NOT RECOMMENDED FOR PUBLICATION

No. 23-1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 26, 2024
KELLY L. STEPHENS, Clerk

CAROL ANN MCBRATNIE, Plaintiff-Appellant, v. DENIS RICHARD MCDONOUGH, U.S. Secretary of Veterans Affairs, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: BOGGS, McKEAGUE, and BLOOMEKATZ, Circuit Judges.

Carol Ann McBratnie, proceeding pro se, appeals the district court's grant of summary judgment in favor of Denis Richard McDonough, Secretary of the Department of Veterans Affairs (VA), in this employment-discrimination action. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we affirm.

In February 2014, McBratnie applied to work as a nurse practitioner for CR Associates, Inc. (CRA), a staffing firm that contracts with the VA to provide healthcare services at an outpatient clinic in Bridgeport, Texas. Because the position involved treating VA patients, CRA referred any candidate that it intended to hire to the VA for a credentialing process. Following an interview, a VA health-credentialing specialist emailed McBratnie, directing her to complete and upload several credentialing documents. One document, the Declaration of Health, asked McBratnie to confirm that, "to the best of [her] knowledge, [she] do[es] not have a physical or mental health condition that would adversely affect [her] ability to carry out the clinical privileges

which [she] ha[d] requested from [the outpatient clinic]." The declaration also required a physician to sign and "concur with the declaration of health presented by" McBratnie. Although McBratnie submitted some of the credentialing documents, she refused to submit the Declaration of Health. She explained to the credentialing specialist that "questions regarding [her] disability status could not be asked until somebody had made [her] an offer, and nobody had made [her] an offer" at that point. McBratnie Dep., R. 45-3, PageID 1599. When Lynn Stockebrand, CRA's Vice President for Quality Management, encouraged McBratnie to return the Declaration of Health, McBratnie told Stockebrand that she would not "until someone makes [her] a committed job offer." Because McBratnie was "not willing to fill out the paper work requested for VA credentialing," Stockebrand told her that CRA was "pulling her application." Stockebrand Email, R. 39-3, PageID 484. Consequently, McBratnie was removed from the applicant pool.

After exhausting her administrative remedies, McBratnie sued the VA, alleging that it violated the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq., and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112, et seq., by requiring her to complete the Declaration of Health as part of the credentialing process. According to McBratnie, the Declaration of Health was "a cleverly designed form to acquire and use prohibited information in the application process so as to exclude a class of individuals from being considered for open positions." Compl., R. 1, PageID 14.

Over McBratnie's objections, the district court adopted the magistrate judge's report and recommendation that the VA's summary-judgment motion be granted. In doing so, the district court first clarified that the ADA is inapplicable because the Rehabilitation Act, which prohibits discrimination on the basis of a disability during job-application procedures and hiring, *see* 29 U.S.C. § 791; 42 U.S.C. § 12112, is a prospective federal employee's sole avenue for raising disability-discrimination claims. Nonetheless, "[c]laims brought under the Rehabilitation Act are reviewed under the same standards that govern ADA claims." *Keith v. County of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013); *see* 29 U.S.C. §§ 791(f), 794(d). Section 12112(d)(2)(A) of the ADA provides, as relevant here, that employers "shall not conduct a medical examination or make

inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." However, § 12112(d)(2)(B) expressly allows employers to "make preemployment inquiries into the ability of an applicant to perform job-related functions," and the applicable regulation further allows employers to "ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform the job related functions." 29 C.F.R. § 1630.14(a).

Here, the district court determined that the Declaration of Health and accompanying physician confirmation were permissible pre-employment inquiries and not unlawful "medical examinations" under the Rehabilitation Act. It therefore concluded that the VA was entitled to summary judgment.

We review the district court's grant of summary judgment de novo. *Booth v. Nissan N. Am., Inc.*, 927 F.3d 387, 392 (6th Cir. 2019). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The Rehabilitation Act prohibits discrimination based on disability, and a plaintiff seeking to prevail on an employment-discrimination claim ordinarily must show that he was subjected to an adverse employment action due to his disability. *See Bledsoe v. Tenn. Valley Auth. Bd. of Dirs.*, 42 F.4th 568, 578 (6th Cir. 2022). As noted above, 42 U.S.C. § 12112(d)(2)(A) prohibits a covered employer from making preemployment inquiries "as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." "A plaintiff need not prove that he or she has a disability in order to contest an allegedly improper medical inquiry under 42 U.S.C. § 12112(d)." *Lee v. City of Columbus*, 636 F.3d 245, 252 (6th Cir. 2011).

Viewing the evidence most favorably to McBratnie, *see Booth*, 927 F.3d at 392, we agree with the district court that the Declaration of Health and accompanying physician confirmation were permissible "pre-employment inquiries" under § 12112(d)(2)(B). *See* 29 C.F.R. § 1630.14(a). As aptly stated by the district court, the Declaration of Health did not compel medical "procedures" or "tests" and did not "necessitate" a medical examination. It merely

required McBratnie to declare that, to the best of her knowledge, she has no "physical or mental health condition that would adversely affect [her] ability to carry out the clinical privileges" that would be required of a nurse practitioner. Decl. of Health, R. 45-4, PageID 1632. In other words, the Declaration of Health was limited to asking about any condition that could impact McBratnie's ability to perform essential "clinical privileges," which the VA defines as the ability "to provide specified medical or other patient care services within the scope of the individual's license, based on the individual's clinical competence as determined by peer references, professional experience, health status, education, training, and licensure." Veterans Health Administration Handbook, R. 57-1, PageID 2090. The declaration did not improperly ask if McBratnie was disabled or whether a particular condition "is indicative of an underlying impairment." *See* 29 C.F.R. pt. 1630 app. (Interpretive Guidance on Title I of the Americans with Disabilities Act). Thus, on its face, the Declaration of Health was an appropriate "narrowly tailored" inquiry into whether McBratnie could perform the job functions required of a nurse practitioner. *See Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 842 n.5 (9th Cir. 2000) (citing 29 C.F.R. § 1630.14(a)).

The physician confirmation contained in the Declaration of Health likewise was a narrowly tailored inquiry, *see id.*, and not a "medical examination." With guidance from the EEOC, we have interpreted a "medical examination" in the ADA context to be a "*procedure* or *test* that seeks information about an individual's physical or mental impairments or health." *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 815 (6th Cir. 2012) (emphases added) (quoting EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the* [*ADA*], pt. B.2 (2000)). The physician confirmation is neither a procedure nor a test. Nor did it require one or suggest that one was required. *See Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 676 (1st Cir. 1995) (holding that "a certification from a treating psychiatrist that does not necessitate new tests or procedures is best analyzed as an 'inquiry' rather than as a 'medical examination'").[1] Indeed, the VA avowed that the physician "confirmation did not require any

[1] McBratnie challenges the district court's reliance on *Grenier* because she is a new applicant, unlike the plaintiff in *Grenier*, who was an applicant seeking to be rehired. Although *Grenier* discussed whether an employer may require a "former employee" with a "recent known disability"

specific testing or performance metrics," VA Mot. for Summ. J., R. 45, PageID 1581, and its credentialing handbook did not specify that the confirmation required any such medical tests or procedures. And contrary to McBratnie's argument, the physician confirmation did not seek "disability information"; it simply required the signature of a physician ("such as the [applicant's personal] health physician or [a] physician supervisor from [her] previous employment," Veterans Health Administration Handbook, R. 45-5, PageID 1633, concurring with the signed declaration. That's all. *See id.* (holding that "an employer may request that an applicant provide medical certification from doctors of ability to perform so long as the inquiry does not otherwise run afoul of § 12112(d)(2)(A)"); *see also Harris*, 206 F.3d at 843-45 (concluding that the employer's request for a medical release as a prerequisite to re-hiring the plaintiff did not violate the ADA, reasoning in part that the release did not require new tests or procedures and thus was an "inquiry" and not an "examination"). In light of the record evidence, McBratnie cannot establish a genuine dispute of material fact as to whether the Declaration of Health and physician confirmation are permissible pre-employment inquiries under the Rehabilitation Act.

None of the numerous arguments that McBratnie raises on appeal alters this conclusion. Only a handful are worthy of discussion. First, McBratnie argues that a non-treating physician, "who has no knowledge of the applicant," cannot make a "medical inquiry" and concur with an applicant's declaration "without some form of an exam being performed." Appellant's Br., 27-28, 34-41; Reply Br., 23-28, 35-36. This argument finds no support in the record. The plain language of the physician confirmation merely required *any* physician to "concur with the declaration of health presented by" the applicant. Decl. of Health, R. 45-4, PageID 1632. The form did not require the physician to conduct a medical examination; all that the physician needed to do was sign the form confirming that he or she agrees with the applicant's declaration that the applicant

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to provide medical certification about her ability to return to work with or without a reasonable accommodation, *see* 70 F.3d at 676-78, it also first thoroughly discussed the legislative history of § 12112(d)(2)(A) and "whether a request for medical certification constitutes a 'medical examination' or whether it is instead an 'inquiry'"—i.e., the dispositive question in this appeal. (The same goes for the court in *Harris*, *see* 206 F.3d at 841-43, on which we also rely here).

"do[es] not have a physical or mental health condition that would adversely affect [her] ability to carry out the" required job functions. *Id.* McBratnie offers no evidence that a medical examination is required for a physician to so agree. *See First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968) (stating that, in the face of a defendant's properly supported motion for summary judgment, the plaintiff cannot rest on her allegations without "any significant probative evidence tending to support the complaint"). Indeed, as noted above, the physician could be the applicant's primary-care physician (who would presumably already be familiar with the applicant's physical and mental-health conditions) or a former supervisory physician (who would presumably have knowledge of the applicant's physical and mental-health conditions and whether they adversely affect the applicant's ability to perform job functions).

Second, McBratnie argues that "all job applicants are 'Regarded as Disabled'" until a physician signs the Declaration of Health. Appellant's Br., 27-29, 45-47. Again, this argument finds no support in the record. The physician confirmation did not inquire about "disabilities," and an applicant's failure to get a physician to sign the confirmation would not indicate that the applicant had a disability. At best, the lack of a physician's signature would show that the applicant might not have the ability to carry out clinical privileges due to a "physical or mental health condition." This is permissible under the ADA and, by extension, the Rehabilitation Act. *See* 42 U.S.C. § 12112(d)(2)(B); 29 C.F.R. § 1630.14(a).

Third, McBratnie argues that asking applicants to sign the declaration is tantamount to asking if they have a job-related disability, which leads to disability discrimination in hiring. But, as the district court explained, the statute explicitly permits employers to ask job applicants about their ability to "perform job-related functions," and, as the regulations and EEOC Guidance clarify, even to "describe . . . how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. 29 C.F.R. § 1630.14(a); EEOC, *Enforcement Guidance: Disability–Related Inquiries and Medical Examinations of Employees Under the* [*ADA*], Part B.12. The VA also confirmed that it did not read an applicant's signature on the declaration to mean that they do not need a reasonable accommodation, stating: "[E]ven [an applicant] who needed a

reasonable accommodation to exercise clinical privileges could truthfully sign the declaration" because "[t]he declaration did not ask whether the applicant would need an accommodation, and any applicant who could successfully exercise clinical privileges *with* a reasonable accommodation would '*not* have a physical or mental health condition that would adversely affect [her] ability to carry out the clinic privileges.'" Appellee's Br. 10-11 (emphases added) (quoting Decl. of Health, R. 45-5, PageID 1632)).

Finally, McBratnie argues that "[t]he VA admits [that it was] confused in that McBratnie was a pre-offer job applicant versus a post-offer job applicant," pointing to the VA's summary-judgment motion where the VA states that, "even if" the Declaration of Health required a medical examination (which the VA maintains that it did not), "the VA would have been permitted to require a job-specific medical examination because the VA was under the reasonable impression that CRA had extended McBratnie a conditional offer of employment." Reply Br., pp. 17-20; VA Mot. for Summ. J., R. 45, PageID 1579. But the district court determined, and the VA does not dispute on appeal, that McBratnie was a pre-offer applicant—not a conditional post-offer candidate.

Because McBratnie failed to point to a genuine dispute of material fact as to whether the VA's actions violated the Rehabilitation Act's prohibition on pre-employment inquiries or medical examinations, the district court properly entered summary judgment in the VA's favor. Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 01/26/2024.

Case Name: Carol McBratnie v. Denis McDonough
Case Number: 23-1438

Docket Text:
ORDER filed : AFFIRMED Mandate to issue., pursuant to FRAP 34(a)(2)(C), decision not for publication. Danny J. Boggs, Circuit Judge; David W. McKeague, Circuit Judge and Rachel Bloomekatz, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Ms. Carol Ann McBratnie
1130 Larkmoor Boulevard
Berkley, MI 48072

A copy of this notice will be issued to:

Mr. Christopher J. Doyle
Ms. Kinikia D. Essix

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL ANN McBRATNIE,

Plaintiff,

Civil Action No. 20-cv-12952
HON. BERNARD A. FRIEDMAN

vs.

DENIS McDONOUGH, United States Secretary of Veterans Affairs,

Defendant.
_____/

OPINION AND ORDER OVERRULING PLAINTIFF'S OBJECTIONS, ACCEPTING AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Carol Ann McBratnie commenced this employment discrimination action against the Secretary of Veterans Affairs ("VA"). She alleges that the VA unlawfully rejected her application to work as a temporary nurse practitioner after she declined to answer questions about her ability to perform the job.

Before the Court are McBratnie's objections to Magistrate Judge Kimberly G. Altman's April 24, 2023 report and recommendation. (ECF Nos. 61, 64). The report recommends granting the VA's motion for summary judgment. (ECF No. 45). The Court will rule on the objections without oral argument pursuant to E.D.

Mich. 7.1(f)(2). For the following reasons, the Court (1) overrules McBratnie's objections, (2) accepts and adopts the April 24, 2023 report and recommendation, and (3) grants the VA's motion for summary judgment.

II. Background

A. Factual History

McBratnie applied for a temporary nurse practitioner position with CR Associates, Inc. ("CRA") in February 2014. (ECF No. 39-3, PageID.418, Tr. 7:21). CRA contracts with the VA to provide health care services at the Department's North Texas Veterans Healthcare System, Community-Based Outpatient Clinic in Bridgeport, Texas. (ECF No. 1, PageID.29, ECF No. 39-3, PageID.490-550). CRA's representatives interviewed McBratnie and forwarded her personal information to the VA for the purpose of credentialling her to work at the Bridgeport facility. (ECF No. 39-3, PageID.409, Tr. 12:11-22; PageID.418, Tr. 8:9-18).

A VA health credentialing specialist emailed McBratnie on February 28, 2014, confirming that CRA had requested the VA to begin credentialling her for work at the Bridgeport facility. (ECF No. 39-3, PageID.473). The email attached several documents that the specialist directed McBratnie to complete and upload to a digital processing system. (*Id.*).

Among other things, the credentialling packet included a Declaration of Health that reads:

> I, _____, hereby declare that, to the best of my knowledge, do not have a physical or mental health condition that would adversely affect my ability to carry out the clinical privileges which I have requested from VA North Texas Health Care System.

(ECF No. 39-3, PageID.478). The section immediately below the Declaration – entitled "Confirmation of Applicant's Declaration" – requires a physician to sign and "concur with the declaration of health presented by" the applicant. (*Id.*).

McBratnie submitted some of the credentialling documents but declined to return the Declaration of Health and the Physician Confirmation. (ECF No. 45-3, PageID.1598, Tr. 43:24-44:5). McBratnie informed the VA's credentialling specialist that she would not submit the Declaration because "questions regarding my disability status could not be asked until somebody had made me an offer." (ECF No. 45-3, PageID.1599, Tr. 45:25-46:2). And when CRA's Vice President for Quality Management, Lynn Stockebrand, encouraged her to complete the forms, McBratnie reiterated her position that "the declaration of health can't be requested until someone makes me a committed job offer." (ECF No. 45-3, PageID.1606, Tr. 76:22-24). Stockebrand informed McBratnie that CRA would be "pulling her application" as a result. (ECF No. 39-3, PageID.484; ECF No. 45-3, PageID.1607, Tr. 77:12-13).

On March 26, 2014, Stockebrand requested that the VA "remove" McBratnie as a candidate because "she is not willing to fill out the paperwork requested for VA credentialling." (ECF No. 39-3, PageID.484). The VA terminated the credentialling process that same day. (ECF No. 39-3, PageID.418, Tr. 9:7-16; PageID.643).

B. Procedural History

McBratnie filed an employment discrimination complaint with the VA on June 14, 2014. (ECF No. 39-3, PageID.300). She asserted that the Department violated section 501 of the Rehabilitation Act of 1973 when it required her to undergo a "physical assessment" before extending her a "job offer." (*Id.*; ECF No. 53-19, PageID.1842). The VA initially dismissed the complaint for lack of standing. (ECF No. 39-3, PageID.368-71). The Department concluded that (1) McBratnie sought employment with CRA, not the VA, (2) CRA was the entity that "terminated the employment process," (3) McBratnie did not have an "employee/applicant relationship for EEO purposes" with the VA, and (4) CRA and the VA did not act as joint employers. (*Id.*, PageID.369-70).

McBratnie appealed the VA's dismissal to the Equal Employment Opportunity Commission's ("EEOC") Office of Federal Operations and prevailed. (*Id.*, PageID.679-82; ECF No. 53-19, PageID.1842-50). The EEOC reversed the VA's decision, holding that McBratnie possessed the requisite standing to proceed

with her claims because the Department qualified as McBratnie's joint employer.[1] (ECF No. 53-19, PageID.1847). The Commission remanded the case to the VA for further investigation. (*Id.*). The Department provided McBratnie with its investigative report and issued her a notice of right to request a hearing before an EEOC administrative judge. (ECF No. 1, PageID.30).

McBratnie requested that hearing and the parties cross-moved for summary judgment. (*Id.*). The administrative judge sided with the VA, finding that the Department did not engage in discrimination when it terminated the credentialling process. (*Id.*). McBratnie again appealed to the EEOC's Office of Federal Operations. (*Id.*). The EEOC affirmed the administrative judge, concluding that "the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged." (*Id.*, PageID.32).

McBratnie then filed this lawsuit, alleging causes of action under the Americans with Disabilities Act of 1990 and section 501 of the Rehabilitation Act.

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[1] The VA does not challenge the EEOC's joint employer determination although it could have. *See Haskins v. United States Dep't of Army*, 808 F.2d 1192, 1199 n.4 (6th Cir. 1987); *see also Morris v. Rumsfeld*, 420 F.3d 287, 294 (3d Cir. 2005) ("We hold that, when a federal employee comes to court to challenge, in whole or in part, the administrative disposition of his or her discrimination claims, the court must consider those claims *de novo*, and is not bound by the results of the administrative process . . ."); *Ellis v. England*, 432 F.3d 1321, 1324-25(11th Cir. 2005) (endorsing *Morris*); *Timmons v. White*, 314 F.3d 1229, 1234 (10th Cir. 2003) (holding that "a federal employer is not bound by a prior adverse finding by the EEOC" when a federal employee seeks *de novo* review of the EEOC's discrimination decision).

(*Id.*, PageID.4). The VA now moves for summary judgment on both claims. (ECF No. 45).

III. Legal Standards

A moving party is entitled to summary judgment where the "materials in the record" do not establish the presence of a genuine dispute as to any material fact. Fed. R. Civ. P. 56(c). All the evidence, along with all reasonable inferences, must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

IV. Analysis

A. Statutory Overview

A good deal of conceptual housekeeping is in order before addressing the pertinent statutory authorities. Consider first the Americans with Disabilities Act ("ADA").

Without question the ADA claim is improper. The Rehabilitation Act is a federal employee's exclusive avenue to remedy disability-based employment discrimination. *See* 42 U.S.C. § 12111(5)(B) (defining employers under the ADA and excluding the United States or a corporation wholly owned by the United States government as a covered employer); *see also Peltier v. United States*, 388 F.3d 984, 989 (6th Cir. 2004) ("the Rehabilitation Act . . . provides the remedy for federal employees alleging disability discrimination"). So for the sake of analytic

clarity, the Court will construe the ADA claim as a Rehabilitation Act claim and read the complaint to allege a single cause of action under section 501 of that statute.[2] *See Plautz v. Potter*, 156 F. App'x 812, 816 (6th Cir. 2005) (deeming pro se federal employee's ADA claim as a Rehabilitation Act claim).

Evaluating McBratnie's allegations under the Rehabilitation Act will in no way change the outcome of this litigation. Both statutes "share the same substantive standard[s]." *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007); *see also Doe v. Salvation Army in the United States*, 531 F.3d 355, 357 (6th Cir. 2008) ("We review claims brought under the Rehabilitation Act as we would claims brought under the Americans with Disabilities Act of 1990."). The Rehabilitation Act expressly provides that "[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) . . ." 29 U.S.C. § 791(f). Construing the ADA claim as a Rehabilitation Act claim, therefore, "does not significantly alter the legal analysis" governing this case. *Plautz*, 156 F. App'x at 816.

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[2] The VA did not move to dismiss the ADA claim on this ground. *See Grose v. Lew*, No. 15-5357, 2016 U.S. App. LEXIS 24454, at *7 (6th Cir. Sep. 21, 2016) (dismissing *pro se* federal employee's ADA claim because "the Rehabilitation Act is the exclusive remedy for a federal employee alleging disability discrimination").

Looking to the ADA as a substantive gap-filler (as this Court must), the statute prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). To advance this goal, the statute restricts employers from requiring medical inquiries and examinations during the hiring process. 42 U.S.C. § 12112(d). These restrictions vary in degree – from most restrictive to least restrictive – among three categories: (1) pre-offer job applicants, (2) post-offer candidates, and (3) current employees.[3] 42 U.S.C. § 12112(d)(2)-(4).

Pre-Offer Job Applicants. The type of inquiries prospective employers may pose to pre-offer job applicants are the most limited. Employers may not (1) compel pre-offer job applicants to undergo medical examinations, (2) ask them whether they have a disability, or (3) inquire into "the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A); *see also* 29 C.F.R. § 1630.13(a). But employers may ask about an applicant's ability "to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B); *see also* 29 C.F.R. § 1630.14(a). And they may ask applicants to "describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." 29 C.F.R. § 1630.14(a).

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[3] "[D]isability is not an element of a § 12112(d) claim." *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 813 n.6 (6th Cir. 2012); *see also Lee v. City of Columbus*, 636 F.3d 245, 252 (6th Cir. 2011).

Post-Offer Candidates. Prospective employers are moderately restricted when imposing conditions of employment on post-offer candidates. Employers may require post-offer candidates to undergo medical examinations before starting a job – "and may condition an offer of employment on the results" of those examinations – so long as "all entering employees are subjected to such an examination regardless of disability." 42 U.S.C. § 12112(d)(3)(A); *see also* 29 C.F.R. § 1630.14(b).

Employees. Finally, employers are least restricted when obtaining information from employees. Employers may require "a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity." 29 C.F.R, § 1630.14(c); *see also* 42 U.S.C. § 12112(d)(4)(A). They may also ask about the "ability of an employee to perform job-related functions." 29 C.F.R, § 1630.14(c); *see also* 42 U.S.C. § 12112(d)(4)(B).

Employing the above framework, the Court must decide how best to classify McBratnie.

B. CRA Never Offered McBratnie the Temporary Nursing Position

The parties duel over whether CRA actually offered McBratnie the temporary nurse practitioner job – a question that determines the scope of the inquiry or medical examination the VA could demand from McBratnie before starting the position. The VA maintains that CRA offered McBratnie the job,

subject to her completing the VA credentialing process. (ECF No. 45, PageID.1581-82; ECF No. 57, PageID.2086-88). McBratnie argues that CRA never extended her an offer, whether conditional or otherwise. (ECF No. 53, PageID.1674-75; ECF No. 60, PageID.2197). The record supports McBratnie on this score.

Pursuant to its contract with the VA, CRA assumed the responsibility for credentialing "registered professional nurses and nurse practitioners" consistent with VHA Handbook 1100.19.[4] (ECF No. 39-3, PageID.519; *see also* PageID.412, Tr. 23:1-3). That handbook specifically provides that "medical staff and employment commitments must not be made until the credentialling process is completed." (ECF No. 53-6, PageID.1716).

Representatives from both CRA and the VA further confirmed that the company did not tender employment offers until applicants completed the VA's credentialing process. (ECF No. 39-3, PageID.430, Tr. 4:24-5:2, 15-16 ["So our HR would extend an offer and that's if they make it through credentialling. So once they're credentialled we make a final offer."] ["we cannot hire anyone who cannot get credentialed."]; *id.*, PageID.410, Tr. 16:19-20 ["she's offered the

[4] The contract misprinted the VHA Handbook number as "1100.9." (ECF No. 39-3, PageID.519). The parties agree that the correct handbook number is "1100.19." (ECF No. 45-5, PageID.1633; ECF Nos. 53-6 & 53-7, PageID.1716-17).

position upon credentialling, . . . if her completion is satisfactory."]; *id.*, Page ID.418, Tr. 6:23-7:17).

And most importantly, there is no evidence that CRA ever tendered McBratnie an offer of employment, whether on a preliminary, conditional, or final basis. Once McBratnie declined to submit the Declaration of Health and the Physician Confirmation, CRA's representatives not once mentioned rescinding an *offer* of employment. Instead, CRA requested that the VA "remove" McBratnie as a candidate. (ECF No. 39-3, PageID.484). And CRA's Vice President for Quality Management informed McBratnie that CRA was "pulling her application" – not withdrawing some form of conditional offer. (*Id.*, ECF No. 45-3, PageID.1607, Tr. 77:12-13).

Because CRA never offered McBratnie the temporary nursing position, the VA's credentialling process had to comport with the ADA's limitations on pre-offer medical inquiries and examinations.

C. The Declaration of Health and Physician Confirmation Do Not Violate the Rehabilitation Act

Since both CRA and the VA required McBratnie to complete the VA's credentialling process at the pre-offer stage, the dispositive question is whether the Declaration of Health, together with the Physician Confirmation, constitute a permissible preemployment inquiry or an unlawful medical examination. *See* 42 U.S.C. § 12112(d)(2).

Consulting the ADA yet again, the statute's plain text and legislative history shed little light on the meaning and scope of the term "medical examination." *See Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 815 (6th Cir. 2012). The most helpful interpretive resource is the EEOC's Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations. Equal Opportunity Employment Commission, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995), https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical ("EEOC Guidance"). The agency's guidance, "while nonbinding, constitutes a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Kroll*, 691 F.3d at 815 (cleaned up). And the Sixth Circuit Court of Appeals views this guidance as "very persuasive" when interpreting the ADA. *Id.*, *see also Lee v. City of Columbus*, 636 F.3d 245, 256 (6th Cir. 2011).

Turning to the guidance manual, the EEOC defines "medical examination" as a "procedure or test that seeks information about an individual's physical or mental impairments or health." EEOC Guidance. The manual delineates the following eight-factors to ascertain whether a test or procedure is a "medical examination":

> (1) whether the test is administered by a health care professional or someone trained by a health care professional;
>
> (2) whether the results are interpreted by a health care professional or someone trained by a health care professional;
>
> (3) whether the test is designed to reveal an impairment or physical or mental health;
>
> (4) whether the employer is trying to determine the applicant's physical or mental health or impairments;
>
> (5) whether the test is invasive (for example, does it require the drawing of blood, urine or breath);
>
> (6) whether the test measures an applicant's performance of a task or the applicant's physiological responses to performing the task;
>
> (7) whether the test is normally given in a medical setting (for example, a health care professional's office); and
>
> (8) whether medical equipment is used.

Id.

Both the Declaration of Health and the Physician Confirmation fall well outside the boundaries of a "medical examination." They are neither "procedures" nor "tests" that are employed to assess the job applicant's "physical or mental impairments or health." *Test*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/test (last visited Apr. 30, 2023) (defining "test" as "a diagnostic procedure for determining the presence or nature of a condition or

disease or for revealing a change in function."). And even if the Declaration and Confirmation somehow met this definition, they do not remotely satisfy any one of the EEOC's "medical examination" factors.

Still, a lingering issue persists. Although the Physician Confirmation does not qualify as a prohibited "medical examination" it could perhaps "necessitate" one. *See Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 676 (1st Cir. 1995) ("We conclude that a certification from a treating psychiatrist that does not *necessitate new tests or procedures* is best analyzed as an 'inquiry' rather than as a 'medical examination.'") (emphasis added).

To resolve this concern, courts must assess whether the physician or the employer is directing the applicant to undergo the "new test or procedure." *Id.* Here, while doctors may exercise their own discretion and refuse to sign the Physician Confirmation without performing "new tests or procedures," the VA *does not mandate* that level of clinical verification before the physician confirms the Declaration of Health. (ECF No. 45, PageID.1581 [stating that, according to the VA, the "confirmation did not require any specific testing or performance metrics . . ."]). Because the Physician Confirmation *does not require* the certifying doctor to perform any "new tests or procedures," it is more appropriately viewed as an "inquiry" rather than a "medical examination." *Grenier*, 70 F.3d at 676.

The question remains whether the Declaration and Confirmation pose content-appropriate inquiries. As noted previously, employers may ask job applicants about their ability "to perform job-related functions," 42 U.S.C. § 12112(d)(2)(B), and to "describe or . . . demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." 29 C.F.R. § 1630.14(a).

The Declaration of Health requires applicants to affirm that they "do not have a physical or mental health condition that would adversely affect [their] ability to carry out the clinical privileges . . . requested from" the VA. (ECF No. 39-3, PageID.478). This language fits neatly within the ADA's limitations on pre-offer medical inquiries. And since employers may ask any question of a third-party that they could otherwise pose to the applicant directly, the Physician Confirmation – which simply asks the doctor to "concur with the declaration of health" – passes muster under the ADA as well. (ECF No. 45-4, PageID.1632). EEOC Guidance; *see also Grenier*, 70 F.3d at 676 (holding that "an employer may request that an applicant provide medical certification from doctors of ability to perform so long as the inquiry does not otherwise run afoul of § 12112(d)(2)(A).").

Because the Declaration of Health and the Physician Confirmation comply with the ADA's limitations on pre-offer medical inquiries and examinations,

McBratnie's Rehabilitation Act claim cannot withstand summary judgment. Accordingly,

IT IS ORDERED that McBratnie's objections to the April 24, 2023 report and recommendation (ECF No. 64) are overruled.

IT IS FURTHER ORDERED that the April 24, 2023 report and recommendation (ECF No. 61) is accepted and adopted.

IT IS FURTHER ORDERED that the VA's motion for summary judgment (ECF No. 45) is granted.

SO ORDERED.

s/Bernard A. Friedman
Hon. Bernard A. Friedman
Senior United States District Judge

Dated: May 9, 2023
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAROL ANN McBRATNIE,

Plaintiff,

v.

DENIS McDONOUGH,

Defendant.
_____/

Case No. 2:20-cv-12952
District Judge Bernard A. Friedman
Magistrate Judge Kimberly G. Altman

REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (ECF No. 45)[1]

I. Introduction

This is an employment discrimination case. Plaintiff Carol Ann McBratnie (McBratnie), proceeding *pro se*, is suing defendant Denis McDonough, the United States Secretary of Veterans Affairs (VA), for disability discrimination stemming from the VA's decision to terminate the credentialing process when McBratnie refused to sign a pre-employment Declaration of Health form (Declaration). *See* ECF No. 1. Under 28 U.S.C. § 636(b)(1), all pretrial matters were referred to the undersigned. (ECF No. 10).

[1] Upon review of the parties' papers, the undersigned deems these matters appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); E.D. Mich. LR 7.1(f)(2).

Before the Court is the VA's motion for summary judgment. (ECF No. 45). The motion is fully briefed. (ECF Nos. 53, 57, 60). For the reasons set forth below, it is RECOMMENDED that the motion be GRANTED and the case be DISMISSED.

II. Background

A. Overview

In or around February 2014, McBratnie sought employment as a nurse practitioner with CR Associates (CRA), a private company that had contracted to staff a VA outpatient clinic in Bridgeport, Texas. (ECF No. 1, PageID.29-31).[2] Because the position involved treating VA patients, any candidate that CRA intended to hire needed to be referred to the VA for a medical credentialing process. (*Id.*, PageID.31). To be credentialed by the VA, a candidate had to submit numerous documents, including the Declaration and a scope of practice form. (*Id.*). McBratnie submitted some of the requested materials but did not submit either the Declaration or the scope of practice form. (*Id.*). Because she declined to complete and submit these two forms, her credentialing process was terminated on March 26, 2014. (*Id.*). McBratnie then filed a complaint with the

[2] McBratnie submitted exhibits with her complaint, however, the exhibits were not separately docketed. The majority of the facts comprising this subsection of this Report and Recommendation are summarized from the Office of Federal Operations' decision. The decision can be found at ECF No. 1, PageID.29-34.

Equal Employment Opportunity Commission (EEOC), alleging that the VA discriminated against her based on disability when it terminated the credentialing process. (*Id.*, PageID.30).

After losing at the EEOC stage, McBratnie filed the instant lawsuit, alleging that the VA violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act by requiring completion of the Declaration as part of the credentialing process. (*Id.*, PageID.1-13). McBratnie "asserts that [the Declaration] was a cleverly designed form to acquire and use prohibited information in the application process so as to exclude a class of individuals from being considered for open positions." (*Id.*, PageID.14).

B. Declaration of Health

McBratnie testified at her deposition that she believed an employer could not ask about an individual's disability status or require them to obtain a physical until after the employer had extended a job offer to the individual. (McBratnie Deposition, ECF No. 45-3, PageID.1599). Accordingly, McBratnie told her CRA contacts that she was unwilling to complete the Declaration before such an offer was made. (*Id.*). McBratnie was told that the VA required an applicant to submit the Declaration before it would make a "committed offer." (*Id.*). McBratnie did not want to submit the Declaration before receiving an offer to ensure that she "wasn't excluded from the candidate pool because [she is] disabled." (*Id.*).

She further testified that during the EEOC discovery process she learned that CRA submitted four candidates to the VA for credentialing even though there was only one nurse practitioner position available. (ECF No. 45-3, PageID.1596). The VA was then supposed to tell CRA who to hire. (*Id.*, PageID.1596-1597).

The Declaration is reproduced in full below.

DECLARATION OF HEALTH

I, _____, hereby declare that, to the best of my knowledge, do not have a physical or mental health condition that would adversely affect my ability to carry out the clinical privileges which I have requested from VA North Texas Health Care System.

_____ _____
SIGNATURE OF APPLICANT DATE

****

Do Not Fill In This Section

CONFIRMATION OF APPLICANT'S DECLARATION

I concur with the declaration of health presented by _____
(Applicant)

_____ _____
PHYSICIAN SIGNATURE DATE

_____
PHYSICIAN NAME (PRINT)

_____ _____
NAME OF PHYSICIAN'S PRACTICE PHONE NUMBER

****

SERVICE CHIEF ACCEPTANCE
(If not the physician confirming applicant's declaration above)

_____ _____
SERVICE CHIEF SIGNATURE DATE

_____
SERVICE CHIEF NAME (PRINT)

VA North Texas Health Care System Revised 8/29/13

000010

III. Motion for Summary Judgment Standard

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004).

"The moving party has the initial burden of proving that no genuine issue of material fact exists. . . ." *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 486 (6th Cir. 2011) (internal quotation marks omitted); cf. Fed. R. Civ. P. 56(e)(2) (providing that if a party "fails to properly address another party's assertion of fact," the court may "consider the fact undisputed for purposes of the motion"). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.' " *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The fact that McBratnie is *pro se* does not reduce her obligations under Rule 56. Rather, "liberal treatment of pro se pleadings does not require lenient

treatment of substantive law." *Durante v. Fairlane Town Ctr.*, 201 F. App'x 338, 344 (6th Cir. 2006). Additionally, "once a case has progressed to the summary judgment stage, as is true here, the liberal pleading standards under the Federal Rules are inapplicable." *J.H. v. Williamson Cnty.*, 951 F.3d 709, 722 (6th Cir. 2020) (quoting *Tucker v. Union of Needletrades, Indus., & Textile Employees*, 407 F.3d 784, 788 (6th Cir. 2005)) (cleaned up).

IV. Discussion

A. Parties' Arguments

The question in this case is whether the VA violated either the ADA or the Rehabilitation Act when it terminated McBratnie's credentialing process after she refused to complete and submit the Declaration.

The VA argues that requiring an applicant like McBratnie to sign the Declaration is permissible under 42 U.S.C. § 12112 because § 12112(d)(2)(B) provides that an employer "may make preemployment inquiries into the ability of an applicant to perform job-related functions." The VA further argues that requiring the Declaration to be countersigned by a physician "did not constitute a medical examination. And even if it did, the VA would have been permitted to require a job-specific medical examination because the VA was under the reasonable impression that CRA had extended McBratnie a conditional offer of employment." (ECF No. 45, PageID.1579).

McBratnie argues that purpose of the Declaration was to disqualify applicants with disabilities from positions with the VA in violation of the ADA. She also argues that she was in the pre-offer stage of employment with the VA regardless of whether CRA had made her "a conditional offer." (ECF No. 53, PageID.1674).

B. Overview

Under the ADA, employers are prohibited from "discriminat[ing] against a qualified individual on the basis of disability 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). However, when plaintiffs "bring a claim under § 12112(d), [they] are not required to allege that they suffer from a disability as defined by the ADA or that they were discriminated against because of a disability." *Garlitz v. Alpena Reg'l Med. Ctr.*, 834 F. Supp. 2d 668, 677 (E.D. Mich. 2011); *see also Lee v. City of Columbus, Ohio*, 636 F.3d 245, 252 (6th Cir. 2011) ("A plaintiff need not prove that he or she has a disability in order to contest an allegedly improper medical inquiry under 42 U.S.C. § 12112(d).").

"[T]he ADA prohibits an employer from requiring an applicant to undergo a 'preemployment' medical examination, unless it is focused on 'the ability of the applicant to perform job-related functions.' " *Id.* at 675 (quoting 42 U.S.C. §

12112(d)(2)). However, if certain conditions are met, an employer can require an applicant to undergo "a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant[.]" 42 U.S.C. § 12112(d)(3).

Similarly, "[t]he Rehabilitation Act, a parallel statute of the ADA, prohibits the United States Postal Service, federal agencies, and other programs receiving federal funding from discriminating against any qualified individual with a disability." *Bent-Crumbley v. Brennan*, 799 F. App'x 342, 344 (6th Cir. 2020) (citing 29 U.S.C. § 794(a)). The Rehabilitation Act "specifically incorporates the standards applied under the ADA to determine violations, 29 U.S.C. § 794(d), and courts look to guidance under the ADA to determine if a federal employee has been discriminated against because of a disability[.]" *Id.* at 344-345 (citing *Mahon v. Crowell*, 295 F.3d 585, 588-589 (6th Cir. 2002)).

The parties dispute whether McBratnie was in the pre- or post-offer stage, so the legality of the Declaration will be considered as to both stages.

C. Pre-Offer Stage

1. Requiring McBratnie to Sign the Declaration

The first issue is whether requiring McBratnie to sign the Declaration was permissible if it is assumed, as McBratnie contends, that she was in the pre-offer stage during the credentialing process.

"Although inquiry as to the ability of a pre-offer applicant or an employee to perform job-related functions is allowed under the ADA, such inquiry is not without limits." *Farmiloe v. Ford Motor Co.*, 277 F. Supp. 2d 778, 782 (N.D. Ohio 2002). "[T]he ADA limits an employer's ability to request unfounded examination to prevent 'the unwanted exposure of the employee's disability and the stigma it may carry.' " *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 812 (6th Cir. 1999) (quoting *EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1094 n. 8 (6th Cir. 1998)). "The employer may not request 'wide-ranging assessments of mental or physical debilitation that could conceivably affect the quality of an employee's job performance.' " *Farmiloe*, 277 F. Supp. 2d at 782 (quoting *Sullivan*, 197 F.3d at 812).

Additionally, relevant "regulations clarify that while it is appropriate for an employer to inquire into an applicant's ability to perform job-related functions, it is illegal for him to make targeted disability-related inquiries." *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1215 (11th Cir. 2010) (citing 29 C.F.R. § 1630.13); *see also EEOC v. Grisham Farm Prods., Inc.*, 191 F. Supp. 3d 994, 997 (W.D. Mo. 2016) (holding that the defendant violated § 12112(d) because it required all job applicants "to complete a pre-offer health history form, which inquired into whether the applicant suffered from twenty-seven (27) different types of health conditions—including everything from allergies to epilepsy to breast

disorder to heart murmur to sexually transmitted diseases to depression to varicose veins and beyond"). Furthermore,

> [t]he EEOC's enforcement guidance for the statute explains that medical inquiries that are likely to elicit answers relating to disabilities are prohibited, and a blanket query seeking disclosure of any and all medical conditions runs afoul of this prohibition: "Certainly, an employer may not ask a broad question about impairments that is likely to elicit information about disability, such as 'What impairments do you have?' "

EEOC v. Celadon Trucking Servs., Inc., No. 1:12–cv–00275, 2015 WL 3961180, at *6 (S.D. Ind. June 30, 2015) (quoting EEOC, *ADA Enforcement Guidance: Preemployment Disability–Related Questions and Medical Examinations* ("EEOC Enforcement Guidance") (EEOC Notice 915–002) (Oct. 10, 1995) at 8).

Ultimately, a pre-offer inquiry is permissible so long as it is goes to the essential functions of the job. Essential functions are "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1). "Technical skills and experience are not the only essential requirements of a job." *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 674-675 (1st Cir. 1995) (collecting cases).

Here, the Declaration asked McBratnie to sign off on a statement that "to the best of [her] knowledge, [she] do[es] not have a physical or mental health condition that would adversely affect [her] ability to carry out the clinical privileges which [she] ha[d] requested from the VA North Texas Health Care

System." (ECF No. 45-4, PageID.1632).

> The term "clinical privileging" is defined as the process by which a practitioner, licensed for independent practice (i.e., without supervision, direction, required sponsor, preceptor, mandatory collaboration, etc.), is permitted by law and the facility to practice independently, to provide specified medical or other patient care services within the scope of the individual's license, based on the individual's clinical competence as determined by peer references, professional experience, health status, education, training, and licensure.

(Veterans Health Administration Handbook, ECF No. 57-1, PageID.2090).

In other words, the Declaration asked McBratnie to verify that she was mentally and physically capable of providing medical and other patient care services to VA patients seeking the services of a nurse practitioner. The ability to carry out clinical privileges goes to the heart of the essential requirements of a nurse practitioner. If an individual has a physical or mental condition that would adversely affect her ability to carry out these clinical privileges, then it would be fair to say that she is unable to fulfill the essential requirements of the position. Thus, the Declaration was an acceptable inquiry targeted to ensure the individual selected for the nurse practitioner position could perform her "job-related functions." 42 U.S.C. § 12112(d)(2)(B). As such, requiring McBratnie to sign the Declaration was not illegal under either the ADA or Rehabilitation Act as a matter of law. The issue of whether requiring a physician to countersign the Declaration was legally permissible will be considered next.

2. Requiring a Physician Countersignature

Given the finding above that requiring McBratnie to sign the Declaration did not violate § 12112(d) or the Rehabilitation Act, the VA is entitled to summary judgment if its requirement that the Declaration be countersigned by a physician is determined to be a medical inquiry rather than medical examination. This is because medical examinations are forbidden at the pre-offer stage but inquiries are not. 42 U.S.C. § 12112(d)(2).

The VA relies on *Grenier, supra*, where "the First Circuit affirmed summary judgment in favor of the employer, holding that the employer's pre-offer request of a medical certification from a physician did not violate the ADA." *Farmiloe*, 277 F. Supp. 2d at 784 (citing *Grenier*, 70 F.3d at 674). The First Circuit reasoned "that a certification from a treating psychiatrist that does not necessitate new tests or procedures is best analyzed as an 'inquiry' rather than as a 'medical examination.' " *Grenier*, 70 F.3d at 676. An employer can request such a certification "so long as the inquiry does not otherwise run afoul of § 12112(d)(2)(A)." *Id.*

Similarly, in *Harris v. Harris & Hart, Inc.*, 206 F.3d 838 (9th Cir. 2000), "the Ninth Circuit affirmed summary judgment in favor of the employer, holding that the employer's request that [the plaintiff], a former employee with a known disability, provide a medical release from a physician was appropriate." *Farmiloe*,

277 F. Supp. 2d at 784 (citing *Harris*, 206 F.3d at 840). There, the Ninth Circuit upheld the district court's determination that the "medical release" that the defendant required the plaintiff to submit was an "inquiry" rather than an "examination" because it was "more akin to a progress report from a specialist treating a particular injury, than a comprehensive evaluation from a general practitioner testing a worker for physical or mental impairments." *Harris*, 206 F.3d at 843.

The key similarity between the medical inquiries at issue in both *Grenier* and *Harris* was that they "were limited in scope." *Farmiloe*, 277 F. Supp. 2d at 784. Indeed, "[t]he employers in these cases only required a letter from a physician stating that the job applicant had the ability to perform the essential job functions." *Id.* This type of inquiry differs from those that are "unlimited in scope" like a request for an applicant's full medical records. *See id.*

Here, the requirement that the Declaration be countersigned by a physician is analogous to the medical inquiries at issue in *Grenier* and *Harris*. To reiterate, the Declaration asked McBratnie to sign off on a statement that "to the best of [her] knowledge, [she] do[es] not have a physical or mental health condition that would adversely affect [her] ability to carry out the clinical privileges which [she] ha[d] requested from the VA North Texas Health Care System." (ECF No. 45-4, PageID.1632). After signing, McBratnie then needed to obtain the signature of a

physician who agreed with this statement regarding her ability to carry out her clinical privileges. There was no requirement that the signing physician examine McBratnie or perform any specific testing. Therefore, like the medical inquiries at issue in *Grenier* and *Harris*, the Declaration does not run afoul of either the ADA or Rehabilitation Act because it was directed solely at verifying whether McBratnie could perform job-related functions.

In sum, requiring McBratnie to sign and have a physician countersign the Declaration did not constitute a violation of § 12112(d)(2) as a matter of law.

D. Post-Offer Stage: Requiring a Medical Examination

The VA alternatively argues that even if the Declaration amounted to a medical examination, it would nonetheless be permissible "because the VA was under the reasonable impression that CRA had extended McBratnie a conditional offer of employment." (ECF No. 45, PageID.1579). In other words, the VA says that McBrantie could be considered to be at the post-offer stage where requiring a medical examination is permissible. Because the undersigned has concluded that the Declaration was an acceptable pre-offer inquiry into McBratnie's ability to perform job-related functions under § 12112(d)(2), it is not necessary to address this argument. However, it will be considered for the sake of completeness.

To support its contention that McBratnie was in the post-officer stage, the VA relies upon an email exchange between McBratnie and Colleen Martinez

(Martinez) as well as statements from Louann Freeny (Freeny) and Sandra Nickerson (Nickerson). Nickerson was a credentialing specialist with the VA and Freeny was an administrator with CRA. (ECF No. 39-3, PageID.384). Martinez was a senior recruiter for CRA. (*Id.*, PageID.647-648).

Freeny explained that CRA contacts the VA to begin the "extensive background and credentialing process" after "CRA decides that they are going to go with an individual." (*Id.*, PageID.385-386). She further explained that the credentialing process has to be "done prior to a job offer by the VA." (*Id.*, PageID.386, 418). Similarly, Nickerson testified at a deposition that she contacted McBratnie to begin the credentialing process after CRA decided "they wanted her." (*Id.*, PageID.410). She further explained that McBratnie was "offered the position upon credentialing," meaning that she would get the position if she satisfactorily completed the credentialing process. (*Id.*). Additionally, McBratnie mentioned in an email to Martinez that she had been given a start date of March 30, though that date kept "moving into the future." (*Id.*, PageID.647).

The VA argues that based on the foregoing evidence, "it was under the reasonable impression that CRA had extended McBratnie a conditional offer[,]" and that once a conditional offer had been extended, the VA could require McBratnie to undergo a medical examination under 42 U.S.C. § 12112(d)(3). The VA's argument misses the mark.

The term " '[o]ffer' is strictly construed in this context—the offer must be 'real.' " *Garlitz*, 834 F. Supp. 2d at 675 (quoting *O'Neal v. City of New Albany*, 293 F.3d 998, 1008 (7th Cir. 2002)). "For purposes of § 12112(d)(3), a job offer is real if the employer has evaluated all relevant non-medical information that it reasonably could have obtained and analyzed prior to giving the offer." *O'Neal*, 293 F.3d at 1008 (internal quotation marks and citations omitted). Ultimately, "the burden is on the employer to demonstrate that it took reasonable steps to obtain and evaluate all non-medical information before making an offer conditioned on the successful completion of a post-offer examination." *Garlitz*, 834 F. Supp. 2d at 676.

Here, McBratnie was directed to complete the VA credentialing process after interviewing with CRA. The credentialing process required McBratnie to submit approximately a dozen documents to the VA. (ECF No. 1, PageID.31). The record shows that the VA would only consider McBratnie's application once she had completed the credentialing process, meaning that the VA still needed to consider nearly a dozen documents in addition to the Declaration before McBratnie could be evaluated. If any of these documents had not met the VA's standards, McBratnie would not have been hired.

As the Ninth Circuit has explained, offers are not real when they are "contingent not just on the [individuals] successfully completing the medical

component of the hiring process but also on the completion of a critical *non-medical* component: undergoing background checks, including employment verification and criminal history checks." *Leonel v. Am. Airlines*, 400 F.3d 702, 709 (9th Cir. 2005). Accordingly, the VA has failed to meet its burden to "demonstrate that it took reasonable steps to obtain and evaluate non-medical information before making the offer pursuant to § 12112(d)(3)[,]" and thus that McBratnie had a "real" offer of employment which would permit the VA to require her to undergo a medical examination. *Garlitz*, 834 F. Supp. 2d at 677. Thus, the VA is not entitled to summary judgment based on this argument.

E. Summary

The Declaration is the type of medical inquiry that an employer can make of applicants before extending an offer of an employment. Neither the requirement that McBratnie sign the Declaration nor the requirement that a physician countersign the Declaration violates the ADA or Rehabilitation Act. Thus, the VA is entitled to summary judgment.

V. Conclusion

For the reasons set forth above, the undersigned RECOMMENDS that the VA's motion for summary judgment, (ECF No. 45), be GRANTED and the case be DISMISSED.

Dated: April 24, 2023
Detroit, Michigan

s/Kimberly G. Altman
KIMBERLY G. ALTMAN
United States Magistrate Judge

NOTICE TO PARTIES REGARDING OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation. Any objections must be filed within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 144 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 508 (6th Cir. 1991). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Under Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections,

in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the court determines that any objections are without merit, it may rule without awaiting the response.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on April 24, 2023.

s/Carolyn Ciesla
CAROLYN CIESLA
Case Manager