

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

TOMMIE ROBINSON, )  
 )  
 Plaintiff, )  
 )  
 vs. ) Cause No. 4:07cv1233 CEJ  
 )  
 NORMANDY SCHOOL DISTRICT, )  
 )  
 Defendant. )

**PLAINTIFF’S MEMORANDUM IN OPPOSITION OF  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Comes Now, Plaintiff, by and through his attorney, and pursuant to Rule 56 of the Federal Rules of Civil Procedure responds to the Defendant’s Motion to Dismiss or for Partial Summary Judgment. In support thereof, Plaintiff states as follows:

**STATEMENT OF THE CASE**

Plaintiff, a former grounds keeper for the Normandy School District (the “District” or the “Defendant”), filed this suit under the Americans With Disabilities Act (“ADA”) alleging he was the subject of both disparate impact and disparate treatment discrimination from the District for an actual and perceived disability. Specifically, the Plaintiff has been functionally illiterate for the entire twenty-five year period he worked for the District. The Plaintiff never hid this fact, and until the Fall of 2006 the District made various accommodations for the Plaintiff’s condition. In the Fall of 2006, the District instituted a basic literacy skills requirement, and forced the Plaintiff to take a literacy skills test. That test reinforced what the District already knew, that the Plaintiff was all but illiterate. Within months of taking this test the Plaintiff was terminated, and filed this suit.

Prior to answering, the Defendant filed a motion for summary judgment arguing that the Plaintiff's claims failed as a matter of law because he never told any of his supervisors he was disabled. To support its motion for summary judgment, the District relies on affidavits from its former Superintendent and its School Board members which each swear "I was unaware that Mr. Robinson claimed to have a disability." This Memorandum in Opposition is the Plaintiff's response to the Defendant's motion for summary judgment.

### **FACTS**

The Plaintiff, Tommie Robinson, is a former employee of the Defendant Normandy School District. (Compl. ¶ 1). Robinson has a ninth grade education and has been functionally illiterate his entire life. (Affidavit of Tommie Robinson at ¶ 2, attached hereto as Plaintiff's Exhibit 1, hereinafter "Pltf.'s Aff. "). In July of 1982 the District hired Robinson as a grounds worker, and he was eventually promoted to a grounds supervisor. (Pltf.'s Aff ¶ 3).

Between July 1982 and September of 2006 Robinson's supervisors knew he was illiterate and gave him various accommodations. (Pltf.'s Aff. ¶¶ 13, 14). Those accommodations included, but were not limited to: giving Robinson work assignments and instructions verbally; allowing Robinson to take his daily logs home so family could help him complete them; assigning Robinson to familiar tasks that did not require new information or written instructions; assigning Robinson to a team for new and complex assignments that required detailed written instructions. (Pltf.'s Aff. ¶14).

On September 12, 2006 Robinson enrolled in the Fundamentals Phonics and More Course. (Calloway Aff. Ex. B2). Approximately one month later, on October 3, 2006, Dr. Calloway notified classified staff that the District would begin screening employees to see that

they met the District's basic literacy skills requirement. (Calloway Aff. Ex. B3). As part of that screening process the District required Robinson to take a "literacy skills assessment" on October 17, 2006. (Calloway Aff. Ex. B4).

On March 9, 2007 Robinson received a second memorandum from the District stating "your initial literacy assessment indicated the need for an intense program of literacy development." (Calloway Aff. Ex. A2). The District also claimed in that memorandum that "the recently administered retest showed no progress in reading skills." (Calloway Aff. Ex. A2). The District has not provided the test results for this second test. (Pltf.'s Aff. ¶ 6). The March 9, 2007 memorandum directed Robinson to provide proof that he was enrolled in an approved literacy program by March 16, 2007. (Calloway Aff. Ex. A2). In response to this directive, Robinson enrolled in the St. Louis Public Schools Adult Education and Literacy program, and provided the District with his enrollment form. (Calloway Aff. Ex. A3).

On Thursday April 5, 2007, the District gave Mr. Calloway a second memorandum giving him until Tuesday April 10, 2007 to show he was actually attending class. (Calloway Aff. Ex. A4). The very next day the Plaintiff provided the District with a handwritten statement from Mary Sykees, his adult education teacher, which stated that he was enrolled in a reading class that met from 4 p.m. to 7 p.m. on Tuesdays and Thursdays, and that he was being tested to determine his abilities. (Pltf.'s Aff. ¶ 8; April 5, 2007 note from Mary Sykees, attached here to as Plaintiff's Ex. 2; hereinafter "Pltf.'s Ex. 2").

On Thursday, April 12, 2007 the District informed Robinson by letter that he was terminated for failure to provide evidence of attendance in a literacy program. (Calloway Aff. Ex. A5). That letter also stated that the Board of Education affirmed this decision at its April 11,

2007 meeting. (Calloway Aff. Ex. A5). Mr. Robinson was never informed that the District planned to terminate him, or that the Board would address his case at the April 11, 2007 meeting. (Pltf.'s Aff. ¶ 11). As such, Robinson did not have any opportunity to refute the allegations made against him. (Pltf.'s Aff. ¶12).

The District's Superintendent, Dr. Connie Calloway, recommended that the Board of Education terminate Robinson on April 11, 2007. (Calloway Aff. at ¶ 2). Dr. Calloway holds a bachelor's degree from Sarah Lawrence University, a master's degree from Harvard and a doctorate degree from Ohio University. (Press Release, Detroit Public Schools, Board Selects Connie Calloway as Superintendent (March 9, 2007) attached hereto as Plaintiff's Ex. 3, hereinafter "Pltf.'s Ex. 3"). Dr. Calloway has more than thirty years experience working in education. (Pltf.'s Ex. 3). This experience includes work as a reading specialist, adult education instructor, curriculum supervisor, principal and superintendent. (Pltf.'s Ex. 3). Dr. Calloway has also served on the faculty of Cleveland State University, Ashland University and John Carroll University. (Pltf.'s Ex. 3).

Dr. Calloway personally reviewed the Plaintiff's test results. (Calloway Aff. Ex. B5). On December 11, 2006, Dr. Calloway personally met with Robinson to discuss his test results and the District's minimum competency skills. (Calloway Aff. Ex. A1). Following that meeting, Dr. Calloway took the time to send Robinson a memorandum with his test results. (Calloway Aff. Ex. B5). In that Memorandum Dr. Calloway points out that "your scores reflect a need for literacy instruction." (Calloway Aff. Ex. B5). Next to Robinson's name in the test results are the hand written words "one on one tutoring recommended." (Calloway Aff. Ex. B5).

In addition to his work as a grounds keeper for the District, Robinson runs a small

landscaping business which performed work for Dr. Calloway. (Pltf.'s Aff. ¶¶ 15, 16). Because of this work, Robinson had numerous opportunities to speak with Dr. Calloway both professionally and personally. (Pltf.'s Aff. ¶17). On at least one occasion, Dr. Calloway informed Robinson that if it were not for his inability to read he would be the head of his department. (Pltf.'s Aff. ¶ 17).

## DISCUSSION

### **I. Standard for a Motion for Summary Judgment.**

A moving party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The initial burden of proof is on the moving party to establish that there are no genuine issues of fact, and that it is entitled to judgment as a matter of law. *City of Mt. Pleasant Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268, 273 (8<sup>th</sup> Cir. 1988). The evidence is viewed in the light most favorable to the nonmoving party, thereby giving them the benefit of all inferences that may be reasonably drawn. *Epps v. City of Pine Lawn*, 353 F.3d 588, 591 (8<sup>th</sup> Cir. 2003). In a discrimination case, summary judgment should not be granted unless the evidence could not support “any reasonable inference” of discrimination. *Breeding v. Gallagher*, 164 F.3d 1151, 1156 (8<sup>th</sup> Cir. 1999). As such, summary judgment should seldom be granted in discrimination cases, because inferences are often the basis of the claim. *Id.*

The Defendant’s assertion that “to survive summary judgment, plaintiff must *plead and prove* specific facts,” is simply incorrect. *See* Def. Mem. Supp. Summ. J. at 5. A nonmoving party need not prove anything. Instead, the Plaintiff must simply “provide specific facts

establishing that there is a genuine issue of material fact.” *Scheerer v. Potter*, 443 F.3d 916, 919 (7<sup>th</sup> Cir. 2006). A motion for summary judgment is not the appropriate place to weigh the evidence and determine the truth of the matter, instead it is a means to determine whether there is a genuine issue for trial. *Connolly v. Clark*, 457 F.3d 872, 876 (8<sup>th</sup> Cir. 2006).

**II. Material questions of fact still exist, and as such the Defendant is not entitled to summary judgment.**

As the moving party, the Defendant has the burden of showing that no material questions of fact still exist. The Defendant has not met this burden. The District is arguing that it is entitled to summary judgment because it did not know the Plaintiff was disabled. However, the Defendant’s supporting affidavits and documents simply claim that the Plaintiff did not tell anyone he was disabled prior to being terminated. The District never claimed, nor supported a claim, that it did not know Robinson was disabled, and the facts in this case strongly imply that the District either knew the Plaintiff had a learning disability, or regarded him as having a learning disability. As such, material questions of fact still exist as to whether the District knew the Plaintiff was disabled, or whether the District regarded him as disabled.

**A. A material question of fact still exists as to whether the District knew the Plaintiff was disabled.**

The District is not arguing that the Plaintiff’s illiteracy is not caused by a recognized learning disability such as dyslexia. Instead, the District’s entire case is based on the assertion that “to establish a violation of the ADA, the claimant must show that the employer knew (or should have known) of the disability.” (Def.’s Mem. Supp. Summ. J. at 3). To support its claim the District relies on *Hedberg v. Indiana Bell Tel. Co.* and *Miller v. National Casualty* for the

proposition that “an employer cannot be liable under the ADA for firing an employee when it indisputably had no knowledge of the disability.” *See* Def. Memo. Supp. Summ. J. at 3 - 4 quoting *Hedberg*, 47 F.3d 928, 931 - 934 (7<sup>th</sup> Cir. 1995); and citing *Miller* 61 F.3d 627, 629 (8<sup>th</sup> Cir. 1995).

The District’s reliance on these cases completely misses the mark. First, the defendants in *Hedberg and Miller* did not just show that the plaintiffs never claimed to be disabled, they also showed that they had no knowledge, either direct or indirect, that the plaintiffs were disabled. *See Hedberg*, 47 F.3d at 931; *Miller*, 61 F.3d at 630. While the District is using these cases to create inference that it did not know the Plaintiff was disabled, all it has really stated is that the Plaintiff never told Dr. Calloway or the Board of Education that he was disabled. *See* Def.’s Stat. Uncon. Fact at ¶¶ 7, 8. Had the District bothered to read the entire opinions in these cases it would know that willful ignorance is not a defense to an ADA claim. *See Hedberg*, 47 F.3d at 934; *Miller* 61 F.3d at 630. Indeed, both *Hedberg* and *Miller* point out that some disabilities are so obviously manifested by their symptoms that “it would be reasonable to infer that [the] employer actually knew of the disability.” *Hedberg*, 47 F.3d at 934; *See also Miller* 61 F.3d at 630.

For instance, an employee who suffers from frequent seizures at work likely has some disability. If an employer admitted it fired the employee because of his frequent seizures, a reasonable inference might be drawn that the employer knew the employee had a disability.

*Hedberg*, 47 F.3d at 934. Occasionally summary judgment is appropriate where the employer can show it has no reasonable basis of knowing its former employee was disabled, however those

cases are rare. *Id.* at 932.

In the present case a careful look at the District's affidavits and statement of uncontroverted facts show that the District has never claimed that it did not know the Plaintiff was disabled. Instead, the District is simply saying the Plaintiff never informed Dr. Calloway or the School Board that he was disabled. Dr. Connie Calloway, the District's former Superintendent swore that "I was unaware that Mr. Robinson *claimed to have* a disability." (Calloway Aff. at ¶ 1, emphasis added). Dr. Calloway goes on to say that "*no one discussed with me any disability* which may have caused his illiteracy," and "*at no time did he or anyone on his behalf indicate he had a disability* that kept him from being able to read or to learn to read at a higher level." (Calloway Aff. at ¶ 5, emphasis added). Just like Dr. Calloway, each of the Board members swore that "I was unaware that Mr. Robinson *claimed to have* a disability." (Marks Aff. at ¶ 3; James Aff. at ¶ 3; Collins Aff. at ¶ 3; Days Aff. at ¶ 3; Madison Aff. at ¶ 3; Hartman Aff. at ¶ 3; Haynie Aff. at ¶ 3, emphasis added).

Likewise, the District's statement of uncontroverted fact does not claim that it did not know the Plaintiff was disabled. Instead, the District alleges that "Plaintiff *did not inform* the Superintendent of Schools that he was suffering from a disability which caused his inability to read." (Def.'s Stat. Uncon. Fact at ¶ 7). To the extent the District makes any assertions as to what its employees and board members knew, it simply states "none of the defendant's Board of Education *knew that plaintiff claimed* to have a disability at the time they voted to terminate his employment." (Def.'s Stat. Uncon. Fact at ¶ 8). The District's evidence in support of its motion for summary judgment only addresses what the Plaintiff, a man who everyone accepts could barely read, told the District's employees and board members. None of these statements actually

show what the District and its employees knew, or should have known.

To the contrary, the facts in this case clearly show that Dr. Calloway, the individual who recommended Robinson be fired, either knew or had reason to know Robinson had a learning disability. Dr. Calloway has worked as an educator for more than thirty years. (Pltf.'s Ex. 3). In that time she has worked as a reading specialist, adult education instructor, curriculum supervisor, principal and superintendent. (Pltf.'s Ex. 3). Dr. Calloway has a masters degree from Harvard, and a doctorate from Ohio University, and has served on the faculty of other universities. (Pltf.'s Ex. 3). In addition, Dr. Calloway was familiar with Robinson and had discussed his inability to read prior to implementing the basic literacy requirement. (Pltf.'s Aff. ¶ 17). Finally, Dr. Calloway had access to Robinson's test results, results which indicated that Robinson needed "one on one tutoring." (Calloway Aff. Ex.'s B5, B6). All of this evidence clearly implies that Dr. Calloway had enough experience, the appropriate resources to at least have reason to know Robinson had a disability, even if she wished to remain willfully ignorant.

In addition, Dr. Calloway's affidavit is conspicuously silent on a number of important issues. For instance, Dr. Calloway does not explain why she took a personal interest in Robinson's case, going to the point of taking the time to discuss his test results with him. (*See* Calloway Aff. Ex. A1). Further, the District subjected Robinson to two literacy tests. (Calloway Aff. Ex. A2, B5). However, the District has not provided either of these tests, nor any of the metric's and assumptions used to reach their determinations. Indeed, the District has yet to provide anything relating to the second test. Even if these tests were not actually used to diagnose the Plaintiff (which we simply do not know), at the very least a reasonable inference can be made that an individual with Dr. Calloway's background should have known that

Robinson had a learning disability.

Finally, Dr. Calloway's affidavit contradicts the District's own documents, thereby creating legitimate credibility questions with regard to her entire statement. On the final page of her affidavit Dr. Calloway states, "Mr. Robinson was directed to enroll in one of the specified programs, which he did not do." (Calloway Aff. at 4). However, the District's Exhibits clearly show that the District received Robinson's application to the Urban program. (See Calloway Aff. Ex. A3). Dr. Calloway's credibility is further called into question with the existence of Plaintiff's Exhibit 2. Dr. Calloway states that Robinson "never provided proof of participation in any program as he had been directed to do." (Calloway Aff. at ¶ 6). However, the Plaintiff has produced documentation which he provided to the District in response to its April 5, 2007 letter directing him to produce evidence that he was attending a reading program. (Pltf.'s Ex. 2). Dr. Calloway's contradiction of her own facts, and the April 5, 2007 note from Ms. Sykees create credibility questions regarding the District's stated reason for terminating Robinson.

Given the facts in this case, it is simply incredible to believe that the District did not know, or reasonably suspect that the Plaintiff suffered from a learning disability. Here we have an employer that is both in the business of, and has a legal responsibility to identify and educate students with learning disabilities. Further, the District's Superintendent had ample training, resources, interaction and documentation to make such a diagnosis for Robinson. Dr. Calloway remained conspicuously silent on whether she knew or suspected Robinson had a disability. Finally, evidence exists that clearly contradicts her stated reason for recommending Robinson's termination. At the very least, Plaintiff has shown the tangible implication that Dr. Calloway knew, or suspected, that Robinson was disabled and terminated him because of those suspicions.

The District has clearly failed to meet the burden of establishing that no material questions of fact exist as to whether it knew the Plaintiff was disabled. The test under the ADA is whether the employer actually knew a plaintiff was disabled, not whether the plaintiff told the employer he was disabled. In the present case, the District has only shown evidence that the Plaintiff never told anyone he was disabled. The Plaintiff has shown that a material question of fact still exists as to whether or not the District knew the Plaintiff was disabled, and summary judgment is therefore inappropriate at this time.

**B. A question of material fact still exist as to whether the Defendant “regarded” the Plaintiff as being disabled.**

Whether or not the Plaintiff told anyone in the District he was disabled is irrelevant to his claim that the District regarded him as being disabled. The ADA protects qualified individuals with a “disability,” which is defined as: “(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). Under subsection (C), individuals who are “regarded as” having a disability are protected by the ADA regardless of whether they are actually disabled. *Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999).

There are two ways an individual may be “regarded as” having a disability, and thereby be covered by the ADA. First, his employer may mistakenly believe that a person has an impairment that substantially limits one or more major life activities. *Id.* Second, his employer may mistakenly believe that an actual, non-limiting impairment substantially limits one or more major life activities. *Id.* Under the “regarded as” definition of disability it does not matter

whether a plaintiff actually has a “physical or mental impairment” or not, so long as his employer believes he is disabled. Therefore, if the Defendant treated the Plaintiff as if his illiteracy were caused by a learning disability, he is still protected under Subsection (C) regardless of whether he actually has a learning disability.

In the present case, the District has not provided any evidence to negate the Plaintiff’s claim that it regarded him as disabled. In fact, the Defendant’s Motion for Summary Judgment does not even address the Plaintiff’s allegation that the District regarded him a being disabled. As explained above, the District is simply asserting that the Plaintiff never told anyone he was disabled. Even if the District had properly addressed this claim, the previous analysis regarding whether Dr. Calloway knew Robinson was disable applies equally to whether she regarded him as disabled.

Given Dr. Calloway’s interaction with Robinson, her extensive experience as an adult educator and as a reading specialist, it is almost impossible to believe that she never suspected that Robinson had a learning disability. The Plaintiff’s claim that the District regarded him as disabled becomes even more credible given the District’s statements that he needed “an intense program of literacy development,” to the point of recommending “one on one tutoring.” (Calloway Aff. Ex. A2, Ex. B6). Finally, a question of fact still exists over whether Robinson provided the District evidence that he was attending class, and as such whether the Defendant’s stated reason for terminating him was a pretext. It does not matter whether this evidence ultimately shows that Dr. Calloway knew the Plaintiff was disabled, or that she just regarded him as disabled, so long as her recommendation was based on one of those reasons it would violate the ADA.

Under a claim that the Defendant regarded Robinson as disabled, it makes absolutely no difference that he did not inform the District that he was disabled. As described above, questions of fact still exist as to whether or not the District, and specifically Dr. Calloway, regarded the Plaintiff as being disabled. The evidence shows that the individual recommending termination, Dr. Calloway, had adequate training and sufficient interaction with the Plaintiff, and could have diagnosed him with a learning disability, or at the very least suspected a learning disability was behind his illiteracy. As such, summary judgment is not appropriate.

### **III. The ADA recognizes a cause of action for disparate impact.**

The Defendant makes a bold, and legally incorrect, assertion that there is no cause of action recognizable under the law that could possibly invalidate the District's "basic literacy skills requirement." (Def.'s Memo. Supp. Summ. J. at 5.) Contrary to the Defendant's assertions, the ADA recognizes claims for both disparate treatment and disparate impact. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). The ADA specifically prohibits employers from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability." 42 U.S.C. § 12112 (b)(6).

In order to make a prima facie case of disparate impact under the ADA, a plaintiff must:

- 1) identify the challenged employment practice or policy; and pinpoint the defendant's use of it;
- 2) demonstrate a disparate impact on the plaintiff or a protected group; and 3) demonstrate a causal relationship between the identified practice and the disparate impact. *Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 n. 26 (5<sup>th</sup> Cir. 1999). A disparate impact claim does not require any animus on the part of the defendant. Likewise, whether or not an employer knew any of its employees were disabled is completely irrelevant under a disparate impact claim.

In the present case, there is no question that the Defendant adopted a “basic literary skills requirement” which required employees to demonstrate they had mastered reading and writing skills. (Stat. Uncon. Facts at ¶ 2). There is also no dispute that the Defendant tested both the Plaintiff and other employees to implement this test. (Stat. Uncon. Facts at ¶ 3). In addition, the Defendant has admitted that its test is intended to screen out anyone who is illiterate, regardless of cause. (Def.’s Memo. Supp. Summ. J. at 6). However, the Defendant has not asserted that its “basic literacy skills requirement,” and the tests it used to enforce it, do not have a discriminatory impact on individuals with disabilities such as the Plaintiff. Nor has the Defendant provided any evidence to support such an assertion. As such, the Defendant has not met its burden, and summary judgment is inappropriate at this time.

**IV. A motion for summary judgment is not proper at this time because the Plaintiff requires substantial discovery on key issues in this case.**

While a defending party may move for summary judgment at any time, summary judgment should be refused “where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). Rule 56(f) allows a nonmoving party to oppose summary judgment by showing that the party cannot present essential facts to justify its opposition. Fed. R. Civ. Pro. 56(f).

In the present case, the Defendant has not even answered, let alone given the Plaintiff adequate time for discovery, and discovery is needed in this case. For instance, District admits that it has given the Plaintiff two literacy tests. (Calloway Aff. at ¶ 6). The Defendant has not provided copies of these tests, any information as to how they were administered, who administered them or any explanation as to how these test determined that the Plaintiff was

reading at the kindergarten level. Likewise, District Exhibit B6 indicates that the Plaintiff was given Test “L.” (Calloway Aff. Ex. B6). Despite this designation there is no explanation of what other tests were given, why the Plaintiff was given Test “L,” how the Defendant determined who took what test, or what Test “L” was testing for. These documents are needed to answer legitimate questions such as: did the Defendant’s own tests diagnose the Plaintiff with a learning disability; did the Defendant target the Plaintiff with a specific test because it believed he was disabled; or did the Test “L” have a disparate impact on individuals with learning disabilities.

Further, Dr. Calloway’s affidavit has raised numerous questions of fact, and serious credibility issues that can only be answered through discovery. For instance, Dr. Calloway’s affidavit states that “I was unaware that Mr. Robinson claimed to have a disability.” (Calloway Aff. at ¶ 3). It does not state that she did not know he was disabled, or that she did not consider him disabled. These omissions are especially troublesome given her advanced degrees and experience as both a reading specialist and an adult education teacher. Finally, Dr. Calloway has contradicted herself on at least one occasion by stating that the Plaintiff did not enroll in a District approved education program, when the Defendant’s own documents clearly show that he did. (*Compare* Calloway Aff. at ¶6 with Ex. A4, Ex. A5 and Ex. A6). Given her lack of candidness, and misstatement of facts, Dr. Calloway’s affidavit clearly raises questions of fact and credibility that can only be resolved through discovery.

Finally, the Plaintiff in this matter has been an employee of the District for almost twenty-five years. (Pltf.’s Aff. ¶ 3). In that time his supervisors have known he was illiterate, and have made accommodations for him. (Pltf.’s Aff. ¶13). The Plaintiff’s personnel file contains twenty-five years of reviews and other documents relating to his interaction with his supervisors,

including Dr. Calloway. Under any theory of discrimination, the Plaintiff is clearly entitled to make his case with evidence found in his personnel files instead of relying on the Defendant's assertion that it did not discriminate against him.

**CONCLUSION**

For all of the foregoing reasons, Defendant's Motion for Summary Judgment is inappropriate at this time. Therefore, Plaintiff respectfully requests the Court to deny the Defendant's Motion for Summary Judgment.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 17, 2007, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following: Darold E. Crotzer, Jr, Attorney for Defendant.

/s/ J. Christopher Chostner

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