IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF PONTIAC, a Municipality of the State of Michigan,<br><br>Defendant. | ) | CASE NO. 94-CV-74997-DT<br><br>HON. DENISE PAGE HOOD |

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PLAINTIFF UNITED STATES' BRIEF IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT

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## CONCISE STATEMENT OF ISSUES

This is an employment discrimination action in which the Plaintiff United States alleges that the Defendant City of Pontiac has discriminated against Dennis Henderson in violation of title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111 et seq. ("ADA"). Defendant discriminated against Henderson by failing or refusing to hire him into the position of fire fighter in the Pontiac Fire Department because the City regarded Henderson as having a disability.

When it made its decision to deny employment to Henderson, the Defendant ignored Henderson's 14 years of prior fire fighting experience; his outstanding scores on Pontiac's own preemployment examinations; his state certifications as an Emergency Medical Technician, Fire Fighter and Fire Officer; and the promotions, commendations and specialized fire fighting training he has received. Instead, without conducting any individualized assessment of Henderson's abilities, the Defendant refused to hire Henderson because he had a physical condition that was disqualifying under National Fire Protection Association ("NFPA") guidelines.

Undisputed facts from pleadings, admissions, deposition testimony and the Defendant's own Rule 30(b)(6) testimony establish a prima facie case of employment discrimination under the ADA, and show that Defendant can offer no nondiscriminatory reason for its hiring decision. Further, all of the Affirmative Defenses relied upon by the Defendant are either inapplicable or are disproved by uncontested facts. Therefore, Plaintiff urges that summary judgment be entered in favor of the Plaintiff.

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## I. STATEMENT OF UNCONTESTED FACTS

### A. HENDERSON'S EDUCATION, TRAINING AND EXPERIENCE

1. Dennis Henderson permanently lost the use of his right eye in 1975. Deposition of Dennis P. Henderson, dated June 8, 1995 (Exhibit 1) at 61/13-15. Henderson has made a career of fire fighting. Id. at 36/3, 200/1-5. During his entire career as a fire fighter, Henderson has had monocular vision due to the loss of his eye. Id. at 64/3-9. Henderson has worked since 1978 as a fire fighter for the City of Wixom, gaining a broad range of relevant fire fighting experience. Id. at 142/19-21, 143/18-22. The City of Wixom promoted Henderson to the position of Sergeant in 1986 and Lieutenant in 1990. Declaration of George W. Spencer (Exhibit 2) ¶ 2. Henderson currently holds the rank of Lieutenant at Wixom and also serves as command officer, supervising and directing other fire fighters at emergency scenes, and fire inspector. Id.

2. During the course of his career as a fire fighter, Henderson has responded to hundreds of calls. Exhibit 1 at 178/21-179/1. These include structure fires, field fires, dumpster fires, automobile fires, industrial fires and hazardous materials operations. Id. at 179/2-182. In fighting these fires, Henderson has performed safely virtually every fire fighting duty at the emergency scene, including working on the entry crew and as command officer. Exhibit 2 ¶ 4. Henderson has safely operated all tools and equipment used at the fire station. Id. ¶ 6; see generally Expert Witness Report of Frank J. Landy, Ph.D (Exhibit 3) at 17-18; Expert Witness Report of William O. Monaco, O.D. (Exhibit 4) at 6-7. Henderson has also safely driven all of the fire department vehicles operated by the City of Wixom, including medic units, squads, engines, a ladder truck, a utility truck, a reserve truck and an inspector's car. Exhibit 2 ¶ 6; Exhibit 3 at 17; Exhibit 4 at 6-7.

3. Henderson has received several awards and commendations for his work as a fire

fighter, including commendations for professionalism, outstanding performance and the "Best Apparatus Driving Award" for his driving abilities. Exhibit 2 ¶¶ 6, 8. Henderson's performance throughout this time had not only been safe, but had been <u>outstanding</u> according to his Fire Chief. Exhibit 2 ¶¶ 4, 7.

4. Henderson is certified by the State of Michigan as an Emergency Medical Technician (EMT). Exhibit 1 at 112/18-113/3. Henderson also holds state certificates, issued by the Michigan Fire Fighters Training Council (MFFTC), as a Fire Fighter I, Fire Fighter II, Fire Officer I, Fire Officer II and Fire Officer III. <u>Id.</u> at 116/5-117/19. Henderson has also completed other MFFTC training. <u>Id.</u> at 117/23-118/1. Henderson has attended numerous other college classes, training programs and other educational programs related to fire fighting, including courses on fire investigation, hazardous materials, awareness level and operations level, and has attended fire ground incident command school. <u>Id.</u> at 116/5-121/4.

B. <u>HENDERSON'S APPLICATION WITH AND REJECTION BY PONTIAC</u>

5. Sometime prior to October 8, 1991, Dennis Henderson applied for a fire fighter position with the City of Pontiac. Defendant's Responses to Plaintiff's First Request for Admission of Facts (Exhibit 5) No. 13. The City processed Henderson's application and scheduled and administered Henderson's pre-employment examinations. Exhibit 5 Nos. 14, 15; Rule 30(b)(6) Deposition of the Defendant, dated May 8, 1995 (Exhibit 6) at 66-70. Henderson took and passed all the tests, including the written, oral and physical agility examinations. Rule 30(b)(6) Deposition of the Defendant, dated April 27, 1995 (Exhibit 7) at 83/3-10; Exhibit 5 No. 15.

6. The physical agility test, which Henderson passed, is meant to simulate the activities of being a fire fighter. Deposition of Robert Lamson (Exhibit 8) at 22/22-23/4; Deposition of Lawrence Lyons (Exhibit 9) at 15/18-17/13. The physical agility examination includes a hose

drag, hose coupling, ladder positioning and climbing, simulated rescue of an injured person at an emergency scene, joist walk and forcible entry. Description of Physical Agility Examination (Exhibit 10); Exhibit 8 at 22. Henderson performed so well on the physical agility test that the persons administering the test were not aware that he had the use of only one eye. Exhibit 8 at 22/22-23/4.

7. Henderson's combined score on the examinations was so high that he placed 7th out of 107 persons on the City's Fire Civil Service Register ("Register"). City of Pontiac Fire Civil Service Register (Exhibit 11) at 1. After his scores were compiled and he was placed on the Register, Henderson was certified for hire by the City's Fire Civil Service Commission ("Commission") on May 5, 1992. Minutes of the Fire Civil Service Commission, dated May 5, 1992 (Exhibit 12). The City then telephoned Henderson, made him a conditional job offer and scheduled him for a medical examination. Exhibit 6 at 30, 43/2-7, 52/2-5; Medical Records of Dennis Henderson, dated July 15, 1992 (Exhibit 13). After the medical examination, Judy Wilson, the Pontiac Personnel Department Supervisor, scheduled Henderson for an ophthalmological examination, which took place on July 16, 1992. Exhibit 6 at 50/25-53/17, 56/5-18; Exhibit 13.

8. The role of the ophthalmologist who examined Henderson was to determine only whether an applicant met standards issued by the National Fire Protection Association ("NFPA"). Deposition of Dr. Dierdre Holloway (Exhibit 14) at 27, 70/22-71/16, 114-115/6. The relevant NFPA standard automatically excludes all persons with monocular vision from fire fighting employment. NFPA 1001 ch. 2-2 at 1001-6, ch. 2-2.7.1.9 at 1001-10 (Exhibit 15); NFPA 1582 ch. 1-4 at 1582-5, ch. 3.2.1 at 1582-8 (Exhibit 16); Defendant's Responses to Plaintiff United States' Interrogatories (Exhibit 17) No. 2.

9. The ophthalmologist who examined Henderson determined only whether he met the

NFPA medical standards and made no recommendations about his ability to perform any fire fighting functions. Exhibit 14 at 27, 70/22-71/16, 114-115/6. At the time of Henderson's examination, that doctor had never seen any descriptions of the City's fire fighting functions; she had seen and applied only the NFPA standards. Id. 61/21-62/15, 74/6-75. Further, the ophthalmologist made no findings as to any risk Henderson might pose, including no findings as to the nature, duration, severity, imminence or likelihood of any believed risk of harm. See Report of Dr. Dierdre Holloway (Exhibit 19).

10. The results of the ophthalmological examination, indicating that Henderson had monocular vision, were stamped as received by the City Personnel Office on August 3, 1992. Exhibit 19. On August 3, 1992, the same day the City received the ophthalmological records, the City of Pontiac rejected Henderson's application for a fire fighter position. Letter from Electra V. Fulbright to Dennis P. Henderson, dated August 3, 1992 (Exhibit 20). Henderson was informed of the rejection by letter, dated August 3, 1992, from the City's Personnel Director, which stated that he was rejected because he had monocular vision and therefore did not meet the NFPA standards. Id. The Defendant has specifically admitted that "[t]he decision to reject Dennis Henderson's employment application for an entry-level fire fighter position in the City of Pontiac Fire Department was made on or before August 3, 1992." Exhibit 5 No. 26.

11. The Commission met on July 7, 1992, well prior to the City receiving Dr. Holloway's report and did not meet again until August 5, 1992, two days after the City had already rejected Henderson's application. Minutes of the Civil Service Commission, dated July 7, 1992 and August 5, 1992 (Exhibit 21). The Commission played no part in determining that Henderson had failed the medical examination. Exhibit 9 at 50/22-51/7. Because the Commission did not meet between the time of Henderson's medical examinations and his August 3, 1992, rejection, the

Commission had no input into the decision to reject Henderson.

12. Before the City's August 3, 1992 rejection of Henderson, no one from the City of Pontiac consulted Henderson or his Fire Chief in Wixom, George Spencer, in any way regarding Henderson's abilities to perform any fire fighting functions in light of his monocular vision. Exhibit 1 at 242/10-12; Exhibit 2 ¶ 9. In addition, before the August 3, 1992 rejection, Defendant did not consider whether any measures or accommodations might mitigate any risks Defendant believed Henderson's monocular vision might pose. Exhibit 5 Nos. 45, 51, 52, 76. Most applicants for hire as a City of Pontiac entry-level fire fighter lack prior fire fighting experience. Deposition of Malachi McQueen, dated May 25, 1995 (Exhibit 31) at 54/19-25.

13. Henderson, by letter dated September 23, 1992, wrote to the Commission requesting a reconsideration of his rejection. Letter from Dennis Henderson to the Pontiac Fire Civil Service Commission, dated September 23, 1992 (Exhibit 22). A commissioner admitted that the Commission did not have the power to overturn the City's decision to reject Henderson, did not have the power to place Henderson back on the hiring list, and considered Henderson's appeal only as "a courtesy" to Henderson. Deposition of Myra Kruger (Exhibit 23) at 61/3-25, 63/15-24. Another commissioner was unsure whether the Commission even had the power to review the City's determination. Exhibit 9 at 50/12-51/7.

14. The Commission requested and received legal advice from the City's Law Department; on November 10, 1992, City Attorney John Claya sent a memorandum regarding Henderson to the Commission, advising that because Henderson did not meet the NFPA standards, he could not be hired. Memorandum from City Attorney John C. Claya to the Fire Civil Service Commission, dated November 10, 1992 (Exhibit 24). The City's Fire Chief, Robert Lamson, notified Henderson, by letter dated December 7, 1992, that the Commission denied his

reconsideration. Letter from Robert Lamson to Dennis Henderson, dated December 7, 1992 (Exhibit 25).

15. The Defendant admitted that because Henderson was not permitted to commence working as an entry level fire fighter, on August 21, 1992 the City hired Anthony Collier, whose combined scores and Register ranking were lower than those of Henderson. Exhibit 5 No. 57. The City has also admitted that if Henderson had had binocular vision he would have been hired as a fire fighter. Exhibit 5 Nos. 17-20, 58, 59; Rule 30(b)(6) Deposition of the Defendant, dated April 28, 1995 (Exhibit 26) at 90/10-13.

16. Henderson filed a charge against the City with the Equal Employment Opportunity Commission ("EEOC") on December 16, 1992 (Charge No. 230-93-0467), alleging that the City had discriminated against him by failing or refusing to hire him for the position of fire fighter because of his disability. EEOC Charge and Notice of Charge (Exhibit 27). Henderson's charge was filed timely with the EEOC within 180 days of August 3, 1992, the date the City notified Henderson by letter that he was denied the position. Id. Defendant received notice of the charge in December 1992. Id.; Exhibit 5 No. 56. On August 24, 1993, the EEOC determined that reasonable cause existed to believe that the City had discriminated against Henderson in violation of title I of the ADA. EEOC Determination Letter, dated August 24, 1993 (Exhibit 28). The EEOC notified the Defendant that attempts at conciliation failed on September 17, 1993. EEOC Notice of Conciliation Failure, dated September 17, 1993 (Exhibit 29).

C. PONTIAC AS EMPLOYER OF FIRE FIGHTERS

17. The pertinent Collective Bargaining Agreement ("Agreement") between the City of Pontiac and the Pontiac Fire Fighters Union, Local #376, International Association of Fire Fighters, governs every aspect of a fire fighters employment by the City of Pontiac. Exhibit 26 at 80/13-25,

82/1-10; Collective Bargaining Agreement (Exhibit 30). The contract is signed by the City, not the Commission, and governs wages, seniority, promotions, layoffs, discipline, performance evaluations, sick leave, vacation, disability, insurance, and pensions, among other terms and conditions of employment. Exhibit 30. The Agreement requires that performance evaluations be kept in the fire fighter's official personnel file to be maintained by the City's Personnel Department. Exhibit 30 at 35. It also provides a method for resolving grievances rejected for resolution by the Fire Civil Service Commission. Exhibit 30 at 2.

18. The City of Pontiac Personnel Department is responsible for maintaining personnel files for all fire fighter applicants and incumbent fire fighters. Exhibit 6 at 21/18-22/7. The Personnel Department is responsible for developing the application and advertising for fire fighter applicants and screening those applications to insure the applicant meets the minimum qualifications for hire. Id. at 38/17-39/5; Exhibit 23 at 20/9-16. For those applicants who meet the minimum standards the Personnel Department then administers written, oral and physical agility tests. Id. at 39/6-42/11. At the conclusion of the testing process, the Personnel Department ranks the applicants on an eligibility list (the Register). Id. at 42/12-18. When a Fire Department vacancy occurs the Fire Chief or the Mayor's office requests the Commission to certify the highest ranking name of the Register for hire. Id. 42/2-43/1; Exhibit 26 at 33/15-34/3. When the Commission certifies an applicant, the Personnel Department notifies the applicant and makes a conditional offer of employment and, upon completion of the required medical examination, the applicant is then hired by Personnel Department as a fire fighter. Exhibit 31 at 43/1-10. The City, not the Commission, contracts with doctors to examine fire fighter applicants and incumbents. Contract between City of Pontiac and North Oakland Medical Center (Exhibit 32); Exhibit 14 at 42/18-44/8.

19. The minimum qualifications for fire fighter, as well as what written, physical and oral examinations will be administered are determined by the City, the City's Fire Department and the City's Fire Fighters Union, Local #376. Exhibit 26 at 28/5-31/2.

20. The Commission has no employees, has no budget, and meets on City property. Exhibit 7 at 26/13-18, 63/25-64/11; Exhibit 23 at 16/9-10. A City employee records minutes of Commission hearings, and those minutes are maintained by the City Clerk. Exhibit 23 at 19/17-20/3; Exhibit 6 at 73/14-23. The Commission has no power to hire fire fighters. Exhibit 31 at 15/13-15. It plays no role in selecting the tests that are administered to fire fighters. Id. at 17/11-14; Exhibit 9 at 22/18-25, 23/1-4.

21. Act 78 ("Act") adopted by the City, authorizes the creation of a Civil Service Commission. Mich. Comp. Laws Ann. § 38.501 et seq. (West 1995) (Exhibit 33); Pontiac, Mich., Pontiac Code § 12-18. The Commission is composed of three members, one appointed by the mayor with the approval of the City Council, one appointed by the Fire Department and one appointed by the other two Commissioners. Exhibit 33 § 38.502, sec. 2. The Mayor retains the right to remove any Commission members for cause. Exhibit 33 § 38.504, sec. 4.

22. The City's Law Department is required by the City Charter to provide legal counsel only to "the City and its Departments." Pontiac City Charter (Exhibit 34) § 4.202. The City's Law Department has provided legal counsel to the Commission on numerous occasions. See, e.g., Exhibit 24; Letter from Thomas Fleury to Allison J. Nichol, dated September 15, 1995 (Exhibit 35); Minutes of the Pontiac Fire Civil Service Commission (Exhibit 36).

D. THE CITY'S RATIONALE FOR THE HIRING DECISION

23. The City has admitted that the sole reason for Henderson's rejection was the fact

that his visual condition did not meet the NFPA standards,[1] standards which the Defendant admits are not job-related or consistent with business necessity. See infra at 35. The City has also admitted that the standard was applied "strictly," and that no individual determination was made as to whether Henderson could perform the functions of the position. Exhibit 7 at 70/18-25.

24. The Defendant admitted that Henderson met every minimum qualification for hire except for his vision. Exhibit 5 No. 20. Pontiac also admitted that Henderson had the requisite experience, education and training to be hired as a fire fighter in the City of Pontiac. Id. Nos. 22-24. The Defendant also admitted that it did not make a determination as to whether Henderson had the requisite skill to be a fire fighter. Exhibit 5 No. 21.

25. The Defendant has admitted that, when the decision was made to deny employment to Henderson, the City did not consider ways to reduce any risk that it believed might be posed by hiring Henderson. Id. No. 45. Further, the Defendant has specifically admitted that it did not consider "whether any accommodations existed" or "could be made" which would enable Henderson to perform the functions of the entry-level position of fire fighter. Id. Nos. 51-52. Similarly, Pontiac did not "consider whether the functions of the entry-level position of fire fighter could be restructured so that Henderson could safely perform those functions." Id. No. 76.

26. Defendant has stated that the essential functions of the fire fighter position in the City of Pontiac are contained in a 1985 fire fighter job description. Exhibit 17 No. 10; Exhibit 18. Defendant has asserted in this litigation that Henderson's failure to meet the NFPA standards

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[1]Exhibit 5 Nos. 17-19, 20; Exhibit 7 at 70/1-4, 70/11-21, 82/20-83/2. Defendant's only basis for concluding that Henderson was unqualified was that: "The NFPA Standards state that 'absence of an eye' is cause for rejection for employment. The 1992 amended version of the NFPA Standards require binocular vision/corrected far visual acuity of 20-30 which disqualified Plaintiff [Henderson] from employment as a firefighter." Exhibit 17 No. 2. The City also admitted that it decided to deny employment to Henderson because: "It was determined that Plaintiff was monocular and wore a prosthesis in his right eye which was the basis for the rejection." Id. No. 9.

renders him unable to perform the functions described on that job description, Exhibit 17 Nos. 9-11, although Defendant has conceded that the standards are not job-related or consistent with business necessity (see infra at 35), and although uncontroverted evidence demonstrates that Defendant did not individually assess Henderson's abilities prior to his rejection. Facts ¶¶ 23-25.

27. Defendant has testified in this litigation, through its Fed. R. Civ. P. 30(b)(6) designee, that at the time the City rejected Henderson for the position, it assumed that, since Henderson did not meet the NFPA standards, (standards it now concedes are not job-related and consistent with business necessity see infra at 35), he could not perform the essential functions of fire fighter, despite uncontroverted evidence that Defendant did not individually assess Henderson's abilities prior to his rejection.[2]

## II. STANDARD FOR SUMMARY JUDGMENT

Under Fed. R. Civ. P. 56(c), summary judgment is proper only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmovant. Id. at 248. An

[2]Among the tasks the City now claims it assumed Henderson would be unable to perform are: participating in fire prevention inspections, sketching buildings, estimating approximate distances, identifying particular fire hazards during an inspection, participating in training programs, performing routine cleaning and maintenance of fire station facilities, grounds and equipment, performing salvage operations, inspecting and testing equipment, apparatus and fire hydrants, identifying whether a coupling was connected properly or inspect a truck or other vehicle for possible damage. Exhibit 26 at 146/9-158/16. In addition, despite Defendant's failure to individually assess Henderson's abilities prior to his rejection, Defendant now claims that it assumed Henderson's monocular vision prevented him from driving any fire department vehicles because Defendant assumed Henderson could not judge the distance between vehicles and could not see on one side. Id. at 157/3-8. There is no evidence that Defendant investigated Henderson's actual abilities to perform any of these functions prior to Henderson's rejection. See Facts ¶¶ 23-25. In fact, Henderson has performed all these functions safely during his entire time at Wixom. See Facts ¶¶ 1-4.

issue of fact concerns "material" facts only if establishment thereof might affect the outcome of the lawsuit under governing substantive law. Id. The burden of proving that no issue of material fact exists falls upon the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A court must view all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and must resolve all reasonable doubts against the moving party. Anderson, 477 U.S. at 255, 261. The undisputed facts of this case support a finding of summary judgment in favor of Plaintiff.

## III. PRIMA FACIE CASE

In order to prove employment discrimination under the ADA a complainant must show that "a covered entity discriminated against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Thus, to establish a prima facie case, a plaintiff must establish that (1) s/he is an individual with a disability within the meaning of the ADA; (2) s/he is qualified, with or without reasonable accommodation, to perform the essential functions of the job which s/he seeks; and (3) s/he has suffered an adverse employment action because of the disability. Spath v. Berry Plastics Corp., 900 F. Supp. 893, 902 (N.D. Ohio. 1995); see also White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995).

Undisputed facts demonstrate that Plaintiff has established a prima facie case of employment discrimination under the ADA, because: (1) Dennis Henderson is an individual with a disability under the ADA, because the Defendant has regarded him as having a disability; (2) Henderson is qualified to perform the essential functions of the fire fighter position; and (3) the

City of Pontiac denied Henderson employment as a fire fighter because of his perceived disability.[3]

A. DENNIS HENDERSON IS AN INDIVIDUAL WITH A DISABILITY UNDER THE ADA BECAUSE THE DEFENDANT HAS REGARDED HENDERSON AS HAVING A DISABILITY

The ADA defines "disability" as follows:

> The term "disability" means, with respect to an individual –
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

As the definition makes clear, a person does not have to have an actual disability (that is, an impairment that substantially limits a major life activity) in order to demonstrate that s/he has a "disability" within the meaning of the Act. Instead, a person can show that s/he has a disability through the third prong of the definition of disability: "being regarded as having such an impairment." Under this prong, an individual satisfies the definition of disability if the employer treats or perceives the individual as having an impairment that substantially limits a major life activity. Id. § 12102(2)(C); 29 C.F.R. § 1630.2(l).

The "regarded as" prong is central to effecting the ADA's prohibition against rejecting applicants because of untested assumptions about the limiting effect of physical or mental conditions. The ADA seeks to focus on a person's abilities rather than his or her physical condition by requiring employers to make individualized determinations of an applicant's condition, and the extent to which that condition actually limits the applicant from working in the

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[3] The City of Pontiac is both a "covered entity" and an "employer" under title I of the ADA. See 42 U.S.C. §§ 12111(2), 12111(5)(A), §2000e(a).

job. To this end, the Act protects not only those individuals who actually have a disability, but also persons who are "regarded" by employers as having a disability. 42 U.S.C. § 12102(2)(C).

In School Board of Nassau Co. v. Arline, 480 U.S. 273 (1987), the Supreme Court explained: "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Id. at 284; see also Taylor v. United States Postal Service, 946 F.2d 1214, 1218 (6th Cir. 1991). In passing the ADA, Congress reaffirmed Arline's holding that "discrimination on the basis of mythology" was "precisely the type of injury [the "regarded as" provision] sought to prevent." Id. at 285; see, e.g., H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 53 (1990); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 30 (1990). As Chief Judge Posner of the Seventh Circuit has stated:

> 'Disability' is broadly defined. It includes not only 'a physical or mental impairment that substantially limits one or more of the major life activities of [the disabled] individual,' but also the state of 'being regarded as having such an impairment.' §§ 12102(2)(A), (C). The latter definition, although at first glance peculiar, actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 541 (7th Cir. 1995).

The regulations to title I of the ADA[4] provide three different ways of "being regarded as having such an impairment," two of which are relevant to this case. An individual is "regarded as"

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[4]Regulations to title I of the ADA were promulgated by the Equal Employment Opportunity Commission ("EEOC") and are contained in 29 C.F.R. § 1630. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

having a disability if he or she:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; ... or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l).

The term "physical or mental impairment" is defined as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs...." 29 C.F.R. § 1630.2(h)(1) (emphasis added). The Defendant has admitted that Henderson has an anatomical loss, the loss of his eye. Exhibit 5 No. 29. If Defendant treated Henderson as if this impairment substantially limited him in a major life function, Henderson has a "disability" within the meaning of the ADA. 29 C.F.R. § 1630.2(l)(3).

In the present case, it is clear as a matter of law that the Defendant has treated Henderson as if he had an impairment that substantially limited two major life activities: seeing and working.[5] Indeed, as demonstrated below, this case is precisely the type of case Congress sought to cover by including the "regarded as" provision in the ADA. Given Henderson's years of fire fighting experience, multiple state certifications, education and test scores, there is no doubt that he deserved the conditional job offer made to him by the City. The City has admitted repeatedly that the sole reason he was denied employment was his vision, and that that denial was based on a strict application of its exclusionary standards -- no individualized assessment of Henderson's

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[5]Seeing and working are both major life activities. 29 C.F.R. § 1630.2(i).

abilities or limitations was ever done.[6]

1. Henderson Has a "Disability" under the ADA Because the Defendant Has Regarded Him as Being Substantially Limited in the Major Life Activity of Seeing

Uncontradicted evidence shows that the City regarded Henderson as being substantially limited in the major life activity of seeing.[7] The term "substantially limits" includes:

> Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1)(ii).

Pontiac has regarded Henderson as having a disability if it considered Henderson to be "significantly restricted as to the condition, manner or duration" of performing the activity of seeing as compared to the average person in the general population. Uncontradicted evidence shows that when the City rejected Henderson, it considered that his vision was significantly restricted as compared to the average person.

First, the City has assumed that Henderson would be unable to perform certain functions that require no unique visual abilities. Among the functions the City determined that Henderson could not perform are "cleaning and maintenance of fire station facilities, grounds and equipment," "inspecting and testing equipment" "conducting classes," "sketching buildings," and giving

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[6]See Facts ¶¶ 15, 23-25. Further evidence that the City regards Henderson as having a disability comes from paragraph 6 of the Defendant's Answer, which states: "Defendant affirmatively pleads that Dennis P. Henderson's disability prohibited him from performing the essential functions of the position of firefighter." Defendant's Amended Affirmative Defenses (Exhibit 37) ¶ 6.

[7]Both the case law and the EEOC's Interpretive Guidance dictate that a court should "first examine whether [the plaintiff's] impairment substantially limits a major life activity other than working." Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 & n.10 (5th Cir. 1995). Only if the court finds that the plaintiff is not substantially limited in any other major life activity should it proceed to consider the major life activity of working. See 29 C.F.R. Pt. 1630, App. § 1630.2(j).

"estimates of distances," "participating in training programs," "conducting inspections," and "driving the vehicles." Facts ¶¶ 26, 27.

Amazingly, the Defendant also rejected Henderson because it believed that his vision -- the lack of an eye -- would prevent him from participating in the routine cleaning and maintenance of fire station facilities, grounds and equipment. Facts ¶¶ 26, 27. The City also asserts that Henderson's vision would prevent him from "visualizing" equipment in a way that would allow him to clean it. Facts ¶¶ 26, 27. It is uncontroverted that the City believed that Henderson's monocular vision prevented him from performing these simple visual functions; consequently, it is uncontroverted that the City believed that Henderson's vision was significantly restricted as compared to the average person in the general population.

Fundamentally, the City's stated reason for its refusal to hire Henderson is its belief that monocular vision diminishes depth perception and peripheral vision as compared to the average person. See Exhibit 26 at 140/21-158/18. In addition to the functions detailed above, the City testified via deposition that Henderson could not perform salvage operations or identify fire causes because of Henderson's peripheral vision and depth perception. Facts ¶¶ 26, 27. The City believed that Henderson "may not have been able to identify a particular area or see where a particular problem may have been because of, again, the depth perception and the peripheral vision." Facts ¶¶ 26, 27. The City also believed that Henderson's vision prevented him from driving because he would "misjudg[e] the distance between vehicles, not being able to see on one particular side..." Facts ¶¶ 26, 27.

These misassumptions of the Defendant show convincingly that the Defendant regarded Henderson as being substantially impaired in the major life activity of seeing. Consequently, Henderson is an individual with a disability within the meaning of the ADA.

2. Henderson Has a "Disability" under the ADA Because the Defendant Has Regarded Him as Being Substantially Limited in the Major Life Activity of Working

An individual is substantially limited in working if he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Thus, there are two alternative means for a plaintiff to prove that he or she is substantially limited in working, either of which is sufficient to establish a substantial limitation.

Undisputed facts demonstrate that the City "regarded" Henderson as unable to perform both an entire "class of jobs" -- the class of fire fighting jobs -- and "a broad range of jobs in various classes." -- for example, public safety jobs and jobs requiring driving. The City therefore "regarded" Henderson as having a disability because it regarded him as being substantially limited in the ability to work.

a. The City regarded Henderson as being disqualified from the class of fire fighting jobs.

The applicable regulations define a "class of jobs" as a group of jobs requiring the same "training, knowledge, skills or abilities." 29 C.F.R. 1630.2(j)(3)(ii)(B). Because the determination of whether an individual is excluded from a class of jobs draws content from an inquiry into the individual's "job expectations and training," E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1101 (D. Haw. 1980), an individual is substantially limited in working if he or she is significantly restricted in the ability to work in his or her "chosen field." Id. at 1099.[8]

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[8] See also 29 C.F.R. § 1630.2(j)(3)(i) (plaintiff's restrictions must be "compared to the average person having comparable training, skills and abilities"); Gupton v. Virginia, 14 F.3d 203, 205 (4th Cir.) (question is whether plaintiff was "foreclosed . . . generally from obtaining jobs in her field"), cert. denied, 115 S. Ct. 59 (1994); cf. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1126 (11th Cir. 1993) ("probable" that individuals with skin condition were substantially limited in working where fire department's "no beard" rule prevented them from working as fire fighters).

It is clear that the City regarded Henderson's vision as disqualifying him from working in his "chosen field." It is undisputed that Henderson has made fire fighting his chosen field, having worked as a fire fighter and officer since 1978. Facts ¶ 1. In addition, he has attended specialized fire fighting training and holds state certifications in paramedics and fire fighting. Facts ¶ 4. Nonetheless, the City regarded Henderson as unqualified for any line position within the fire department simply because of his vision. Facts ¶¶ 15, 23, 26, 27.

Undisputed facts demonstrate that the City regarded Henderson as being disqualified from the job classification of fire fighting and related occupations.[9] The City rejected Henderson because his monocular vision prevented him from meeting NFPA standards. Facts ¶¶ 15, 23, 26, 27. Those standards, which are issued nationally, purport to apply to all "full-time or part-time employees and paid or unpaid volunteer[]" fire fighters in all "organizations providing rescue, fire suppression and other emergency services, including public, military, private, and industrial fire departments." Exhibit 16 ch. 1-1.1, 1-1.2 at 1582-5. Those standards require automatic exclusion of all individuals with monocular vision. Id. ch. 3-2 at 1582-8; Exhibit 15 ch. 2-2 at 1001-6, 2-2.7.1.9 at 1001-10. Henderson's monocular vision would thus exclude him from any fire department across the United States that strictly applies the NFPA standards.

Further, Defendant has admitted that it believed that Henderson's monocular vision would render him unsafe for any fire fighter position within its fire department. Facts ¶¶ 15, 23, 26, 27. If other employers were to adopt the same misperceptions about monocular vision as the City did,

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[9]Several recognized job classification schemes list fire fighting occupations as a separate classification. See U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook 297-298 (1994); U.S. Office of Personnel Mgt., Handbook of Occupational Groups and Series 13 (1993); U.S. Dep't of Commerce, Economics and Statistics Admin., Bureau of the Census, 1990 Census of Population and Housing: Classified Index of Industries and Occupations xviii (1992).

Henderson would be precluded from all fire fighter positions. Where an employer refuses to hire an individual because of a perceived impairment, a legal presumption arises "that all employers offering the same job or similar jobs would use the same requirement or screening process." E. E. Black, Ltd., 497 F. Supp. at 1100; accord Cook v. State of Rhode Island, 10 F.3d 17, 25-26 (1st Cir. 1993).[10]

Defendant has testified that it believes Henderson's monocular vision, because it does not meet the standards, prevents Henderson from being able to, for example: perform fire suppression and search and rescue tasks, sketch buildings, estimate distances, drive and inspect fire department vehicles, conduct fire inspections, identify fire hazards, check hose connections, attend training, do routine cleaning and maintenance of equipment, participate in salvage operations. Facts ¶¶ 26, 27. These are functions critical to fire fighter, engineer, fire officer, paramedic, EMT or any other position in any fire department. Therefore, the City "regarded" Henderson's monocular vision as substantially limiting him in his ability to perform the class of fire fighting jobs.[11]

b. The City also regarded Henderson as disqualified from a broad range of jobs in various classes

The applicable regulations define a "broad range of jobs in various classes" as a group of jobs not requiring the same "training, knowledge, skills or abilities" as the job from which the

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[10]Congress endorsed this rule in the legislative history to the ADA. See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 30 (person who is rejected for a job on the basis of a perceived disability is "regarded as" disabled "whether or not the employer's perception was shared by others in the field"); accord 29 C.F.R. Pt. 1630, App. § 1630.2(l).

[11]A person who is restricted in the ability to perform only one position is not substantially limited in working. 29 C.F.R. 1630.2(j). However, it cannot be credibly argued that Pontiac regarded Henderson as being significantly restricted in only one position. On the contrary, Pontiac regarded Henderson as being unable to work in any position in the class of fire fighting: fire fighter, fire officer, engineer, paramedic, EMT. Further, the City regarded Henderson's vision as rendering him unable to work in virtually all public safety and myriad other employment positions.

individual has been excluded. 29 C.F.R. § 1630.2(j)(3)(ii). The undisputed facts of this case show that the City regarded Henderson's monocular vision as preventing him from performing a multitude of tasks that would affect virtually all public safety jobs and myriad other employment positions as well, including any position that requires driving, or inspecting and cleaning equipment.

The City testified that it believes Henderson would be unable to perform job functions -- such as driving, conducting inspections, attending training, etc. -- that are central to public safety jobs and the plethora of jobs requiring operation of vehicles. Facts ¶¶ 26, 27. The City also testified that Henderson's monocular vision prevented him from sketching buildings and estimating distances, conducting routine cleaning and maintenance of facilities, cleaning equipment and inspecting vehicles for damage. Facts ¶¶ 26, 27. These tasks apply to a broad range of jobs beyond just public safety jobs. For example, inability to drive would render Henderson unqualified for positions including sanitation worker, taxi driver, delivery person; inability to sketch buildings would also render Henderson unqualified to be an architect or hold a similar job; inability to perform routine cleaning would render Henderson unqualified for all domestic or professional cleaning or maintenance jobs; and inability to inspect vehicles for damage would prevent Henderson from qualifying to be, for example, an insurance adjuster. These examples show that the City's opinion of Henderson's visual capabilities would disqualify him from a broad range of jobs in various classes.

Thus, undisputed facts demonstrate that Henderson has a disability under the ADA because Pontiac has regarded him as being substantially limited in the major life activities of seeing or

working.[12]

B. DENNIS HENDERSON IS QUALIFIED

The second element of the prima facie case requires that Plaintiff demonstrate that he is qualified, with or without reasonable accommodation, to perform the essential functions of the job which he seeks. To make such a showing, the Plaintiff must demonstrate that he meets the necessary prerequisites for the job, such as education, experience, training and the like, and that he can perform the essential functions of the position. 42 U.S.C. § 12112(a); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1111 (8th Cir. 1995).

The facts of the case and Defendant's admissions clearly demonstrate that Henderson was qualified for the entry-level fire fighter position. Henderson passed all of the entry level examinations, selected and administered by the Defendant, including the fire fighter physical agility examination. Facts ¶¶ 5, 6. In fact, his performance on the examinations placed him seventh out of more than 100 persons on the City of Pontiac Civil Service hiring list. Facts ¶ 7.

By any objective measure Henderson had the skills, education and experience for the fire fighter position and could perform its functions. The State of Michigan certified Henderson as qualified, in that Henderson held licenses for the position of EMT and was certified by the Michigan Fire Fighters Training Council not only as a beginning fire fighter (FF I), but also as an advanced fire fighter (FF II) and fire officer (FO I, II and III). Facts ¶ 4. In addition, at the time he applied Henderson had already gained 14 years of fire fighting experience, held the rank of Lieutenant with the Wixom Fire Department and safely and satisfactorily performed all of the functions of fire fighter. Facts ¶¶ 1-3. At the time of his application to Pontiac, Henderson had

[12]Because the Defendant has regarded Henderson as having a disability, summary judgment should also be granted against Defendant on Affirmative Defense Numbers 6 and 11 (whether Henderson is "disabled" within the meaning of the ADA). Exhibit 37 ¶¶ 6, 11.

responded to hundreds of fire and emergency calls of various types, operated all types of fire vehicles and equipment, received commendations, and attended many training courses. Facts ¶¶ 1-4. Henderson's performance throughout this time had not only been safe, but had been outstanding according to his Fire Chief. Facts ¶ 3. Henderson was thus far more qualified than most fire fighter applicants, who generally lack any prior fire fighting experience. Facts ¶ 12.

Moreover, the City obviously found Henderson to be qualified when it made him a conditional job offer, which occurred after the City's Civil Service Commission had certified him for hire on May 5, 1992. Facts ¶ 7. Further, Henderson was denied the job solely due to the Defendant's blanket exclusion of persons with monocular vision, an exclusion based on standards the Defendant conceded are not job-related and not due to any individualized assessment of Henderson's actual abilities, which are clearly demonstrated by his years of outstanding performance at Wixom. Facts ¶¶ 1-4, 15, 23.

### C. THE DEFENDANT DISCRIMINATED AGAINST DENNIS HENDERSON IN EMPLOYMENT BECAUSE OF HIS PERCEIVED DISABILITY

The final element of the prima facie case requires that Plaintiff establish that some adverse employment decision was made on the basis of disability. This element is established clearly by Defendant's repeated admissions that Henderson was not hired by the City of Pontiac solely because of his monocular vision, and that he would have been hired but for his vision. Facts ¶¶ 15, 23, 26, 27. Instead of demonstrating a nondiscriminatory reason for its hiring decision, the Defendant is relying on numerous Affirmative Defenses. It is important to remember that, in order to be shielded from liability because of any of its Affirmative Defenses, the Defendant must plead affirmatively the defense, and, further, Defendant bears the burden of proving each defense. Defendant has either failed to properly plead its defenses, or cannot make out the elements of its defenses. Consequently, none of the affirmative defenses shield the Defendant from liability.

## IV. PLAINTIFF SHOULD BE AWARDED SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSE NUMBER EIGHT: THE "PARTIES" DEFENSE

Defendant has asserted, as an affirmative defense, that Plaintiff has failed to join a necessary party to this litigation, the Fire Civil Service Commission ("Commission"), which Defendant contends was responsible for the decision not to hire Henderson.[13] Summary judgment for Plaintiff should be awarded on this defense because the Commission is a part of the City, and not a separate legal entity. Even if the two are separate, the City, rather than the Commission, made the discriminatory decision to reject Dennis Henderson's employment, after the Commission had certified him for hire; the City, rather than the Commission, is the employer of its fire fighters; and, in any event, the City is liable for perpetuating any discrimination by the Commission.

### A. THE CITY AND THE COMMISSION ARE NOT SEPARATE LEGALENTITIES

The Commission functions as a part of the City of Pontiac and not, as Defendant claims, a separate legal entity. Defense counsel admitted at deposition that, in fact, the Commission is part of the City.[14] Act No. 78, adopted by the City, authorizes the creation of a civil service commission "in each city, village or municipality of any population whatsoever having a fire and/or police department...." Exhibit 33 § 38.501. The Commission's only function in the hiring process is to certify the testing and other results determined by the City. Facts ¶¶ 17-20.

The Commission enjoys none of the indicia of a separate legal entity. The Commission is composed of three members, one of whom is appointed by the Mayor with approval of the city council, one of whom is appointed by the Fire Department and the third of whom is appointed by the first two commissioners. Exhibit 33 § 38.502. The Mayor retains the right to remove any

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[13] See Exhibit 36; Exhibit 17 No. 26; Exhibit 35. The second part of Affirmative Defense No. 8, that Henderson is a necessary or proper party, is discussed infra at 38-40.

[14] Exhibit 31 at 9-10.

commission member for cause. Exhibit 33 § 38.501. The Commission has no employees, has no budget, meets on city property, and its minutes are recorded by an employee of the Personnel Department and retained by the City Clerk. Facts ¶ 20. The City's Law Department, required by the City Charter to provide counsel only to "the City and its Departments" provides legal counsel to the Commission.[15] Facts ¶¶ 14, 22. In addition, neither the City Charter nor the Act grants the Civil Service Commission specific or implied authority to sue or be sued[16] or to retain separate legal counsel.[17] Significantly, Defense counsel in this action have asserted a privilege over communications among it, the City and the Commission.[18] Given this combination of factors, Defendant cannot credibly argue that the Fire Civil Service Commission enjoys any legal status other than a part of the City of Pontiac.

### B. EVEN IF THE CITY AND THE COMMISSION ARE SEPARATE, THE CITY IS STILL LIABLE FOR THE DISCRIMINATORY EMPLOYMENT DECISION

#### 1. The City Made the Decision to Reject Dennis Henderson for a Fire Fighter Position

The facts surrounding Defendant's refusal to hire Dennis Henderson show that the City,

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[15]It is noteworthy that the Law Department issued the legal opinion to the Commission on interdepartmental memorandum stationary, rather than on letterhead. Exhibit 24.

[16]The Act at section 38.509 enumerates the powers and duties of the commission, but nowhere does it grant the Commission either express or implied authority to sue or be sued. In Michigan, the powers of administrative boards and commissions created by statute are limited to those powers conferred expressly by statute or by necessary and fair implication of the statute; those powers should not be extended by implications beyond what is necessary. Coffman v. State Bd. of Examiners in Optometry, 331 Mich. 582, 590, 50 N.W.2d 322, 325 (1951). In addition the Michigan Home Rule City Act, under which the City was chartered, also does not grant the Commission the power to sue or be sued. Mich. Comp. Laws Ann. § 117.1 et seq.

[17]See Op. Mich. Att'y Gen. No. 4983, 520 (June 25, 1976) (stating that the Act does not authorize a civil service commission to retain legal counsel; this authority is vested only in the mayor and city counsel).

[18]Exhibit 31 at 9-10.

rather than the Commission, acted as the employer and made the decision not to hire Henderson, even though the Commission had certified him for hire. Sometime prior to October 8, 1991, Dennis Henderson applied for a fire fighter position with the City of Pontiac. Facts ¶ 5. The Personnel Department, in conjunction with members of the Fire Department processed his application and administered to him the City's written, oral and physical agility tests. Facts ¶ 5. Henderson's scores on those examinations were so high that he was ranked 7th out of 107 applicants on the City of Pontiac Civil Service Register. Facts ¶ 7. On May 5th, 1992, at the request of the City, the Commission certified Henderson for hire. Facts ¶ 7.

After he was certified by the Commission, the Personnel Department made Henderson a conditional job offer and scheduled him for the required medical examination at the North Oakland Medical Center. Facts ¶ 7. The City, not the Commission, contracts with this medical provider to perform such examinations. Facts ¶ 18. The City then scheduled Henderson for an ophthalmological examination which was conducted on July, 16, 1992, by Dr. Dierdre Holloway, who performed such examinations on behalf of the City, not the Commission. Facts ¶ 7. The report of the ophthalmological examination, was stamped as received by the City on August 3, 1992. Facts ¶ 10.

That very day, on August 3, 1992, the City Personnel Department informed Henderson by letter that his application for fire fighter was being rejected by the City. Facts ¶ 10. The Commission did not meet between the time of Henderson's medical examinations and the date of the rejection letter.[19] Thus, the City, not the Commission, took the adverse employment action in refusing to hire Henderson.

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[19]The Commission met on July 7, 1992, prior to the City receiving Henderson's medical reports, and did not meet again until August 5, 1992, two days after the City had already rejected Henderson's application. Facts ¶ 11.

Further, although the Commission later held a meeting, at Henderson's request, to discuss his rejection, they did so merely as a "courtesy," and did not believe that they were empowered to overturn the City's rejection. Facts ¶ 13. The Commission members merely upheld the City's rejection, based summarily on the opinions of the City. Exhibit 25. Therefore, the undisputed facts of this case demonstrate that the Commission did nothing more regarding Henderson's inquiry to them than acquiesce in the discriminatory action that had already been taken by the Personnel Department.

2. The City is the Employer of Fire Fighters

As demonstrated above, the City acted as employer and made the decision to reject Henderson. Moreover, the undisputed facts demonstrate that fire fighters of the City of Pontiac are employees of the City, not the Commission. Under the Act it is the appointing officer, defined as the mayor or principal administrative or executive officer in any city village or municipality (in Pontiac's case, the Mayor), that retains the power to appoint and remove members of the fire department.[20] In addition, the appointing authority retains the right to "create or abolish positions

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[20]Section 38.511(2), which enumerates the City's appointing power, provides, in pertinent part that the "appointing officer":

> shall notify the civil service commission of any vacancy in the service which he or she desires to be filled, and shall request the certification of eligibles. The commission immediately shall certify from the eligible list the names of persons who received the [highest scores] on examinations held under the provisions of this act .. . . The appointing officer, thereupon with sole reference to the merit and fitness of the candidates, shall make the appointment from the names certified.

Exhibit 33 § 38.511(2) (emphasis added). Sections 38.513 and 38.514 authorize the City's removal power. Section 38.513 states in pertinent part as follows:

> [T]he appointing authority shall furnish such employees or subordinate with a copy of reasons for layoff, reduction, or suspension and his reasons for the same, and give such employee or subordinate a reasonable time in which to make and file an explanation . . . .

(continued...)

for reasons of administrative efficiency without the approval of the Commission." Mich. Const. art. XI, § 5; see Slavin v. City of Detroit, 262 Mich. 173, 247 N.W. 145 (1933) (City of Detroit was justified in removing fire personnel from duty notwithstanding appointments to fire department were regulated by civil service provisions); see also Thorne v. Nicholson, 32 Mich. App. 223, 188 N.W.2d 159 (1971) (elimination of a captain position in a city police department was within discretionary power of city).

In addition, the relevant Collective Bargaining Agreement, which governs every aspect of a fire fighters employment, including wages, seniority, promotions, layoffs, discipline, performance evaluations, leave time, vacation, insurance and pensions, is signed by the City of Pontiac, not the Commission. Facts ¶ 17. The minimum qualifications standards for fire fighters, as well as which written, oral and physical agility tests will be administered to applicants, are determined by the Fire Department, the Personnel Department and the Firefighter's Union. Facts ¶¶ 18, 19. The City's Personnel Department advertises for and screens applicants for minimum qualifications for entry-level fire fighting positions, chooses and administers written, oral and physical agility tests to applicants, and then ranks the applicants on an eligibility list, based on their test scores. Facts ¶¶

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[20](...continued)

> Nothing in this act contained shall limit the power of an appointing officer to suspend without pay, for purposes of discipline, an employee or subordinate for a reasonable period . . . .

Exhibit 33 § 38.514 (emphasis added). Section 38.514 provides, in pertinent part, that:

> (2) If for reasons of economy it shall be deemed necessary by any city, village, or municipality to reduce the number of full-time paid members of any fire or police department, the municipality shall follow the following procedure: Removals shall be accomplished by suspending in numerical order, commencing with the last employee appointed to the fire or police department all recent appointees to the fire or police department until the reductions are made.

Id. § 38.514 (emphasis added).

18, 19. When an opening occurs in the Fire Department, the City notifies the Commission and requests that it certify for hire the highest ranking person on the eligibility list. Facts ¶ 18. Once the applicant has been certified, the City notifies the applicant, makes a conditional offer of employment, and schedules the applicant for a medical examination. Facts ¶ 18.

The only role the Fire Civil Service Commission plays in the hiring process is to certify the name from the eligibility list as ranked by the City's Personnel Department, and only when requested to do so by the Fire Chief or through the Mayor. Facts ¶¶ 17-20. The Fire Civil Service Commission plays no role whatsoever in selecting, administering or scoring tests, reviewing applications, interviewing candidates, or even setting staffing requirements. Facts ¶¶ 17-20.

### C. EVEN IF THE CITY AND COMMISSION ARE SEPARATE, THE CITY IS LIABLE FOR PERPETUATING THE DISCRIMINATION OF THE COMMISSION

Even if the Commission participated in the City's refusal to hire Henderson, the Defendant cannot evade its ADA title I responsibilities and liabilities by attempting to shift responsibility to the Commission simply because the Commission may share some common administrative control over fire fighters. Title I of the ADA prohibits discrimination committed by "utilizing standards, criteria, or methods of administration" that "have the effect of discrimination on the basis of disability" or "that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12112(b)(3)(A) and (B) (emphasis added).

The City cannot establish an administrative mechanism in the form of the Commission to shield itself against liability for violation of federal civil rights laws including the ADA. On the contrary, the City as the employer of the fire fighters has the obligation to ensure that all of their employment decisions conform to the ADA. The City failed to do so in the case of Dennis

Henderson and is thus liable for its failure and refusal to hire him in contravention of the ADA.

## V. THE "DIRECT THREAT" DEFENSE DOES NOT SHIELD DEFENDANT'S DISCRIMINATORY EMPLOYMENT DECISION

The ADA sets forth specific statutory requirements which an employer must meet to assert successfully the affirmative defense of "direct threat."[21] In establishing the "direct threat" defense, Congress, recognizing that this defense was narrow and applicable only in unique situations, delineated detailed requirements that employers must follow before determining that an individual with a disability poses a direct threat. This is clear from a reading of the statute:

> (a) In General
> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
> (b) Qualification Standards
> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12111(3).

"Direct threat," in turn, is defined as:

> a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individuals's present ability to safely perform the essential functions of the job.

29 C.F.R. § 1630.2(r).

Thus, a plain reading of the statute makes clear that if an employer seeks to shield itself

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[21]Since "direct threat" is an affirmative defense, the defendant bears the burden of both pleading the defense and proving, by a preponderance of the evidence, every essential element of the defense. Fed. R. Civ. P. 8(c); Bobbitt v. Victorian House, 532 F. Supp. 734, 736 (N.D. Ill. 1982); 5 C. Wright & A. Miller, Federal Practice & Procedure § 1271 (1969). The Defendant failed to specifically plead the direct threat defense. Consequently, the defense does not apply. See Exhibit 36.

from liability by raising the "direct threat" defense, the employer must prove: (1) that the hiring decision was based on "qualification standards" that require that an individual shall not pose a significant risk to health or safety of others; (2) that those qualification standards are job-related and consistent with business necessity; and (3) that the employer considered reasonable accommodations to reduce or eliminate such risk. In addition, courts have recognized that a Defendant must demonstrate that it conducted an individual assessment of an applicant's ability to perform safely the functions of the position. As a matter of law, the Defendant cannot prove all of the elements of this defense, in part because it conceded that its standards are not job-related. Finally, Henderson cannot possibly pose a direct threat because it is undisputed that he does not actually have an impairment that substantially limits a major life activity. Therefore, summary judgment in favor of the United States is proper.

### A. THE DEFENDANT DID NOT CONDUCT AN INDIVIDUALIZED ASSESSMENT OF HENDERSON

Regulations to the ADA make clear that, before declining to hire an individual with a disability due to that individual posing a direct threat to others, the employer must make an individualized assessment of whether hiring the person would in fact pose a direct threat. The regulations state that:

> *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individual assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur: and (4) The imminence of the potential harm.

29 C.F.R. §1630.2(r).

In cases such as the present, where employers have used blanket exclusions to eliminate

individuals, courts (including courts in this Circuit) have found ADA violations and rejected direct threat arguments. See, e.g., Sarsycki v. United Parcel Service, 862 F. Supp. 336 (W.D. Okla. 1994); Bombrys v. City of Toledo, 849 F. Supp. 1210 (N.D. Ohio 1993); cf. Stillwell v. Kansas City, 872 F. Supp. 682 (W.D. Mo. 1995).

In Sarsycki, the Court found that defendant's policy of excluding all persons with insulin-dependent diabetes from driving positions violated the ADA, rejecting defendant's "direct threat" argument because the defendant failed to conduct an individualized assessment. Sarsycki, 862 F. Supp. at 341. Similarly, a District Court in this Circuit has held that, even in public safety positions, irrebuttable presumptions that persons with certain physical conditions pose a direct threat, and therefore cannot be hired, are unlawful. Bombrys, 849 F. Supp. at 1221. In Bombrys, the Court found that blanket disqualification of individuals with insulin-dependent diabetes as candidates for police officer violates the ADA. The Court stated that "[a]n individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices." Id. at 1219.

These and other Courts have held that the types of blanket exclusions used by the City of Pontiac violate the ADA. For example, in Stillwell, the court found that a blanket exclusion of one-armed persons from obtaining security guard licenses violated the ADA due to the lack of an individualized assessment and the defendant's refusal to allow the plaintiff to demonstrate his physical abilities. Stillwell, 872 F. Supp. at 685. The Court stated:

> The blanket exclusion of all one-handed license applicants because of an unfounded fear that they are dangerous . . . clearly runs afoul of the individualized assessment required by the ADA. It is essential that disabled license applicants be given consideration on a case-by-case basis to accurately determine what risks, if any, they pose to themselves or the public.

Id. at 687; see also Arline, 480 U.S. at 287 ("The determination that a person poses a direct threat

to the health and safety of others may not be based on generalizations or stereotypes about the effects of a particular disability; it must be based on an individual assessment that conforms to the requirements of 28 C.F.R. § 36.208(c).").

Like the defendants in the above cases, the City of Pontiac simply applied a blanket exclusionary standard, and failed to conduct an individualized assessment of Henderson's abilities. It is undisputed that the Defendant categorically excludes persons with monocular vision from all fire fighter positions. Facts ¶¶ 15, 23, 26, 27. Before its August 3, 1992, rejection of Henderson, Defendant merely "determined" that Henderson had a physical condition that did not meet the NFPA standards.[22] There is no evidence that Defendant evaluated the factors in a direct threat analysis: the duration of the risk; nature, severity, likelihood, or imminence of the potential harm; or whether any measures might mitigate such risk.

In addition, the Defendant ignored powerful factual evidence of Henderson's capabilities that would have shown that no risk existed. According to the ADA, relevant evidence in a "direct threat" analysis includes "input from the individual with a disability, [and] the experience of the individual with a disability in previous similar positions...." 29 C.F.R. pt. 1630, App. § 1630.2(r) (direct threat). Prior to its August 3 rejection of Henderson, the Defendant did not obtain Henderson's own input about his ability to perform any fire fighting tasks with his monocular vision, did not ask Henderson to demonstrate his ability to perform any such tasks,[23] and did not consult Henderson's Fire Chief of 14 years, George Spencer, who had supervised Henderson

[22]The City's ophthalmologist testified that she was asked merely to evaluate Henderson's compliance with NFPA standards, and to do nothing further. Facts ¶¶ 8, 9. She also testified that at the time she examined Henderson, she had never even seen a description of fire fighter job functions. Facts ¶¶ 8, 9.

[23]In fact, the Defendant ignored the fact that Henderson had passed Defendant's own physical agility test. Facts ¶ 6.

performing all of the tasks he would have performed for Defendant if hired. Facts ¶ 12. Such a blanket exclusion and failure to consider strong evidence of Henderson's abilities violates the ADA's individual assessment requirement and defeats Defendant's direct threat defense.

B. THE DEFENDANT HAS ADMITTED THAT IT DID NOT CONSIDER ANY REASONABLE ACCOMMODATION TO REDUCE ANY "DIRECT THREAT"

The next element of the direct threat defense is the requirement that the employer have considered "reasonable accommodation" to eliminate or reduce any "significant risk of substantial harm to the health or safety of the individual or others..." 29 C.F.R. § 1630.2(r); 42 U.S.C. § 12111(3). Henderson does not need a reasonable accommodation. He has been a fire fighter in Wixom for 17 years without any accommodation. Facts ¶¶ 1-4. Nonetheless, if the Defendant asserts that hiring Henderson would create a direct threat, the ADA requires that it have considered reasonable accommodation to reduce any perceived risk. Defendant is thus precluded from raising the defense because it admitted that it never considered any reasonable accommodations.

Requiring the consideration of reasonable accommodation addresses Congress' concern that in the past, much disability-based discrimination occurred due to baseless presumptions about certain disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 27 (1989); cf. Arline, 480 U.S. at 284; Taylor, 946 F.2d at 1218. To end such discrimination, Congress required that employers consider reasonable accommodations that might mitigate risks an employer believes would be posed by an individual with a disability. Congress' concern is evidenced by the fact that consideration of accommodations appears in the very definition of "direct threat." 42 U.S.C. § 12111(3) ("direct threat" means a significant risk to the health or safety or others that cannot be eliminated by reasonable accommodation.") (emphasis added); see also 29 C.F.R. pt. 1630, App. § 1630.2(r) (direct threat). ("This [direct threat] determination . . . must consider potential reasonable accommodations") (emphasis added).

Defendant admits that it did not consider any accommodations before it rejected Dennis Henderson's application for an entry-level fire fighter position. Exhibit 5 Nos. 45, 51, 52, 76. Therefore, by Defendant's own admission, it did not fulfill the ADA's statutory requirements for asserting the direct threat defense.

### C. THE DEFENDANT HAS WITHDRAWN ANY ARGUMENTS THAT ITS QUALIFICATION STANDARDS ARE "JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY"

The statutory language of title I of the ADA makes clear that an employer may assert a successful direct threat defense of a hiring qualification standard only if the employer pleads and proves that the standard at issue was also job-related and consistent with business necessity. Employment requirements precluding the hire of individuals who pose a direct threat are defined as "qualification standards" under the ADA, which in turn must be shown to be job-related and consistent with business necessity.

Again, the statute states:

> (a) In General
>
> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
>
> (b) Qualification Standards
>
> The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12111(3).

Defendant has admitted that its qualification standards are not job-related and consistent with business necessity. The Defendant raised the business necessity defense by specifically pleading it in Defendant's Amended Affirmative Defenses. Exhibit 37 ¶ 9. However, on October

4, 1995, Defendant withdrew the defense and refused to respond to discovery on the defense.[24] Defendant has thus waived the defense, and waived any arguments that its standards are job-related and consistent with business necessity. Therefore, the Defendant cannot establish a central element of the direct threat defense.

D. DENNIS HENDERSON CANNOT POSE A DIRECT THREAT WITHIN THE MEANING OF THE ADA BECAUSE HE HAS NO ACTUAL DISABILITY

Under the ADA, a person who does not have an actual disability cannot pose a direct threat. To assert that an individual poses a direct threat, it must be shown that the individual poses a "significant risk of substantial harm" because of the disability of that individual. 29 C.F.R § 1630.2(r). A person who is merely "regarded as" having a disability does not have an actual disability, but is only treated as if s/he has an actual disability. 42 U.S.C. § 12102(2)(a). It is axiomatic that if the disability is only illusory, then it cannot pose a "significant risk of substantial harm."

The language of the statute lends support to this proposition. To pose a "direct threat," an individual's disability (that is, the individual's impairment that substantially limits a major life activity) must rise to the level of a "significant risk of substantial harm." Put simply, the impairment must be substantially limiting, and must create a significant risk of substantial harm. 29 C.F.R. § 1630.2(r); 42 U.S.C. § 12113(3). When a person is only regarded as having such an impairment, the person cannot, in fact, create such a risk.

Further support for this argument comes from the principle that an employer generally need not provide reasonable accommodation to an individual who is only regarded as having a disability. Instead, an employer is generally required to consider and provide reasonable accommodation only

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[24] See Defendant's Withdrawal of Affirmative Defenses (Exhibit 38); Exhibit 35.

to persons with actual disabilities. Alderson v. Postmaster General, 598 F. Supp. 49, 55 (W.D. Okla. 1984). Logically, if it is only the employer's perception that caused the applicant to have a disability under the ADA, the remedy is to remove that perception; no reasonable accommodation is necessary or required. Id.

In the present case, Defendant asserts that Henderson has no actual disability. At the same time, Defendant also claims that Henderson's disability poses a direct threat. These two assertions are clearly contradictory, and cannot be reconciled. In fact, the Defendant admitted that Henderson's visual condition cannot pose a direct threat when it stated explicitly: "Defendant denies that it believed that Dennis Henderson had a physical impairment that substantially limited his ability to work" or "work as a fire fighter."[25]

It is uncontested that Dennis Henderson does not have an actual disability. In fact, Defendant admits that Dennis Henderson's monocular vision, although an anatomical loss, does not affect his sight[26] and does not substantially limit him in any major life activities, including in being a fire fighter.[27] An individual who is not substantially limited in seeing or working as a fire fighter cannot possibly pose a significant risk of substantial harm in fire fighting. Therefore, this defense must fail.

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[25]Exhibit 5 Nos. 36-38.

[26]The ADA defines "physical impairment," as, inter alia, an anatomical loss affecting special sense organs. 29 C.F.R. § 1630.2(h). Defendant, by admitting that Henderson's monocular vision is an anatomical loss, but specifically denying that it constitutes a physical impairment under the ADA, can only be denying that the monocularity affects Henderson's sense of sight. See Exhibit 5 Nos. 30-35.

[27]See Exhibit 5 Nos. 36-39.

## VI. PLAINTIFF SHOULD BE AWARDED SUMMARY JUDGMENT ON ALL OTHER AFFIRMATIVE DEFENSES

### A. AFFIRMATIVE DEFENSE NO. 1: "PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION"

This defense is clearly defeated because undisputed facts demonstrate that Plaintiff has established a prima facie case of employment discrimination under the ADA, (see supra at 11), and because by raising affirmative defenses, Defendant has conceded that the complaint states a cause of action.[28]

### B. AFFIRMATIVE DEFENSE NO. 2 "PLAINTIFF'S COMPLAINT IS BARRED IN WHOLE OR IN PART BY THE APPLICABLE STATUTE OF LIMITATIONS" AND AFFIRMATIVE DEFENSE NO. 5: "PLAINTIFF'S CLAIMS ARE BARRED FOR FAILURE TO EXHAUST THE ADMINISTRATIVE REMEDIES PROVIDED BY LAW"

Summary judgment should be granted in favor of Plaintiff on both these defenses. First, Defendant has admitted that neither defense is supported factually. Defendant's Interrogatory answers admitted that no facts exist to support the defenses, and Defendant admitted in Fed. R. Civ. P. 30(b)(6) testimony that one of the defenses was raised only so it wouldn't be waived.[29] Defendant has not provided any supplementary interrogatory answer indicating that either defense has any evidentiary support, and since discovery has closed, the time period for providing such supplementation has passed. Therefore, this defense has no evidentiary support, and Defendant should have withdrawn it. Absent that action, summary judgment on this defense should be entered in favor of the United States.

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[28]"In answering a complaint and asserting affirmative defenses under Fed.R.Civ.P. 8(c), a Defendant concedes that the complaint states a cause of claim, but contends that other facts nonetheless defeat recovery." Flasza v. TNT Holland Motor Express, Inc., 155 F.R.D. 612, 613 (N.D. Ill. 1994).

[29]Exhibit 17 Nos. 4, 7; Exhibit 7 at 96/2-19 and 97/19-98/21.

More fundamentally, summary judgment should be entered in favor of Plaintiff on Affirmative Defense No. 2 because title I of the ADA does not contain any statute of limitations. Similarly, Affirmative Defense No. 5 must fail because it is factually undisputed that all administrative prerequisites have been met in this case.[30]

C. AFFIRMATIVE DEFENSE NO. 10: "PLAINTIFF LACKS STANDING TO SUEON BEHALF OF OR FOR DAMAGES ALLEGEDLY SUFFERED BY MR.HENDERSON" AND AFFIRMATIVE DEFENSE NO. 8: "PLAINTIFF HAS FAILED TO JOIN HERETO A PROPER PARTY OR PARTY NECESSARY FOR THE JUST ADJUDICATION HEREOF INCLUDING BUT NOT LIMITED TO . . MR. HENDERSON"

Summary judgment should be entered on behalf of the United States on these Affirmative Defenses because, once again, they are not supported by any factual bases. When asked to identify the factual basis of Affirmative Defense No. 10 and identify all facts upon which this defense is based, the Defendant stated: "See 42 USC 12101, et seq. and 42 USC 2000e et seq." Exhibit 17 No. 31. Thus, the Defendant has failed to cite any facts supporting this defense. Defendant has not provided any supplementary interrogatory answer indicating that this defense has any evidentiary support, and since discovery has closed, the time period for providing such supplementation has passed.

Despite the lack of clarity on the part of the Defendant in setting out the "Standing" defense, it seems that the Defendant is asserting that the United States lacks standing to seek relief

[30]Henderson was denied employment on August 3, 1992; he filed an EEOC on December 16, 1992, (Charge No. 230-93-0467), against the City, well within the prescribed time period. Facts ¶ 16. The City received notice of the charge in December, 1992, had an opportunity to defend and conciliate the charge, and received notice from the EEOC indicating that conciliation had failed. Facts ¶ 16. Consequently, all administrative requirements were met, and, as a matter of law, Defendant cannot maintain these two defenses.

on behalf of Dennis Henderson without the intervention of Henderson.[31] Given the fact that the relevant statutes clearly and unambiguously refute this contention, and given the wealth of caselaw over the past thirty years recognizing that the United States has standing to enforce civil rights statutes and to seek equitable and monetary damages on behalf of victims of discrimination in both individual and pattern or practice cases, this defense or these defenses are groundless and may be frivolous; in any event, summary judgment in favor of Plaintiff is proper.

The ADA explicitly states that the "powers, remedies and procedures" set forth under title VII "shall be the powers, remedies, and procedures (the ADA) provides to the . . . Attorney General." 42 U.S.C. § 12117(a). Under title VII, the Attorney General is empowered "to bring a civil action against such respondent in the appropriate United States district court" where, as here, the EEOC is unable to achieve conciliation of a charge of discrimination against a state of local government employer. 42 U.S.C. § 2000e-5(f)(1). The person who filed the charge of discrimination (the "charging party") has the right to intervene in such an action, but such intervention is not required.[32] E.g., United States v. Berrien County, 49 FEP Cases 78 (W.D. Mich. 1988) (award of damages under title VII without intervention of charging party); United States v. Board of Trustees of S. Ill. Univ., No. 97-733 WLB, 1995 WL 311336 (S.D. Ill. 1995) (same); United States v. Hancock County Bd. of Educ., 65 Empl. Prac. Dec. ¶ 43,318 (N.D. W. Va. 1993) (same). Indeed, when the United States sues first, the individual employee is not

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[31]The Defendant explained this defense by stating that: "Mr. Henderson is the one who's claiming he was damaged. Mr. Henderson is not a party to the suit, has not been made a party to the suit. If he is the one who is claiming damage, how is the Department of Justice claiming damage on behalf of him." Rule 30(b)(6) Deposition of the Defendant, dated November 29, 1995 (Exhibit 39) at 209/13-17.

[32]It should be noted that the United States notified the Charging Party of his right to intervene. Letter from Edward Miller to Dennis Henderson, dated December 22, 1994 (Exhibit 40).

entitled to sue independently but may intervene. 42 U.S.C. § 2000e-5(f)(1); McClain v. Wagner Elec. Corp., 550 F.2d 1115, 1119 (8th Cir. 1977).[33] In such an action, the Attorney General has the power to seek broad relief, including injunctive, equitable and monetary relief. 42 U.S.C. § 2000e-5(g)(1); see, e.g., Board of Trustees of S. Ill. Univ; Hancock County Bd. of Educ; see generally, Fitzpatrick v. Blitzer, 427 U.S. 445 (1975) (federal courts can award monetary damages in favor of private individuals against a state government employer under title VII).

In setting out "standing" as a defense, or in arguing that damages cannot be awarded against the City of Pontiac absent intervention of the Charging Party, the Defendant seeks the reversal of 30 years of jurisprudence under title VII and other civil rights statutes. E.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); United States v. Roadway Express Co., Inc., 457 F.2d 854 (6th Cir. 1972); United States v. Electrical Workers, Local 38, 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970); United States v. City of Warren, 759 F. Supp. 355 (E.D. Mich. 1991); see also Berrien County, 49 FEP Cases 78, and cases cited above. This Court should reject that argument and award summary judgment in favor of the United States on these defenses.

## VII. CONCLUSION

For the foregoing reasons, there being no issue of material fact at hand, Plaintiff's Motion for summary judgment should be granted.

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[33]Henderson is neither a proper nor necessary party, because full relief can be granted by the Court without his intervention. In addition, Defendant could have made a timely motion to add him as a party, which it has failed to do.

Respectfully submitted,

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