IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-01321-DME-MLC

JOHN HUNTZ,

Plaintiff,

v.

BILL ELDER as Sheriff of El Paso County Sheriff's office, and
EL PASO COUNTY SHERIFF'S OFFICE,

Defendants.

ORDER

Defendants Bill Elder in his official capacity and the El Paso County Sheriff's Office (collectively, "Defendant" or the "Sheriff's Office"), move to amend their answer to add an affirmative defense (Doc. 72). The court had referred the motion to Magistrate Judge Craig B. Shaffer, who heard oral argument on September 21, 2017. Judge Shaffer ruled from the bench that he would issue a written opinion recommending denial of the motion (Doc. 82, minutes). Judge Shaffer later became unavailable for the present. As the case is ready for a final pretrial conference and the setting of trial, the court withdrew its reference of the motion (Doc. 88). The Court, having considered the parties' written pleadings and the taped hearing before the Magistrate Judge, DENIES the motion.

I. BACKGROUND

On June 1, 2016, Plaintiff John Huntz and former plaintiff Tiffany Huntz filed this action relating to their former employment with the Sheriff's Office (Doc. 1). On August 25, 2016,

they filed an amended complaint stating four claims (Doc. 11). As pertinent to the present motion, Mr. Huntz brings a claim under the Americans with Disability Act, the "ADA" for failure to accommodate a disability from shoulder surgery and impairment (Doc. 11 ¶¶ 172–193; claim four). Mr. Huntz also brings a retaliation claim under Title VII of the Civil Rights Act which is not implicated in the Sheriff's Office's present motion.

On September 8, 2016, Defendant answered as to only Mr. Huntz's ADA claim (Doc. 14) and otherwise moved to dismiss (Doc. 15). After the court denied the motion to dismiss (Doc. 21), the Sheriff's Office answered claims one through three (Doc. 28). On March 9, 2017, the Sheriff's Office timely amended its answers to admit an allegation and drop an affirmative defense (Doc. 38).[1] None of the three answers pled that Mr. Huntz was a "direct threat" to the "health or safety of others," an affirmative defense provided by the ADA. 42 U.S.C. §§ 12111, 12113(b); *Chevron USA v. Echazabal*, 536 U.S. 73, 78 (2002).

On April 17, 2017, both sides moved for summary judgment. As pertinent here, Defendant argued that Mr. Huntz was a direct threat to the health or safety of others (Doc. 46 at pp. 27–28). In his May 26, 2017 response, Mr. Huntz argued that the Sheriff's Office could not rely on this affirmative defense because it did not plead it (Doc. 60, at p. 27). Meanwhile, in opposing Mr. Huntz's motion for summary judgment on the Sheriff Office's affirmative defense of "undue hardship," the Sheriff's Office again raised the direct threat defense (Doc. 56 response at pp. 16–17, filed May 26, 2017). Mr. Huntz again objected that the Sheriff's Office could not rely on an affirmative defense that it had not pled (Doc. 63 reply at pp. 9–10, filed June 16, 2017).

[1] In its March 9, 2017 amendment, the Sheriff's Office admitted ¶ 82 of the amended complaint and withdrew its affirmative defense that Mr. Huntz was not a qualified individual with a qualified disability with respect to his shoulder surgery recovery.

A month after the summary judgment briefing was complete, on July 17, 2017 the Sheriff's Office moved to amend the answers to add the direct threat affirmative defense (Doc. 72). On September 7, 2017, the court concluded that the undue hardship affirmative defense regarding Mr. Huntz's mental health disability "is not responsive to John Huntz's ADA claim alleging that the Sheriff's Office failed to accommodate his shoulder impairment" (Doc. 80 at p. 6). The court thus granted summary judgment to Mr. Huntz on that affirmative defense. *Id.*

II. ANALYSIS

The direct threat defense is an affirmative defense under the ADA. *Chevron*, 536 U.S. at 78. It requires the employer to show the following:

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

29 C.F.R. § 1630.2. In applying those factors, "an employer's determination that an employee posed an impermissible threat to health and safety must be 'objectively reasonable.'" *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1269 (10th Cir. 2015).[2]

[2] As Plaintiff's counsel noted in the audiorecorded argument before Judge Shaffer, when the essential functions of a job implicate the safety of others, the plaintiff may bear an initial burden of showing that with a proposed accommodation he was not a direct threat to the safety of others. *See, e.g., Osborne,* 798 F.3d at 1268, n. 10; *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007) ("exception to the general rule" that direct threat is a defense); *McKenzie v. Benton,* 388 F.3d 1342, 1354-55 (10th Cir. 2004). This ruling does not address what elements Mr. Huntz must prove for his ADA claim.

Unless an unpled affirmative defense is tried by consent,[3] "[f]ailure to plead an affirmative defense results in a waiver of that defense." *Bentley v. Cleveland Cty. Bd. of Cty. Comm'rs*, 41 F.3d 600, 604 (10th Cir. 1994) (citing Federal Rule of Civil Procedure 8(c)). *See also Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1076 (10th Cir. 2009) (the "general rule is that a party waives its right to raise an affirmative defense at trial when the party fails to raise the defense in its pleadings"). Defendant does not dispute that the direct threat theory is an affirmative defense; nor does it dispute that its answers "do not expressly raise the Direct Threat defense" (Doc. 72 Motion at p. 2). Mr. Huntz did not consent to the Sheriff's Office attempt to raise the affirmative defense at the dispositive motion phase. Accordingly, unless the court gives the Sheriff's Office leave to amend, the direct threat defense is waived.

The scheduling order deadline to amend pleadings was March 24, 2017 (Doc. 16 at pp. 17–18). Defendant did not file its motion to amend until after that deadline. "After a scheduling order deadline, a party seeking leave to amend must demonstrate (1) good cause for seeking modification under Fed. R. Civ. P. 16(b)(4) and (2) satisfaction of the Rule 15(a) standard." *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n*, 771 F.3d 1230, 1241 (10th Cir. 2014).

> In practice, [the Rule 16(b)(4)] standard requires the movant to show the scheduling deadlines cannot be met despite [the movant's] diligent efforts. Rule 16's good cause requirement may be satisfied, for example, if a plaintiff learns new information through discovery or if the underlying law has changed.

Birch v. Polaris Indus., Inc., 812 F.3d 1238, 1247 (10th Cir. 2015). If a litigant knew of the underlying conduct but simply failed to raise a claim or affirmative defense, it is barred. *Id.* Under Rule 15(a), "untimeliness alone is a sufficient reason to deny leave to amend.... when the party filing the motion has no adequate explanation for the delay." *Pater v. City of Casper*, 646 F.3d 1290, 1299 (10th Cir. 2011).

[3] *See, e.g.*, Fed. R. Civ. P. 15(b)(2); *McKenzie*, 388 F.3d at 1349 n.2.

In this case, the Sheriff's Office seeks leave to add the direct threat affirmative defense four months after the deadline for amending pleadings. The parties had already completed fact discovery and summary judgment briefing. Until recently, the final pretrial conference was set for October 27, 2017. The case is ready for entry of a final pretrial order and a trial date.

In its motion, the Sheriff's Office recognizes that under Rule 16 it must show good cause for the delay. However, the Sheriff's Office does not point to any reason – procedural, legal or factual – that it could not have timely pled the direct threat affirmative defense. It does not assert for instance a change in the law or facts that it only recently discovered. *Birch*, 812 F.3d at 1247. To the contrary, the Sheriff's Office argues that the defense is supported by the same or overlapping facts as it pled for other affirmative defenses.

The only explanation that the Sheriff's Office offers for the delay is that the proposed amendment is not truly necessary. In its view, under the facts alleged here the "direct threat" defense is subsumed within broader affirmative defenses that it did plead, Plaintiff did not say otherwise until his May 2017 brief, and therefore the Sheriff's Office did not need to seek leave to amend until after the scheduling order deadline for amendments. Specifically, the Sheriff's Office argues that the direct threat defense is subsumed within its defenses that (a) no reasonable accommodation for Mr. Huntz's mental health condition was possible[4] or was an undue hardship, and (b) he was unable to perform the essential functions of his job, with or without an accommodation (Doc. 14 Separate Defenses ¶¶ 9, 14, 15). These defenses do not include the specific defense of "a direct threat to the safety of others."

[4] Plaintiff disputes that the ADA recognizes impossibility or inability to provide a reasonable accommodation as a defense apart from undue hardship (Doc. 74 at p. 6). The court does not reach that question and assumes for purposes of this motion that the inability to provide a reasonable accommodation is a defense.

Regardless that the direct threat defense may rest upon the same or overlapping facts as other defenses, it involves discrete issues of whether the employee "pose[s] a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). This defense is addressed in its own subsections of the statute and regulations. As an affirmative defense, it requires the employer to show that it assessed in an objectively reasonable fashion the risk that an employee posed to others' health and safety with a proposed accommodation. *See supra* (quoting 29 C.F.R. § 1630.2(r)); *see also Osborne,* 798 F.3d at 1268 (characterizing the direct threat defense as "an additional legal standard in the ADA"). As an affirmative defense, the "direct threat" defense must accordingly be pled expressly.

Nor do the facts alleged in this case result in the direct threat being subsumed or pled by implication from broader defenses. The Sheriff's Office points to several facts it alleged in answer to ¶¶ 172, 180, 182, 183, 185, 186, 221, and 223 of the amended complaint. These paragraphs allege Mr. Huntz's "acute stress disorder" or post-traumatic stress disorder ("PTSD"), his failure to cooperate in the leave process, and his failure to provide requested information regarding his mental health condition. For example, the Sheriff's Office alleges that

> Mr. Huntz was terminated solely because of reasons related to his failure to provide documentation concerning his return to his work based on his first medical condition of "acute stress disorder." Indeed, Plaintiff John Huntz's FMLA had expired on April 15, 2015; EPSO allowed him to be on unpaid leave for 125 days and an undue hardship existed to keep Plaintiff John Huntz's position unfilled; Plaintiff John Huntz failed to provide any additional medical information concerning his first medical condition of "acute stress disorder", and, in effect was requesting, and taking an indefinite, open-ended absence.

Doc. 14 ¶ 221 (footnote omitted). These allegations demonstrate that Defendant consistently asserted that Mr. Huntz was terminated because he failed to provide requested information

regarding his mental health condition and a continued indefinite leave of absence was an undue hardship – not that his mental health condition posed a direct threat to health or safety.

In essence, the Sheriff's Office assumes that because of the nature of police officers' jobs, any reference to Mr. Huntz's mental health condition – acute stress disorder, PTSD or panic attacks from seeing police uniforms or cars – sufficed to raise the direct threat defense. The Sheriff's Office cites no authority in support of this assumption. The Tenth Circuit has addressed the direct threat defense in the context of a former police officer and noted that although the defendant had not pled the direct threat defense, the plaintiff consented to the defense's inclusion in the pretrial order. *McKenzie v. Benton,* 388 F.3d 1342, 1349 at n.2 (10th Cir. 2004). *Cf. Den Hartog v. Wasatch Acad.,* 129 F.3d 1076, 1089 (10th Cir. 1997) (in a teacher's ADA case, the school alleged the direct threat defense). These cases do not suggest that the Tenth Circuit would find the nature of a police officer's job relieves the Sheriff's Office from pleading the direct threat affirmative defense.

In short, the Defendant's answers did not put Mr. Huntz on notice that the Sheriff's Office considered his mental health condition to be a direct threat to health or safety. Until the Sheriff's Office raised the theory on summary judgment, it was not Mr. Huntz's responsibility to point out that the Sheriff's Office had not pled it. Accordingly, the Sheriff's Office does not show good cause for its delay in seeking to add the direct threat affirmative defense. For this reason alone, the motion to amend is denied. *See, e.g., Gorsuch,* 771 F.3d at 1241 (trial court does not abuse its discretion in considering Rule 16's good cause as the "threshold inquiry" for whether to allow an untimely amendment).

Moreover, even if the court ignores the lack of good cause for the delay and considers whether justice requires the amendment under Rule 15(a), the amendment would unfairly

prejudice Mr. Huntz. Until its summary judgment motion, the Sheriff's Office consistently relied on other defenses. Plaintiff submitted for instance pre-litigation correspondence in which the Sheriff's Office contended that Plaintiff was terminated for failure to provide documentation and undue hardship in continuing his leave of absence (Doc. 74 at pp. 1–2, referring to Exs. 1–3). In those documents, the Sheriff's Office does not indicate that Mr. Huntz's mental health condition was a health or safety issue for others. In its motion and reply, the Sheriff's Office did not provide any evidence that before this litigation it had raised a health or safety issue with respect to Plaintiff's mental health condition.

Nor did the pleadings or discovery put Mr. Huntz on notice to conduct discovery regarding a direct threat defense. Plaintiff issued an interrogatory to the Sheriff's Office asking why ("every reason") his employment was terminated. In response, the Sheriff's Office identified only his failure to comply with the leave process regarding his acute stress disorder, its inability to reasonably accommodate an indefinite leave of absence, and his lack of medical clearance to return to work. It did not identify that he was a direct threat to others' health or safety (Doc. 74–3 at p. 3, response to interrogatory 1). In reply, the Sheriff's Office does not dispute that this was its complete answer to the interrogatory (Doc. 75).

The Sheriff's Office points to several written discovery requests that Mr. Huntz issued, topics that he identified for the Rule 30(b)(6) deposition of the Sheriff's Office, and an excerpt of the deposition of Larry Borland. The Sheriff's Office considers these materials to be "extensive discovery on the issue of whether a reasonable accommodation existed based on John Huntz's mental health condition." (Doc. 72, referencing Exs. A–D). But with one exception, these materials do not reflect that the Sheriff's Office had considered his mental health condition as

raising a health or safety issue for other individuals, or that it was now attempting to assert a direct threat affirmative defense.

The exception is in Mr. Borland's deposition, in which Plaintiff's counsel asked "[w]hy was it necessary that John Huntz submit to a fitness for duty examination from a third-party practitioner?" Mr. Borland responded that "[i]t was our belief that based upon his psychologist's representation of the Acuity of his condition, that we wanted to make sure he was not going to be a danger to himself or others" (Doc. 72–2, March 15, 2017 deposition at p. 43). But deposition testimony is not equivalent to pleading an affirmative defense based on that testimony. A week remained after Mr. Borland's deposition in which Defendant could have timely moved to amend to add the direct threat defense. It did not do so. Plaintiff asked follow up questions of Mr. Borland, but he had no opportunity to timely conduct further discovery. At the time of Mr. Borland's deposition, only two days remained before the fact discovery cutoff (Doc. 37, minute order extending discovery deadline to March 17, 2017). The failure of the Sheriff's Office to timely seek to add the direct threat defense deprived Plaintiff of the opportunity to seek an extension for further discovery before dispositive motions. *See, e.g., Arias v. DynCorp,* Case Nos. 1:01cv01908 (ESH), 1:07cv01042(ESH), 2016 WL 6496214, at *6 (D.D.C. Nov. 2, 2016) ("Failure to raise an affirmative defense in pleadings deprives the opposing party of precisely the notice that would enable it to dispute the crucial issues of the case on equal terms").

Mr. Huntz also shows that he would in fact have done additional discovery regarding a direct threat defense. If the Sheriff's Office had pled the defense, or if the court grants the motion to amend, Plaintiff argues that he would have issued

> written discovery into Defendant's basis for asserting the affirmative defense, discovery seeking comparators who Defendant did not treat as a direct threat, … depositions to determine what steps Defendant took to evaluate the "direct threat"

> factors contained in 29 C.F.R. § 1630.2(r), and [he] may have hired an expert witness to provide an opinion about the application of those factors to Mr. Huntz.

Doc. 74 at p. 15. The Sheriff's Office appears to concede that if the court determines the references to Mr. Huntz's mental condition were insufficient to raise the direct threat defense, discovery should be reopened on this issue (Doc. 75 reply).

If the court were to grant the Sheriff's Office motion to amend, it would significantly delay setting the trial date. The court would have to allow time not only for Mr. Huntz to issue additional written discovery requests but also to reopen depositions. If Mr. Huntz determines from that discovery that he wishes to retain an expert on this issue, the preparation of another expert report would take further time and the Sheriff's Office would likely request to depose the expert. Where the defendant does not give good reason for its delay in seeking to amend, delaying trial to reopen discovery on a new affirmative defense is unjustified. *See, e.g., Pater,* 646 F.3d at 1299 ("the court would have been forced to grant significant additional time for discovery" and the plaintiffs did not "give a reason for their delay").

In short, the Sheriff's Office lacks an adequate explanation for its delay, and the proposed amendment would unfairly prejudice Mr. Huntz. *Smothers v. Solvay Chems., Inc.*, Civ. 11–200–F, 2014 WL 3051210, at *6–7 (D. Wyo. July 3, 2014) (denying motion to add affirmative defense shortly before trial). For both reasons, the motion (Doc. 72) to amend is DENIED. The proposed final pretrial order, due December 11, 2017, should be revised accordingly.

SO ORDERED this 16th day of November, 2017.

BY THE COURT:

s/ David M. Ebel
U.S. Circuit Court Judge