

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARIA SALINAS

Plaintiffs,

VS.

CITY OF NEW BRAUNFELS

Defendant.

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CIVIL ACTION NO. SA-06-CA-0729XR

DEFENDANT CITY OF NEW BRAUNFELS'
MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE XAVIER RODRIGUEZ:

NOW COME **CITY OF NEW BRAUNFELS**, Defendant in the above styled and numbered cause, and pursuant to Rule 56, Federal Rules of Civil Procedure, files this its Motion for Summary Judgment and in support thereof would respectfully show unto the Court the following:

I.

Defendant **CITY OF NEW BRAUNFELS** would show unto the Court that there is no genuine issue as to any material fact herein and that it is entitled to Judgment, as a matter of law.

II.

Defendant **CITY OF NEW BRAUNFELS** incorporates into its Motion for Summary Judgment for all purposes the following exhibits:

- (1) Exhibit A - Deposition of Plaintiff Maria Salinas;
- (2) Exhibit B - Deposition of Detective Tarina Skrzyki;
- (3) Exhibit C - Deposition Excerpts of Officer Jermyn Baker;
- (4) Exhibit D - City of New Braunfels Police Reports; and,

- (5) Exhibit E - Deposition of Dispatch Supervisor Kelly Holder.

The above Exhibits A - E are hereby incorporated by reference for all purposes.

III.

The case at bar concerns an incident which occurred on September 23, 2004, wherein Plaintiff Maria Salinas, a hearing impaired individual, returned home to her apartment after work and found her boyfriend, Ed Spencer, lying motionless on her couch. Subsequently, it was determined that Mr. Spencer was deceased. Plaintiff Salinas, unable to arouse her boyfriend, went to her neighbor's apartment for assistance who returned to Plaintiff's apartment and called 9-1-1. Police and EMS Personnel arrived from the City of New Braunfels, responded to the call which is known as a Death on Scene (DOS).

The following facts are undisputed:

- (1) Plaintiff Salinas graduated from the Texas School for the Deaf and subsequent attended Lee College for one and a half years and obtained a certificate of art graphics. (*Exhibit A - Deposition of Plaintiff Maria Salinas, pp. 9-12*).
- (2) Subsequent to Plaintiff's education at Lee College, she has worked at a bank; Dillard's Department Store for 9 years and currently is working at Owens-Corning as a knitting operator for over 10 years. (*Exhibit A - Deposition of Plaintiff Maria Salinas, pp. 14-28*).
- (3) Plaintiff Salinas communicates with her co-workers, maintains an email address known as "salsamaria," conducts her own personal business, including writing her bills, credit cards and subscribes to newspapers. (*Exhibit A - Deposition of Plaintiff Maria Salinas, pp. 33; 43; 48-52; 62-66*).
- (4) Plaintiff Salinas has been stopped twice by the City of New Braunfels' Police Department for motor vehicle violations and was able to communicate with the officer. (*Exhibit A - Deposition of Plaintiff Maria Salinas, pp. 56-59*).
- (5) At the time of the incident in question, Plaintiff Salinas had a video phone which she uses to effectively communicate with the hearing world. (*Exhibit A - Deposition of Plaintiff Maria Salinas, pp. 94-95; 105-106; 117-118*).

- (6) At the time of the incident in question, Plaintiff Salinas could have used the video phone to communicate with the Police Department, but because of her emotional state, preferred an interpreter to give her "comfort." (*Exhibit A - Deposition of Plaintiff Maria Salinas, pp. 101-108*).
- (7) On the date of the incident, New Braunfels City Police Officer Baker attempted to contact through dispatch a hearing impaired interpreter for the Plaintiff but was unable to contact one. (*Exhibit C - Deposition Excerpts of Officer Jermyn Baker, pp. 109; 163*).
- (8) Officer Baker was able to communicate with Plaintiff Salinas through pen and paper and obtained all the information needed for his report. (*Exhibit C - Deposition Excerpts of Officer Jermyn Baker, pp. 103; 105; 172-173; 180-181*).
- (9) Detective Skrzyki arrived as the lead investigator on the scene and was able to effectively communicate with Plaintiff Salinas. (*See, Exhibit B - Deposition of Detective Tarina Skrzyki, pp. 190; 193*).
- (10) Detective Skrzyki was able to assist Plaintiff Salinas in guiding her to the computer screen wherein Plaintiff Salinas contacted Patty Tels (Smith) to come to her apartment to interpret for her. (*See, Exhibit B - Deposition of Detective Tarina Skrzyki, pp. 145-159; and Exhibit A - Deposition of Plaintiff Maria Salinas, pp. 83-84*).
- (11) Plaintiff Salinas admits that from the time Patty Tels arrived she was able to effectively communicate with Police. (*Exhibit A - Deposition of Plaintiff Maria Salinas, pp. 116-118*).
- (12) From the time the City of New Braunfels' Police Department was dispatched to the scene at 15:14 until the time that Pat Tels arrived at Plaintiff's apartment which was 16:38 the entire amount of time that transpired was 1 hour and 24 minutes. (*Exhibit C - Deposition Excerpts of Officer Jermyn Baker, pp. 193-194; Exhibit D - City of New Braunfels' Police reports*).

VI. LEGAL ISSUES

Plaintiff Salinas' claims against the City of New Braunfels are brought pursuant to Title II of the Americans With Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (§504).

The jurisprudence interpreting both the ADA and Rehabilitation Act is applicable to both regarding the burden of proof. *Haynes v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000). Plaintiff's burden under these claims is to prove the following:

- (1) She is a qualified individual;
- (2) Who was excluded from participation in or denied the benefits of services, programs or activities of a public entity; and,
- (3) That such exclusion or denial or discrimination was by reason of his disability.

Lightbourn v. County of El Paso, Texas, 118 F.3d 421, 428 (5th Cir. 1997). Plaintiff's burden in both causes of action is to show intentional discrimination. *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 264 (5th Cir. 1984).

Defendant City of New Braunfels asserts that Plaintiff has failed in both the second and third prongs of this analysis. As a point of initial inquiry, Defendant contends that Plaintiff was not "denied public benefits" by the fact that she had her neighbor call 9-1-1 and dispatch police to investigate a call for a possible death on scene. Although the Courts have broadly construed the "services, programs or activities" language in the ADA and the Rehabilitation Act, no Fifth Circuit case has specifically addressed whether 9-1-1 emergency services fall within this category. The leading case in the Fifth Circuit, *Haynes v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) addresses the ADA in the context of a criminal defendant and his interaction with the police during the course of an arrest. Defendant asserts that in an analogous case of *Albra v. City of Ft. Lauderdale*, 2007 W.L. 1213230 (11th Cir. Fla.), the Court held that the Plaintiff, an alleged crime victim, failed to state a claim under the Americans with Disabilities Act in alleging that he was denied public benefits due to the City's police department's failure to investigate his claim. The Court held that the City did not have a duty to investigate his claim and therefore, the Plaintiff failed to state a claim under ADA.

Defendant City of New Braunfels asserts that even if Plaintiff's 9-1-1 call for assistance to investigate a DOS was a "public entity service" that Plaintiff was not denied the benefits of those services or otherwise discriminated. Plaintiff relies heavily on *Center v. City of West Carrollton*, 227 F.Supp.2d 863 (S.D. Ohio, 2002) for her ADA claim. However, the *Center* case is distinguishable from the case at bar. In *Center*, the plaintiff placed a call to the City of West Carrollton Police Department to report that her vehicle had been vandalized and requested a qualified interpreter for the deaf. The police department dispatched an officer who responded to the scene and made a report concerning the broken window of plaintiff's vehicle. Plaintiff, on several occasions, requested an interpreter but was refused by the officer who claimed that communications were effective. The trial court denied the motion for the summary judgment to the extent that there was a genuine issue of material fact as to whether or not the communication between the plaintiff and the officer was in fact effective under the ADA. The fact was undisputed that the city never attempted to acquire an interpreter in the *Center* case.

In the case at bar, quite to the contrary, the City of New Braunfels never refused Plaintiff Salinas but instead attempted to acquire an interpreter. (Exhibit B – Deposition of Detective Tarina Skrzycki, p. 165; Exhibit C – Deposition excerpts of Officer Jermyn Baker, pp. 109, 163; Exhibit D – New Braunfels Police Reports). Eventually, an interpreter by the name of Pat Tels, arrived at the scene and even the Plaintiff admits that communication was effective at that point. (Exhibit A – Deposition of Plaintiff Maria Salinas, pp. 115-118). The time that elapsed in the case at bar before an interpreter arrived, was 1 hour and 24 minutes. (Exhibit C – Deposition excerpts of Officer Jermyn Baker, pp. 193, 194). Despite Plaintiff's pleadings to the contrary, there was never an issue as to any fee being charged by the interpreter. (Exhibit A – Deposition of Plaintiff Maria Salinas, pp. 121 – 123).

In the case at bar, Defendant City of New Braunfels, never refused an interpreter to Plaintiff Salinas, but instead, attempted to acquire one. Defendant City of New Braunfels had the name of sign language interpreter on file at dispatch by the name of Linda Schrank but they were unable to contact her. (*Exhibit D – Deposition of Dispatch Supervisor Kelly Holder*, pp. 30-33). City of New Braunfels Police Department sends its dispatchers for special training in dealing with deaf persons. (*Exhibit D – Deposition of Dispatch Supervisor Kelly Holder*, pp. 42-48). Furthermore, Plaintiff Salinas had a video phone at her residence which she could have used to effectively communicate with the police department. (*Exhibit A – Deposition of Plaintiff Maria Salinas*, pp. 94-106). Plaintiff Salinas chose not to use the video phone due to her emotional state and the fact that she wanted an interpreter to comfort her. (*Exhibit A – Deposition of Plaintiff Maria Salinas*, p. 103). Defendant City of New Braunfels asserts that it was not under a duty to wait for a hearing impaired interpreter before completing its investigation. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1086 (11th Cir. 2007). In *Bircoll*, the Court held that waiting for an oral interpreter before taking a field sobriety test was not a reasonable modification of police procedures to accommodate a motorist’s deafness. The Court held that “forestalling all police activity at a road side DUI stop until an oral interpreter arrives is not only impractical, but also would jeopardize the police’s ability to act in time...”. *Id.* at 1086.

Defendant asserts that the case of *Saltzman v. Board of Commissioners of the North Broward Hospital District*, 239 Fed. Appx. 484 (11th Dist. Fla. 2007) is analogous to the case at bar. In *Saltzman*, the plaintiff, a hearing impaired stroke patient and his wife brought claims against the medical center under the ADA and Rehabilitations Act for failure to provide a deaf interpreter. Saltzman called 9-1-1 emergency services and was transported to the hospital. The plaintiff claimed that the hospital failed to provide a sign language interpreter both to the patient

and his family who were deaf. The Court held that the medical center did not engage in intentional discrimination when it failed to provide sign language interpreter for the family.

In the case at bar, Defendant City of New Braunfels did not act intentionally nor with deliberate indifference to the needs of Plaintiff Salinas. Plaintiff Salinas was never denied an interpreter, had effective communication with the police Officer Baker (*Exhibit C – Deposition excerpts of Officer Jermyn Baker, pp. 180-181*) and Detective Tarina Skrzyki (*Exhibit B – Deposition of Detective Tarina Skrzyki, pp. 190-193; 177-181*), and by her own admission communicated effectively 1 hour and 24 minutes subsequent to the police arriving when Pat Tels, the interpreter arrived. (*Exhibit A – Deposition of Plaintiff Maria Salinas, pp. 117-118; Exhibit C – Deposition excerpts of Officer Jermyn Baker, pp. 193-194*). Plaintiff Salinas at most sustained hurt feelings by not being physically comforted. (*Exhibit A – Deposition of Plaintiff Maria Salinas, p. 131*). In this regard, the case is analogous to *Crocker v. Lewiston Police Department*, 2001 W.L. 114977 (D.M.E. 2001). The trial court in citing *Rosen v. Montgomery County, Maryland*, 121 F.3d 154, 158 (4th Cir. 1997) held that hurt feelings standing alone did not state a cause of action invoking the ADA's protection. The Court held that humiliation and embarrassment are emotions experienced by almost every person arrested for drunk driving which was the underlying issue in the case and that it was not an injury sufficient to state a cause of action under the ADA.

In the case at bar, Plaintiff has failed to proffer any evidence of a prima facie case under the second and third elements of an ADA claim. Plaintiff was not excluded nor denied the benefits of the public entity's services, but rather did obtain an interpreter 1 hour and 24 minutes into the police call for service. Plaintiff Salinas was afforded the same service and courtesy as any member of the public, hearing or non-hearing, concerning a death on scene (DOS) which was the basis of the call. (*Exhibit B – Deposition of Detective Tarina Skrzyki, pp. 177-181*).

Defendant City of New Braunfels did not discriminate or otherwise deny Plaintiff Salinas by reason of her disability for the call in question, as a matter of law. *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1087 (11th Cir. 2007).

WHEREFORE, PREMISES CONSIDERED Defendant **CITY OF NEW BRAUNFELS** prays that its Motion for Summary Judgment be in all things granted, that Plaintiff's lawsuit be dismissed against it and for such other and further relief as it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2008, I electronically filed the foregoing Defendant **CITY OF NEW BRAUNFELS'** Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Ms. Lucy D. Wood
Advocacy, Incorporated
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And I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participant:

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/s/ Charles S. Frigerio
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