UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SCOTT MCGOWAN, Plaintiff	)	
vs.	)	CIVIL ACTION NO. 3:20-cv-30131-KAR
TOWN OF WILLIAMSTOWN, JASON HOCH, and KYLE JOHNSON, Defendants	)	

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO PARTIALLY DISMISS THE PLAINTIFF'S COMPLAINT [DKT. NO. 12]

NOW COME the Defendants, Town of Williamstown, Jason Hoch, and Kyle Johnson (collectively "Defendants"), and, hereby file this Reply Brief in response to Plaintiff's Opposition to Motion of the Defendants to Partially Dismiss the Plaintiff's Complaint ("the Opposition").

A. Facts in the Record Establish that the Alleged Perception of Plaintiff's Impairment was Transitory and Minor

Plaintiff argues that the ADA exception for impairments that are both "transitory and minor" has no bearing in this case, and does not address that portion of Defendants' argument. Rather, Plaintiff argues that it is impossible to resolve this issue in Defendants' favor at this stage of the proceedings because it constitutes an affirmative defense.

> On a Rule 12(b)(6) Motion, the court's inquiry sometimes may encompass affirmative defenses. Everything depends on the record. As a general rule, a properly raised affirmative defense can be adjudicated on a motion to dismiss so long as (i) the facts establishing the defense are definitively ascertainable from the complaint and other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude.

Rodi v. Southern New School Sch. of Law, 389 F.3d 5, 12 (1st Cir. 2004), citing *Banco Santander De P.R. v. Lopez-Stubbe (In Re: Colonial Mortg. Bankers Corp.)*, 324 F.3d 1216 (Cir. 2003).

(in an appropriate case, an affirmative defense may be adjudicated on a motion to dismiss for failure to state a claim).

Contrary to Plaintiff's position, the facts establishing Defendants' affirmative defense are definitively ascertainable from the complaint and the documents attached to Defendants' Motion to Dismiss, and those facts are sufficient to establish the affirmative defense with certitude. Those facts establish that, to the extent that Defendants could have perceived Plaintiff as suffering from an impairment, that perception began on January 4, 2019 when Plaintiff self-disclosed he was suffering from physical, emotional and medical setbacks. By February 12, 2019, any such perception necessarily terminated when Plaintiff was cleared to return to work by both his primary care physician and a psychologist chosen by the Town. Plaintiff returned to work full-time at that point, and there are no allegations that would support an inference that Defendants regarded Plaintiff as impaired after that point. To the extent that Defendants could have regarded Plaintiff as impaired, that perception could only have lasted for a period of approximately six weeks, firmly establishing, without the need for further discovery that any perceived impairment was, by definition, "transitory and minor."[1]

B. Plaintiff's Paid Administrative Leave was not a Discriminatory Adverse Action

In support of his argument that his paid administrative leave was an adverse action, Plaintiff appears to make three points: (1) that the leave was unnecessarily long, (2) that it was adverse because Plaintiff's weapon and license to carry was taken from him, and (3) that an email from Johnson to the police department regarding Plaintiff's leave revealed that the leave was involuntary and for medical reasons. These actions, even taken together, do not amount to

[1] Discovery on Johnson's state of mind and knowledge is not required to reach this conclusion. Plaintiff does not allege that Johnson based his decision to require a medical evaluation on stereotypes or his own speculation about Plaintiff's health, but solely on Plaintiff's self-disclosure, which is not disputed.

adverse employment actions. Importantly, Plaintiff does not argue that he lost opportunities for professional advancement or to earn money while he was on leave, factors the case law most frequently considers when considering whether paid leave is an adverse action. See e.g., *Coloplast Corp.*, 295 F. Supp. 3d 37, 43 (D. Mass. 2018).

Plaintiff argues that requiring him to stay on paid administrative leave for three weeks while awaiting a psychological evaluation was "particularly unjustified" and constituted a discriminatory adverse action.[2] (Docket No. 12, p. 8). Whether such a leave is an adverse action is an objective test from the perspective of a reasonable person in plaintiff's position, considering all the circumstances. *United States ex rel. Herman v. Coloplast Corp.*, 295 F. Supp. 3d 37, 43 (D. Mass. 2018).[3] Objectively, Plaintiff's period of leave was not unnecessarily long. Contrast *Coloplast Corp.*, 295 F. Supp. at 43 (D. Mass. 2018) (period of nearly one year of paid administrative leave found to be an adverse action). There are no allegations that the leave was prolonged beyond the time it took for Plaintiff to be evaluated by a psychologist,[4] and Plaintiff identifies no cases where such a minimal period of leave was found to be an adverse action. Likewise, Plaintiff's weapon and license to carry were taken for only a brief period of time and

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[2] Plaintiff argues that involuntary leave "may" constitute an adverse action, as was acknowledged by Defendants in their motion. (See Docket No. 12, p. 8, Docket No. 8, p. 6). Plaintiff appears to imply that the passage of the ADAAA in 2008 changed the law regarding whether involuntary leave constitutes an adverse employment action. While Defendants note the language added to a federal regulation cited by Plaintiff, both prior to an and after the regulation was amended, courts have found that that administrative leave did not violate the ADA. See e.g., *Adkison v. Willis*, 214 F. Supp. 3d 1190, 1198 (N.D. Al. 2016) (placing a police officer on paid administrative leave pending the results of a medical examination did not violate the ADA); *Watson v. City of Miami*, 177 F.3d 932, 935 (11th Cir. 1999) (placing a police officer on paid administrative leave pending the results of a medical examination did not violate the ADA). The passage of the ADAAA did expand the scope of the ADA, but the expansion occurred in the definition of a disability, not in what constitutes an adverse action. See *EEOC Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, https://www.eeoc.gov/statutes/notice-concerning-americans-disabilities-act-ada-amendments-act-2008

[3] Defendants relied on this standard in their motion, and Plaintiff does not offer an alternative. In his Opposition, Plaintiff appears, without saying, to be applying this standard to the facts.

[4] The length of the leave may have been prolonged by Plaintiff's primary care physician who refused to refer him to a psychologist. (See Docket No. 1, ¶ 52).

Plaintiff does not allege that this had a tangible impact on him. Plaintiff cites to no case where taking an officer's weapon during a suspension or administrative leave to undergo fitness-for-duty exams is considered an adverse action, and as is argued below, such action was justified and arguably required.

Plaintiff's argument that Johnson violated his Second Amendment or Due Process rights by taking his license to carry a weapon is also without merit. The determination of what weapon, if any, a police officer may carry lies within the discretion of the head of local law enforcement. See M.G.L. c. 41, § 98 ("[Police officers] may carry within the commonwealth such weapons as the chief of police or the board or officer having control of the police in a city or town shall determine"); *Kraft v. Police Comm'r*, 410 Mass. 155 (1991) (Police commissioner has responsibility to determine conditions under which police officer will qualify to carry a weapon); *Boston v. Boston Police Patrolmen's Assoc.*, 8 Mass. App. Ct. 220, 225 (1979) (In Massachusetts, "the decision as to who shall carry a firearm and under what conditions, be it a public official or a private citizen, is one which our Legislature has seen fit to leave with the heads of law enforcement agencies").

Finally, as argued in Defendant's Motion, Johnson's email to the department was facially neutral and cannot reasonably be construed to have stigmatized Plaintiff in the manner he alleges, nor can the reference in the email to "health and wellness" be construed to have violated Plaintiff's medical privacy. (See Docket No. 8, Footnote 2).

C. The Fitness-For-Duty Exams and Related Actions Were Job-Related and Consistent with Business Necessity

Plaintiff argues that the letter from Johnson to Plaintiff placing him on paid administrative leave expressing concern for Plaintiff's health and well-being establishes that Johnson regarded him as disabled, but ignores the clearly established "job-related and consistent with business

necessity" exception contained in the ADA and developed by the courts. In some cases, such as this, employers have a right, and at times a duty, to make reasonable inquiries regarding the fitness of their employees to work.

The business necessity of requiring medical examinations, placing Plaintiff on paid administrative leave, and taking Plaintiff's weapon and license are all necessarily intertwined. Plaintiff disclosed to Johnson that he suffered from "physical, *emotional*, and medical setbacks I have experienced and still cope with on a daily basis as a result of . . . *enormous stress*." (Docket No. 8-2, p. 3 (emphasis added)). This statement provides an objective basis for Johnson to question Plaintiff's psychological state and provides a clear business necessity for obtaining a job-related physical and psychological evaluation. Plaintiff appears to argue that because he was, as a result of the exams, found to be physically and mentally fit to perform the duties of his position, it follows that it was not job-related or consistent with business necessity to require him to undergo the evaluations. This inference cannot be drawn with the benefit of hindsight, however, but must be based on the information available to Johnson at the time of the decision when Plaintiff, without any apparent reason, self-reported significant physical, emotional, and medical setbacks.

When there is a reasonable basis to doubt a police officer's psychological fitness to perform his job, it is reasonable to place the officer on leave and take the officer's firearm, thereby mitigating the possibility of harm from an officer who is mentally unfit. *Nolan v. Police Comm'r of Boston*, 383 Mass. 625, 630 (1981) ("There is no doubt that the Commission [of the Boston Police Department] has a public duty to oversee the performance of police officers, and especially their use of firearms. A fortiori, the Commission has the authority and duty to determine a police officer's fitness to perform his duties or to return to full working status.")

(emphasis added and internal citations omitted)). If a police officer is psychologically unfit to carry out his or her duties, such an officer could pose a significant risk to the public by being allowed to carry a weapon and/or continue to exercise the substantial powers of a police officer. In fact, failure to place an officer on leave and take the officer's firearm after receiving notice that an officer may be psychologically unfit, could expose a municipality to liability.

Plaintiff's reliance on *LaCroix v. Boston Police Department*, 454 F. Supp. 3d 97 (D. Mass. 2020) is misguided. In that case, there were no facts to support a finding that plaintiffs may be psychologically unfit to perform the duties of their position. A psychological examination was required as a result of a blanket policy requiring such an examination of any officer on leave for a specified period of time. By contrast, in this case, there were specific, individualized facts upon which Johnson based his requirement that Plaintiff undergo a psychological evaluation: Plaintiff's own written and verbal communications to Johnson.

I. CONCLUSION

For the reasons set forth herein, Defendants' Motion to Partially Dismiss the Plaintiff's Complaint should be allowed.

THE DEFENDANTS,
TOWN OF WILLIAMSTOWN,
KYLE JOHNSON, AND JASON HOCH,

Dated: November 18, 2020

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 18th day of November, 2020.

/s/ Patricia M. Rapinchuk, Esq.
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