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' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their attorneys, hereby submit their Memorandum in Opposition to Defendants' Motion for Summary Judgment.

Defendants' motion is without merit because:

- The central question -- whether Defendants ever offered Plaintiff Marcia Barber a reasonable accommodation -- is sharply disputed;
- The disputed and undisputed evidence that Defendants rejected Ms. Barber's request for a reasonable accommodation demonstrates intentional conduct, entitling Plaintiffs to compensatory damages; and
- Plaintiffs' damages constitute disputed issues of material fact.

Because granting Defendants' Motion for Summary Judgment would require this Court to make credibility determinations among witnesses and resolve disputed questions of fact, Plaintiffs respectfully request that it be denied.

FACTS

1. Plaintiff Julianna Barber ("Julianna") turned 15 on September 8, 2004. (Stipulations ¶ 5 (Ex. 1 hereto).) On or about October 13, 2004, Julianna obtained a minor's instruction permit under C.R.S. § 42-2-106(b) and completed a driver education course on October 23, 2004. (Id. ¶ 18.)

2. Pursuant to Colorado law in effect at that time, Julianna could drive, but only under the supervision of a parent, stepparent, or guardian if such individual held a valid driver's license. C.R.S. § 42-2-106(b) (2004).

3. However, Julianna's mother, Marcia Barber ("Ms. Barber") is legally blind and, as a result, does not have a driver's license. (Stipulations ¶¶ 1, 7.) Ms. Barber has full custody of Julianna; Julianna's father lives out of state. (Id. ¶¶ 2-4.) As a result, Ms. Barber requested the reasonable accommodation that Julianna be allowed to practice driving with another licensed driver, such as her grandfather. Ms. Barber was directed to call Steve Tool, then the Senior Director for the Colorado Division of Motor Vehicles. (M. Barber Dep. at 32 (Ex. 2 hereto); Stipulations ¶ 14.)

4. Ms. Barber explained her situation to Mr. Tool and asked that her father (Julianna's grandfather) be allowed to be the supervising licensed driver for purposes of section 42-2-106(b). (Tool Dep. at 18-19 (Ex. 3 hereto).)

5. Mr. Tool sought guidance from Robert Dodd, an attorney with the Attorney General's office. Specifically, Mr. Tool asked whether Ms. Barber's father could be considered a "guardian" for purposes of section 42-2-106(b). (Id. at 14-15; 18-19.)

6. Mr. Dodd provided a memo to Mr. Tool with his office's interpretation of

the word "guardian" as used in that section. Although Defendants have withheld the memo as privileged, Mr. Tool quoted portions of the memo in a letter (the "Tool Letter," Ex. 4 hereto) to Ms. Barber dated November 22, 2004. (Tool Dep. at 16, 17, 19.) The Tool Letter – which is not mentioned in Defendants' brief – states:

> The term "guardian" is defined in Black's Law Dictionary 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, who, for some peculiarity of status or defect of age, understanding of self-control, is considered incapable of administering his own affairs." In addition, it includes "one who legally has the care and management of the person, or the estate, or both of a child during its minority."

(Id. at 1.) Based on this definition, Mr. Tool denied Ms. Barber's request that her father be allowed to supervise for purposes of section 42-2-106(b). (Id.; Tool Dep. at 19.)

7. In response, Ms. Barber wrote Mr. Tool and asked that, as an accommodation, an exception be made to the literal requirements of section 42-2-106(b), permitting another licensed driver over the age of 21 to supervise Julianna's driving. (Tool Dep. at 20-22, Ex. P-2.) Mr. Tool understood Ms. Barber to be requesting a reasonable modification under the ADA and believed the request was reasonable. (Id. at 22.)

8. Mr. Tool again consulted Mr. Dodd. Although Defendants have asserted a privilege as to the substance of that call, the result was that Mr. Tool contacted Ms. Barber "and informed her that this accommodation could not be made." (Id. at 22-23.)

9. In January 2005, after her request for an accommodation had been denied twice, Ms. Barber called John Suthers, the Attorney General of Colorado. Ms. Barber and Mr. Suthers had attended the same high school, and Ms. Barber left him a

phone message, which he returned. (M. Barber Dep. at 47.)

10. What was said during this telephone call is in considerable dispute. Ms. Barber testified, "I explained the situation to [Mr. Suthers] and asked for a reasonable accommodation under the ADA, and was informed that the ADA didn't apply to statutes, and that because I was not a licensed driver, my daughter would not be allowed to drive unless I was willing to assign guardianship." She does not recall that Mr. Suthers made any further comments about trying to solve the problem. (Id. at 47-48.)

11. Defendants assert that Mr. Suthers offered Ms. Barber the option of signing a limited delegation of authority that would not relinquish parental rights. (Mem. Br. in Support of Defs.' Mot. for Summ. J. ("Defs.' Br.") at 6.) Ms. Barber denies that Mr. Suthers made this offer. (M. Barber Dep. at 47-48; M. Barber Decl. ¶¶ 3-5 (Ex. 5 hereto).) Mr. Suthers's deposition testimony also contradicts Defendants' assertion. For example, he testified, "I believed that we could work this out by having a guardian take that responsibility, and it could be the father." (Suthers Dep. at 27 (Ex. 6 hereto); see also id. at 20, 23-24.)[1] Mr. Suthers also testified that he was familiar with the steps necessary to create a formal guardianship and that he did not "know of a guardianship, a true guardianship, other than a formal guardianship." (Id. at 10-11.)

12. Following the telephone call with Mr. Suthers, Ms. Barber sent him two letters dated January 21 and 25, 2005, respectively. In the second letter, she made clear that her request was to "[a]llow[ ] [her daughter] to drive with a parent-delegate such as an uncle or grandfather." Mr. Suthers received both letters but did not respond

[1] Reference to any type of guardianship contradicts Defendants' assertion that Ms. Barber would not have had to relinquish parental rights. See infra note 4.

to either one. (Id. at 15, 21, 34, Exs. P-3, P-4.)

13. On February 3, 2005, attorney Chris Méndez of the Legal Center for People with Disabilities and Older People sent a letter to Mr. Dodd explaining the legal basis for Ms. Barber's request. (Stipulations ¶¶ 24-25.)

14. Mr. Dodd's February 23, 2005 letter in response -- the "Dodd Letter" -- says nothing about the solution Mr. Suthers claims he offered only one month earlier. (Stipulations ¶ 26, Ex. 7 hereto.) Rather, Mr. Dodd unequivocally states that, under section 42-2-106(b), "it is critical that [young drivers] be under the direct and immediate supervision of someone with full parental authority." (Dodd Letter at 1 (emphasis added).) Like the Tool Letter, the Dodd Letter is not mentioned in Defendants' Brief.

15. Mr. Dodd wrote the Dodd Letter after talking with Mr. Suthers about his call with Ms. Barber. (Suthers Dep. at 33.) At his deposition, Mr. Suthers reviewed the Dodd Letter and testified that he agreed with it. (Id. at 38.)

16. In August, 2005, Defendants finally permitted Ms. Barber to designate her father to supervise Julianna's driving pursuant to C.R.S. § 42-2-106(b) without relinquishing any parental rights. (Defs.' Br. Ex. J.) Ms. Barber would have been willing, starting in October, 2004, to sign such a document. (M. Barber Decl. ¶ 6.)

17. Julianna was able to practice driving for eleven and a half hours between October, 2004 and August, 2005: five and a half hours with a driving instructor in October and November of 2004, and six hours donated by the National Driver Training Institute in May through August, 2005. She was unable to practice during the six months between November, 2004, and May, 2005. (See Defs.' Br. Ex. I.)

18. If the state had granted Ms. Barber's request for reasonable modification when she first made it in late October or early November, 2004, Julianna would have been able to practice driving with her grandfather starting then. Julianna estimates that she missed out on at least one hundred hours of driving practice between November, 2004, and August, 2005. (J. Barber Decl. ¶ 5.)

19. Plaintiff Marcia Barber testified to the injuries resulting from Defendants' discrimination. For example, she felt "kicked in the teeth . . . flabbergasted. . . . like somebody pulling the rug out from underneath your feet. . . . This was the first time in my life that my parenting ability was called into question because of my disability. It was very painful." (M. Barber Dep. at 42-43.) She explained, "the undermining of my confidence, of my parenting abilities, the humiliation over not being able to afford my daughter a normal opportunity, the awareness that the ADA does not protect me, that legislators are unaware of the ADA, don't have to comply with the ADA . . . turned my world upside down . . .. I've worked really, really hard to compensate for my disability and to make sure that my children are not disadvantaged because of my disability, and it was the first time that I wasn't able to get the help that I needed. It was very scary." (Id. at 74; see also id. at 55.)

20. Julianna testified that she was frustrated by the fact that she was unable to practice driving, and angry at the way her mother was treated and the fact that this discrimination meant that she missed out on driving practice. (J. Barber Decl. ¶¶ 2-3.)

Argument

I. Standard of Review

Summary judgment can be granted only where "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). Summary judgment may enter only where no reasonable trier of fact could find for the non-moving party. See Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Defendants, as the moving parties, have the burden of showing that no genuine issues of material fact exist; "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

Plaintiffs agree that the case currently consists only of Marcia and Julianna Barber's claims for compensatory damages under the Rehabilitation Act. 29 U.S.C. § 794. Discrimination under the Rehabilitation Act includes failure to make reasonable accommodations. Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 857 (10th Cir. 2003). This is the only theory on which Plaintiffs proceed; as set forth in a pleading filed December 9, 2005, they no longer proceed on a theory of disparate impact. (Pls.' Reply Br. in Support of Mot. to Reconsider at 2 n.2.)

II. Elements.

Plaintiffs agree with the elements as recited by Defendants. (See Defs.' Br. at 11.) Only the fourth element -- whether "the program has discriminated against the plaintiff" -- is in dispute. Defendants have stipulated to the first and third elements: that Ms. Barber is disabled; and that both the Department of Revenue and the Division of Motor Vehicles receive federal financial assistance. (Stipulations ¶¶ 1, 15.) Their brief

does not challenge the second element -- that Ms. Barber is "otherwise qualified" to participate in the program -- and this Court has held that, if Ms. Barber had been granted the requested accommodation, she would have been able to participate in the program. Ord. Granting in Part and Den. in Part Defs.' Mot. to Dismiss at 4-5.

Thus, the only element in dispute is whether Defendants discriminated against Ms. Barber by denying her request for a reasonable accommodation.

Defendants also challenge Plaintiffs' damages claims. Plaintiffs agree that they must prove intentional conduct to recover damages under the Rehabilitation Act; such conduct includes "deliberate indifference to the strong likelihood that pursuit of [Defendants'] questioned policies will likely result in a violation of federally protected rights." Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1152-53 (10th Cir. 1999).

III. The Accommodation Requested by Ms. Barber was Reasonable.

There is no dispute that the accommodation requested by Ms. Barber was reasonable. Mr. Tool testified that he believed Ms. Barber's request was reasonable (Tool Dep. at 22), and Mr. Suthers thought that it was "a clear oversight" to limit the supervision requirements under section 42-2-106(b) to licensed parents, stepparents or guardians. (Suthers Dep. at 27.) Indeed, granting this reasonable accommodation in late October or early November, 2004 -- when Ms. Barber first made the request -- would have furthered the goals of the Colorado General Assembly in ensuring that drivers between the ages of 15 and 16 get as much supervised driving practice as possible. See Colo. Laws 1999 ch. 334, sec. 1(c) & (d); C.R.S. § 42-2-105.5.

The Defendants do not argue that the accommodation sought by Ms. Barber was

unreasonable. At the very least, whether a requested accommodation is reasonable is a question of fact for the jury. See, e.g., Williams v. Philadelphia Housing Auth. Police Dep't, 380 F.3d 751, 771(3d Cir. 2004) ("[T]he question of whether a proposed accommodation is reasonable is a question of fact." (Citations omitted.)).

IV. The Only Option Defendants Offered Ms. Barber was To Assign Full Guardianship of Julianna to Her Father.

Defendants' motion for summary judgment as to liability turns entirely on two factual assertions: (1) that they offered Ms. Barber the option of designating her father to supervise Julianna's driving without relinquishing parental rights (Defs.' Br. at 13, 15); and (2) that Ms. Barber was unwilling to sign any document whatsoever. (Id. at 13, 15.) Both of these assertions are sharply disputed -- by evidence that includes two crucial letters from Defendants that Defendants omitted completely from their motion. Defendants' motion for summary judgment must therefore fail.

A. The Undisputed and Disputed Evidence Establishes that Defendants Insisted Ms. Barber Assign to her Father Full Guardianship Of Julianna As a Condition of Permitting Him to Supervise Her Driving.

Defendants assert that Ms. Barber could have, consistent with the 2004 version of section 42-2-106(b), appointed someone in a limited role to supervise Julianna's driving. (Defs.' Br. at 13.) This represents a complete, post-lawsuit, change in position by the Defendants. At the time that Ms. Barber requested that she be allowed to designate another licensed driver to supervise Julianna's driving, Defendants -- on four separate occasions -- unequivocally stated that section 42-2-106(b) required supervision by a full guardian with full parental authority over Julianna.

1. The Tool Letter Required Full Guardianship.

In November 2004, in response to Ms. Barber's request for a reasonable accommodation, Mr. Tool asked the Attorney General's office for its interpretation of the word "guardian" as used in section 42-2-106(b), hoping that a grandparent could "fit under that category." (Tool Dep. at 19.) The response was "that the answer is 'no, unless the grandparent is also a legally appointed guardian,'" and that a "guardian" was strictly limited to 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." (Tool Letter at 1.) This is directly contrary to Defendants' current contention that they would have permitted supervision by someone whose powers were limited to supervising Julianna's driving.

2. The Attorney General, through Mr. Tool, Made Clear That No Accommodation Could Be Made in the Requirement of Full Guardianship.

In response to the Tool Letter, Ms. Barber asked Mr. Tool to inquire whether, notwithstanding the literal requirement of a "guardian" in section 42-2-106(b) and as defined in the Tool Letter, an accommodation could be made so that Julianna's grandfather could supervise her driving. Mr. Tool consulted with the Attorney General's office and "informed [Ms. Barber] that this accommodation could not be made." (Tool Dep. at 23.) Again, this is completely contrary to Defendants' current position that they would have permitted someone to act in a more limited or informal role.

3. Mr. Suthers -- in His Phone Call with Ms. Barber -- Stated That She Would Have to Assign Guardianship.

The only evidence supporting Defendants' assertion that they offered Ms. Barber the accommodation of designating someone without relinquishing parental rights is Mr. Suthers's account of his telephone call with Ms. Barber in January 2005.[2] However, Ms. Barber disputes that account, and specifically disputes that Mr. Suthers told her that she could make any sort of limited designation. Mr. Suthers told Ms. Barber that "the ADA didn't apply to statutes, and that because [she] was not a licensed driver, [her] daughter would not be allowed to drive unless [she] was willing to assign guardianship." (M. Barber Dep. at 47-48.) In light of Ms. Barber's testimony and the evidence that the Attorney General's office had repeatedly interpreted section 42-2-106(b) as requiring a full guardianship with full parental authority, a jury could rationally find that Mr. Suthers did not tell Ms. Barber that a limited designation was possible during the January 2005 call. Such a finding would also be supported by justifiable inferences from the letters Ms. Barber wrote to Mr. Suthers, repeating her request to delegate her father, and from the fact that Mr. Suthers did not respond to either letter to state his alleged offer in writing. (See Suthers Dep. at 15, 21, 34, Exs. P-3, P-4.)

Because Ms. Barber disputes Mr. Suthers's version of the phone call, finding that Mr. Suthers in fact offered limited guardianship or designation would require credibility determinations and factual findings that are inappropriate on summary judgment.

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[2] A number of passages in Mr. Suthers's deposition contradict the statements in Defendants' brief that he proposed a designation that did not involve relinquishing parental rights. For example, he testified that, "I believed that we could work this out by having a guardian take that responsibility, and it could be the father." Suthers Dep. at 27.

4. The Dodd Letter Required Supervision by Someone with "Full Parental Authority."

The Dodd Letter confirmed to Ms. Barber what the Tool Letter and the Suthers phone call had already conveyed: that Defendants were insisting she assign full guardianship if her father were to supervise Julianna's driving. The Dodd Letter stated that Defendants would only permit someone with "full parental authority" to supervise Julianna's driving. (Id. at 1.) This letter – and the fact that Mr. Suthers agreed with the statements in that letter (see Suthers Dep. at 38) – also permits the justifiable inference – which must be drawn in Plaintiffs' favor – that Mr. Suthers insisted on guardianship with "full parental authority" in his phone call with Ms. Barber.

B. There Is No Evidence that Defendants Offered -- Or Ms. Barber Refused -- The Option of Designating Her Father in Writing Without Relinquishing Any Parental Rights.

Defendants assert that Ms. Barber would not have signed "any document whatsoever." (Defs.' Br. at 15.) In light of the fact that the only option Defendants gave her was to assign full guardianship, this is speculative and irrelevant. It is also incorrect. Ms. Barber was prepared from the start to document in writing the accommodation she requested: designating her father to supervise Julianna's driving without relinquishing parental rights. (M. Barber Decl. ¶ 6.) Defendants' assertion is, in any event, not supported by the citations they supply to pages 51, 55 and 56 of Ms. Barber's deposition. (See Defs.' Br. at 15.) Rather, this testimony makes clear that Ms. Barber was unwilling to relinquish parental rights, not that she was unwilling to sign "any document whatsoever." On page 51, Ms. Barber makes clear that she would not "give up other parenting rights in order to designate another individual to supervise driving."

(Emphasis added.) On pages 55 and 56, the question posed is whether she explored "fil[ing] a piece of paper saying that [she was] giving a limited guardianship for purposes of supervising [her] daughter's driving." (Emphasis added.) At no point does Ms. Barber assert that she was unwilling to sign any document whatsoever; and when Defendants finally permitted her to sign a document designating her father without relinquishing any parental rights, she did so. (M. Barber Decl. ¶ 7.) Again, this entitles her to the inference that she would have signed a similar document in October or November, 2004, had she been permitted to do so.

V. Giving up Guardianship -- Full or Limited -- Is Unreasonable and Defendants Do Not Argue Otherwise.

In their Brief, Defendants use the concept of designation without relinquishment of parental rights interchangeably with the concept of limited guardianship.[3] These two concepts are not interchangeable; in fact, they are mutually exclusive, as a limited guardianship by definition involves the relinquishment of parental rights.[4]

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[3] Compare Defs.' Br. at 13 (Ms. Barber could have "designate[d] any licensed driver over 21"), 14 (suggesting she could have "simply empower[ed] another individual to supervise the driving" in a document that "would not relinquish any parental rights"), with id. at 13 ("she could have executed a limited guardianship or power of attorney"), 14 (suggesting she could have "giv[en] limited guardianship for the purpose of supervising her daughter's driving").

[4] Colorado statute provides that "a guardian of a minor ward has the powers of a parent regarding the ward's support, care, education, health, and welfare." C.R.S. § 15-14-208(1). Section 15-14-206(2) provides that the court "may limit the powers of a guardian otherwise granted by this part 2 and thereby create a limited guardianship." Although a limited guardianship is, by definition, limited, it still involves the exercise of some of the "powers of a guardian," § 15-14-206(2), which are simply "the powers of a parent." § 15-14-208(1). Requiring Ms. Barber to assign limited guardianship to her father would have required her to assign to him some of her powers as Julianna's parent.

As explained above, until August, 2005, Ms. Barber was not offered the option of merely designating her father without relinquishing parental rights, and would have done so -- in writing -- at any time. She was also not offered the option of establishing a limited guardianship. (M. Barber Decl. ¶¶ 3-6.) That option would, however, have been unreasonable, and Defendants do not argue to the contrary.

A. Defendants do Not Attempt to Argue that Giving Up Guardianship -- Limited or Full -- Is A Reasonable Accommodation.

Defendants do not attempt to argue that assignment of guardianship -- limited or full -- would have been reasonable. Although they spend several pages asserting that Ms. Barber could have assigned limited guardianship (Defs.' Br. at 13-15), the only step they defend as reasonable is the execution of a written instrument, not the assignment of parental power. (See id. at 14.) Defendants offer no case law, argument, or other support for the proposition that it would have been reasonable to ask Ms. Barber to give up full or limited guardianship to her daughter to permit the latter to practice driving.

Instead, Defendants assert that "[t]he additional requirement of a written instrument is not onerous" and cite three cases in support. (Defs.' Br. at 14.) The assertion is irrelevant -- until August, 2005, Defendants insisted on full guardianship, not merely executing a written instrument -- and the three cases Defendants cite do not support their assertion.

None of the three cases relates to the plaintiffs' execution of a written instrument. Rather, each of the cases involved the imposition of an additional eligibility or testing requirement on a driver with a disability, based on the state's safety concerns relating to the driver's disability. Theriault v. Flynn, 162 F.3d 46, 47 (1st Cir. 1998) (state required

the plaintiff to take an additional road test to demonstrate that his cerebral palsy would not affect his ability to safely drive a car); Bailey v. Anderson, 79 F. Supp. 2d 1254, 1255-56 (D. Kan. 1999) (state required plaintiff to submit a report detailing her ability to drive safely with device designed to correct visual impairments); Briggs v. Walker, 88 F. Supp. 2d 1196 (D. Kan. 2000) (state required plaintiff who used wheelchair to submit completed medical certification before taking driving test).

The present case -- in contrast to the cited cases -- does not involve a disabled driver being required to prove she is a safe driver. Indeed, Defendants do not argue before this Court that section 42-2-106(b)'s limitation to licensed parents, stepparents and guardians was necessary to address safety concerns. The cases Defendants cite on page 14 of their brief are thus irrelevant to the question whether it would have been reasonable to ask Ms. Barber to give up full or limited guardianship of Julianna so that the latter could practice driving.

B. Giving Up Guardianship -- Limited or Full -- Is Not A Reasonable Accommodation.

It is not reasonable to require a mother with a disability to cede all or part of her parental powers in order to ensure that her daughter can practice driving. Title II of the ADA prohibits the imposition of a surcharge on an individual with a disability in connection with the provision of reasonable modifications. 28 C.F.R. § 35.130(f).[5] This provision has been held to prohibit a six dollar fee for a disabled parking placard. See

[5] The parties have agreed that the standards for interpreting the Rehabilitation Act are the same as those for interpreting Title II of the Americans with Disabilities Act. 42 U.S.C. § 12131 et seq. (See Mem. Br. in Support of Defs.' Mot. to Dismiss at 5-6 & n.3; Mem. in Opp'n to Defs.' Mot. to Dismiss at 4.)

Dare v. Calif., 191 F.3d 1167, 1172 (9th Cir. 1999). It is, of course, far more onerous to require an individual to cede to another power -- even limited power -- over her child to obtain an accommodation so that the child may learn to drive.

The Supreme Court has held that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000). These rights include the right of parents "to direct the upbringing and education of children under their control." Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-535 (1925). It is unreasonable to ask a parent to give up all or part of that control merely to ensure that the State's goal of providing maximum driving practice between the ages of 15 and 16 is achieved. This is especially true here, where Defendants concede that the accommodation Ms. Barber requested was reasonable. See supra at 8-9.

VI. Defendants' Discussions of The Facial Neutrality of the Statute and The Circumstances of Nondisabled Unlicensed Drivers Are Not Relevant.

Defendants argue that the Rehabilitation Act "does not require the state to evaluate the impact of facially neutral regulations . . .." (Defs.' Br. at 12-13 (citing Alexander v. Choate, 469 U.S. 287 (1985), Patton v. TIC United Corp., 77 F.3d 1235 (10th Cir. 1996).)) This argument and both of these cases relate to the theory of disparate impact that Plaintiffs abandoned in a pleading filed almost a year ago and are thus not relevant to the case in its current posture. (See supra at 7.)

Defendants also argue that Ms. Barber "had the same ability to designate a supervising driver as a non-disabled parent without a license." (Defs.' Br. at 13.) This Court has already rejected this argument. See Order Granting in Part and Denying in

Part Defendants' Motion to Dismiss at 4 n.1. Regardless of the situation of nondisabled drivers who may choose not to maintain their license -- or who may have had it revoked by the state -- the Rehabilitation Act requires that, "'to assure meaningful access, reasonable accommodations in the [Defendants'] program or benefit may have to be made.'" Chaffin, 348 F.3d at 857 (citation omitted).

VII. Plaintiffs Have Demonstrated Intentional Conduct Sufficient to Support their Claim for Compensatory Damages under the Rehabilitation Act.

In order to recover compensatory damages under the Rehabilitation Act, Plaintiffs must prove intent. Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1152 (10th Cir. 1999). Intent includes "deliberate indifference to the strong likelihood that pursuit of [Defendants'] questioned policies will likely result in a violation of federally protected rights." Id. at 1153. Plaintiffs have provided undisputed evidence of Defendants' intentional and/or deliberately indifferent conduct.

In the context of a request for reasonable modification,[6] intentional conduct occurs when the plaintiff "alerted the public entity to his need for accommodation," and the defendant's failure to act was "more than negligent, and involve[d] an element of deliberateness." Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001); see also Love v. Westville Correctional Ctr., 103 F.3d 558, 560 (7th Cir. 1996) (failure to provide accommodations constitutes intentional discrimination). Here, Ms. Barber's

[6] Most of Defendants' argument on intent is premised on the incorrect assertion that "the gravamen of [Plaintiffs'] claim is based upon a theory of disparate impact." (Defs.' Br. at 16.) As noted above, this is incorrect. See supra at 7. The single case on which Defendants rely was a disparate impact case, so it is not relevant here. See Tyler v. City of Manhattan, KS, 118 F.3d 1400, 1403 (10th Cir. 1997) (noting that the case involves "acts and omissions which have a disparate impact on disabled persons . . ."), quoted in Defs.' Br. at 16.

phone calls and letters -- which used the term "accommodation" -- alerted the public entity to her need for an accommodation. Indeed, Mr. Tool testified that he understood her to be requesting such an accommodation. (Tool Dep. at 22.) The undisputed evidence also shows that Defendants knowingly -- rather than negligently -- denied the request: they sent Ms. Barber two letters explicitly denying the request (see Tool Letter; Dodd Letter), Mr. Tool testified that he denied her request, (Tool Dep. at 22-23), and Ms. Barber testified that Mr. Suthers denied her request in their phone call. (M. Barber Dep. at 47-48; M. Barber Decl. ¶ 2-4.) This evidence is more than sufficient to sustain a claim for compensatory damages under the Rehabilitation Act.

In support of their motion as to intent, Defendants again assert that they attempted to accommodate Ms. Barber. The Tool Letter and the Dodd Letter provide documentary evidence that this is not the case: that Defendants in fact directly and explicitly rejected Ms. Barber's requests. At the very least, Plaintiffs have raised a disputed issue of fact concerning whether Defendants ever offered Ms. Barber a reasonable modification. Summary judgment as to intent is inappropriate where factual disputes exist concerning the extent of accommodations provided in response to a request. See, e.g., Scott v. Garcia, 370 F. Supp. 2d 1056, 1076 (S.D. Cal. 2005) (denying summary judgment where there were disputed issues of fact concerning extent of accommodations provided).

VIII. Plaintiffs' Testimony Concerning the Injuries they Suffered Is Sufficient to Support their Claim for Compensatory Damages.

Defendants also seek summary judgment on the grounds that "Plaintiffs admit no cognizable injury exists." (Defs.' Br. at 18.) This is incorrect. Plaintiffs' testimony

concerning the effect Defendants' discrimination had on them is sufficient to demonstrate cognizable injury and thus to defeat Defendants' motion.

Plaintiff Marcia Barber testified at some length concerning the injuries she suffered, including feeling "kicked in the teeth," that "it was very painful," and that it undermined her confidence and caused "humiliation over not being able to afford my daughter a normal opportunity." (See M. Barber Dep. at 42-43, 55, 74; see also supra at 6.) Julianna Barber testified that it made her frustrated and angry, and that she missed out on at least one hundred hours of driving practice. (J. Barber Decl. ¶¶ 2-5.) It is undisputed that Julianna was unable to practice driving at all from November, 2004 until May, 2005, and was only able to practice for a total of six hours from May to August, 2005. (See Defs.' Br. Ex. I at 1-2.)

Plaintiffs have provided sufficient evidence to defeat summary judgment and present their claim for emotional distress and other compensatory damages to the jury. The Tenth Circuit has held that "[e]motional distress is an intangible damage, and is an issue of fact within the providence of the jury." Canady v. J.B. Hunt Transport, Inc., 970 F.2d 710, 715 (10th Cir. 1992). In Hampton v. Dillard Department Stores, Inc., 247 F.3d 1091, 1114-15 (10th Cir. 2001), that court rejected the defendants' argument that there was no support for a $56,000 emotional distress verdict, holding that the plaintiff's own testimony that she felt "humiliated and disgraced" and feared ridicule and humiliation while shopping was sufficient to sustain it. See also U.S. v. Balistrieri, 981 F.2d 916, 932-33 (7th Cir. 1992) (holding that an award for emotional distress may be appropriate even where the only direct evidence is the plaintiff's own testimony and that "[t]he jury is in the best position to evaluate both the humiliation inherent in the

circumstances and the witness's explanation of his injury."); Hogue v. MQS Inspection, Inc., 875 F. Supp. 714, 725 (D. Colo. 1995) (denying the defendants' motion for summary judgment based on the fact that "[the plaintiff] has testified to the existence, nature and severity of emotional distress he states he suffered from [the defendant's] actions.").

The one case cited by Defendants, Armstrong v. Turner Indus., 141 F.3d 554 (5th Cir. 1998), is not to the contrary. The Fifth Circuit made clear that "Armstrong has not alleged any actual injury flowing from the alleged [ADA] violation" and that his attorney "seemed to admit that, for this very reason, Armstrong was not entitled to damages relief." Id. at 561 n.17. In contrast, Plaintiffs here do allege injuries flowing from the alleged ADA violation, and -- as explained above -- have presented sufficient evidence of such injuries to defeat summary judgment.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Motion to for Summary Judgment.

Respectfully submitted,

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Dated: November 28, 2006

Certificate of Service

I hereby certify that on November 28, 2006, 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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