregoing reasons, Plaintiff EEOC respectfully requests the Defendant's Motion for Summary Judgment Against EEOC be denied in its entirety.

RESPECTFULLY SUBMITTED, this 19th day of May, 2008

MARY JO O'NEILL
Regional Attorney

SALLY C. SHANLEY
Supervisory Trial Attorney

/s/ Valerie L. Meyer
VALERIE L. MEYER
Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Phoenix District Office
3300 N. Central Ave., Suite 690
Phoenix, Arizona 85012

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on this 19th day of May, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Scott A. Hagen
Michael E. Blue
Ray Quinney & Nebeker, P.C.
36 South State Street, Suite 1400
P.O. Box 46385
Salt Lake City, UT 84145-0385
Attorneys for Defendant

Russell T. Monahan, Esq.
Daniel W. Morse, Esq.
Cook & Associates, P.C.
230 South 500 East, Suite 465
Salt Lake City, UT 84102
Attorneys for Intervenor

s/ Valerie L. Meyer