IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-00807-REB-CBS

JULIANNA BARBER, by and through her next friend, MARCIA BARBER, et al.,

Plaintiffs,

v.

STATE OF COLORADO, DEPARTMENT OF REVENUE, et al.,

Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO RECONSIDER AND TO ALTER JUDGMENT

Plaintiffs, by and through their attorneys, hereby submit their Reply Brief in Support of Their Motion to Reconsider and to Alter Judgment.

I. Plaintiffs Have Established That This Court Committed Manifest Error, And That At A Minimum, There Are Genuine Issues Of Material Fact As To Whether Defendants Acted With Discriminatory Intent.

Plaintiffs request for reconsideration makes a simple, two-step argument: (1) This Court's Order Granting Defendants' Motion for Summary Judgment ("Order") was manifestly erroneous because Defendants were obligated to provide a reasonable accommodation to Plaintiffs notwithstanding the provisions of Colo. Rev. Stat. § 42-2-106(1)(b) as it existed in 2004 ("section 42-2-106(1)(b)"); and (2) Defendants acted intentionally because Plaintiffs repeatedly informed them of this obligation, and even gave Defendants specific legal authority establishing the obligation, yet

Defendants nevertheless refused to provide Plaintiffs with their requested accommodation.

A. Defendants Do Not Contradict Plaintiffs' Argument That the Court Committed Manifest Error in Holding That an Accommodation Requiring Defendants to Violate the Law Was Per Se Unreasonable.

This Court's Order held that "[a]n accommodation that would have required defendants to willfully ignore or violate the law is per se not reasonable." (Order at 4.) Plaintiffs, in their opening brief for reconsideration, cited several cases and other legal authorities demonstrating that a public entity must provide an otherwise reasonable accommodation even when doing so would be contrary to a statute, regulation or ordinance. (Pls.' Mot. to Reconsider and to Alter J. ("Plaintiffs' Motion") at 7-14.) Defendants do not disagree or argue that Plaintiffs have misconstrued these cases. Rather, Defendants attempt to distinguish these cases only on the ground that they did not involve claims for damages. (Defs.' Response to Mot. to Reconsider and to Alter J. ("Defendants' Response") at 8-11.)

This misses the point. Plaintiffs did not cite these cases to address the legal standard for recovery of damages. Rather, Plaintiffs cited these cases to demonstrate that the holding at the heart of the Order -- that a reasonable accommodation could not require a violation of state law -- was manifestly erroneous. Defendants have not presented any legal authorities that contradict Plaintiffs' argument.

B. There Are Many Facts In The Record that Establish Defendants' Intent to Discriminate under Section 504.

With respect to step two, the Court and both parties agree on the applicable legal standard for the recovery of damages under Section 504. It requires a showing of intentional discrimination.

> "[I]ntentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." Deliberate indifference, in turn, "requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that [knowledge]."

Order at 3 (quoting Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999) and Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001)).

Plaintiffs' Motion cited a number of facts demonstrating that this standard is met in this case, including:

- Defendants knew that Ms. Barber was disabled, and the she needed, and was requesting, a reasonable accommodation;[1]
- Mr. Tool believed that the accommodation she requested was reasonable;[2]

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[1] Pls.' Mot. at 2. All references to Plaintiffs' pleadings incorporate by reference the record citations therein.

[2] Id.

- Mr. Suthers knew that under the Supremacy Clause, where a federal law (such as Section 504) conflicts with a state law (such as section 42-2-106(1)(b)), the "federal law trumps state law;"[3]

- At the time of her request, Ms. Barber, and later her attorney Mr. Mendéz, repeatedly informed Defendants that they were required by the ADA to provide the accommodation despite the provisions of section 42-2-106(1)(b), and they provided Defendants with legal authority demonstrating that this was the case;[4]

- Nevertheless Defendants refused to provide Plaintiffs with the requested accommodation, instead insisting that Plaintiffs wait more than seven months -- over half of the only year during which the program was relevant -- for section 42-2-106(1)(b) to be amended.[5]

Defendants' Response does not challenge any of the above facts. From these facts, a reasonable jury could find that Defendants knew that Plaintiffs needed the requested accommodation and knew that the accommodation was required by law, but nevertheless refused to provide the accommodation. Summary judgment thus should have been denied.

Several courts have denied summary judgment to defendants where similar (and, in some cases, less compelling) facts exist. For example, in Davis v. Flexman,

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[3] Id. at 4.

[4] Id. at 5.

[5] See Mem. Br. in Support of Defs.' Mot. Summary J. ("Defendants' Summary Judgment Motion") at 7 (Docket no. 62 filed Nov. 8, 2006); see also Pls.' Mem. in Opp'n to Defs.' Mot. for Summ. J. at 3-5.

109 F. Supp. 2d 776, 791 (S.D. Ohio 1999), the court held that a genuine issue of material fact existed concerning intentional discrimination where the defendant had been informed of the need for an accommodation, had been provided with a copy of the ADA, and had been informed by the plaintiff that defendant had a legal obligation to provide the accommodation. See also Proctor v. Prince George's Hosp. Ctr., 32 F. Supp. 2d 820, 829 (D. Md. 1998) ("Thus, in cases where a public accommodation is on notice that its failure to provide an accommodation may violate the Rehabilitation Act and intentionally opts to provide a lesser accommodation, compensatory damages are available."); Falls v. Prince George's Hosp. Ctr., No. Civ.A. 97-1545, 1999 WL 33485550, at *10 (D. Md. Mar. 16, 1999) ("'[W]hile defendants may have had the best of intentions, and while they may have believed themselves to be within the confines of the law, they nevertheless intentionally violated . . . the Rehabilitation Act by willfully withholding from plaintiff the reasonable accommodations to which she was entitled under the law. They had notice of the potential risk of their decision, and clearly refused the accommodation knowingly.'" (Quoting Bartlett v. N.Y. State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1151 (S.D.N.Y. 1997), aff'd in part and vacated in part on other grounds, 156 F.3d 321 (2d Cir. 1998)).

II. The Arguments in Defendants' Opposition Lack Merit.

A. Defendants' Proposed Alternative Accommodation did not Provide Meaningful Access.

Defendants contend that they reasonably accommodated Plaintiffs by working to amend section 42-2-106(1)(b). Because this purported "accommodation" limited Julianna to three months of practice driving, it was not a permissible alternative to the

accommodation requested by the Barbers: immediately permitting Julianna to practice driving with her grandfather. A reasonable accommodation must provide meaningful access to the programs and activities of a covered entity. See, e.g., Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 857 (10th Cir. 2003) (Holding that "'to assure meaningful access, reasonable accommodations in the [public entity's] program or benefit may have to be made.'" (quoting Alexander v. Choate, 469 U.S. 287, 301 (1985))). Defendants' purported "accommodation" -- amending section 42-2-106(1)(b) -- does not meet this requirement.

Under Section 504's "meaningful access" requirement, Defendants may not afford persons with disabilities benefits of their programs and activities that are "not equal to that afforded others." 28 C.F.R. § 41.51(b)(1)(ii). The program at issue here is the minor driver instruction program. (See Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss (Oct. 17, 2005) at 4.) Under that program, as it existed when Julianna Barber turned 15, a teenager between the ages of 15 and 16 could practice driving with a minor instruction permit provided she was accompanied by a licensed parent, stepparent or guardian. Section 42-2-106(1)(b). This program was designed to further the legislative objective of "[p]roviding additional behind-the-wheel training with a parent, guardian, or other responsible adult before obtaining a minor driver's license [which] is the beginning of the young driver's accumulation of experience." Colo. Rev. Stat. § 42-2-105.5 (2004).

By its terms, section 42-2-106(1)(b) was only relevant during the 12 months of a person's life between the age of 15 and 16. (See Ex. A to Defs.' Mot. for Summary J.)

Once a person turned 16, Colo. Rev. Stat. § 42-2-106(1)(a) applied, which at the time allowed any licensed driver over the age of 21 to supervise the minor's driving. (See id.) The period during which Marcia and Julianna Barber could benefit from this program was between October 13, 2004 -- when Julianna obtained her minor instruction permit -- and September 8, 2005, when she turned 16 and became eligible to drive with any licensed driver over the age of 21.

The amendment to section 42-2-106(1)(b) -- that Defendants claim constituted a reasonable accommodation -- did not go into effect until May 27, 2005, approximately three months before Julianna's sixteenth birthday; she had, by then, missed out on over seven months of the driving practice the Colorado General Assembly intended her to receive. Thus while similarly-situated persons without a disabled parent would have been able to engage in supervised driving beginning at age 15 for 12 months pursuant to section 42-2-106(1)(b), under the "accommodation" provided by Defendants, Julianna was limited to at most three months of supervised driving under section 42-2-106(1)(b). Defendants' purported accommodation violated Section 504 because it denied Julianna meaningful access by providing her with benefits that were not equal to those provided to others.

B. Discriminatory Intent Does Not Require Discriminatory Animus.

Defendants also argue that there was no discriminatory intent because Mr. Tool, then the Senior Director for the Colorado Division of Motor Vehicles, was “pleasant and nice” to Ms. Barber. (Defs.’ Response at 5.) There are two flaws with this argument. First, as a matter of law, discriminatory intent does not require discriminatory animus.

See, e.g., Duvall, 260 F.3d at 1138-39 (holding that discriminatory animus is not required to establish discriminatory intent under Section 504). Rather, as set forth above, discriminatory intent is shown where a plaintiff requested an accommodation, and the defendant refused to provide it where, as here, the defendant was aware -- or even deliberately indifferent -- "to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." Powers, 184 F.3d at 1153.

Furthermore, as a factual matter, Mr. Tool was not responsible for denying Ms. Barber's request that her father be allowed to supervise Julianna's driving. To the contrary, he thought the request was imminently reasonable. (See Pls.' Mot. at 2.) He then consulted with the Attorney General's Office, and it was that Office that denied Ms. Barber's requested accommodation. (See id. at 2-3.)

Defendants further contend that Ms. Barber would not designate anyone "as a guardian for the limited purposes of supervising her daughter's driving," and that she had "options available" under section 42-2-106(1)(b) other than giving up her parental rights. (Defs.' Response at 6, 12.) This is directly contradicted by the Defendants' own letters, written at the time of the requested accommodation, stating that: (1) only a guardian, defined as "a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person," could supervise Julianna's driving; and (2) it is critical that young drivers be under the direct and immediate supervision of someone with "full parental authority." (Stipulations ¶¶ 19, 26 and attached documents P0001-2 & P0011-13 (Pls.' Mem. in

Opp'n to Defs.' Mot. for Summ. J. Ex. 1).) While Plaintiffs believe assignment of even limited guardianship -- not required of nondisabled parents -- was an unreasonable and discriminatory burden, there is substantial evidence that the State of Colorado would not have permitted -- much less proposed -- such a measure.

Finally, Defendants suggest that the only accommodation sought by Ms. Barber was an amendment of section 42-2-106(1)(b). (Defs.' Response at 6.) To the contrary, Ms. Barber made it clear in a letter to Mr. Suthers that although she recognized that the statute might eventually be amended, "I am respectfully requesting a more immediate and reasonable modification to the existing law so that my daughter . . . may be permitted to practice driving with her learner's permit now." (See Ex. P-4 to Dep. of J. Suthers (attached as ex. 6 to Pls.' Mem. in Opp'n to Defs.' Mot. for Summ. J.).)

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 2, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

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