

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-807-RB-CBS

JULIANNA BARBER, by and through her next friend, Marcia Barber;  
MADELINE BARBER, by and through her next friend, Marcia Barber;  
MARCIA BARBER;  
COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit  
corporation; and AMERICAN COUNCIL OF THE BLIND OF COLORADO,  
INC., a Colorado non-profit corporation,

Plaintiffs,

v.

STATE OF COLORADO, DEPARTMENT OF REVENUE;  
STATE OF COLORADO, DEPARTMENT OF REVENUE, DIVISION OF  
MOTOR VEHICLES;  
M. MICHAEL COOK, in her individual and official capacity as Executive  
Director of the Colorado Department of Revenue; and  
STEVE TOOL, in his individual and official capacity as Senior Director of  
the Colorado Division of Motor Vehicles,

Defendants.

---

**RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER**

---

The Defendants, through the Colorado Attorney General,  
respectfully submit the following Response to "Plaintiffs' Motion to  
Reconsider the Court's Order Dismissing the Claims of Julianna and  
Madeline Barber" ("the "Motion to Reconsider").

## **I. PRELIMINARY STATEMENT**

Plaintiffs brought this action seeking damages, declaratory, and injunctive relief against the Colorado Department of Revenue, the Division of Motor Vehicles, the Executive Director of the Department of Revenue and the Senior Director of the Division of Motor Vehicles, all based on § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (the “Rehabilitation Act”), and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 – 34 (the “ADA”).

Plaintiffs, a mother and her two daughters, maintain that the statute in effect prior to July 1, 2005 violated the Rehabilitation Act and the ADA because it allowed a stepparent or guardian who is a licensed driver to supervise a fifteen year old with an instructional permit. Because Marcia Barber (mother) is blind, and thus not licensed to operate a motor vehicle, she was not qualified pursuant to statute to supervise her daughter while her daughter accumulated experience necessary to receive an unrestricted driver’s license when she turns sixteen. Plaintiffs maintain that Defendants failed to make reasonable modifications by allowing Julianna’s (daughter) grandfather to supervise her driving while she had her instructional permit prior to her sixteenth birthday.

On October 17, 2005, this Court granted Defendants’ Motion to Dismiss in part. Specifically, the Court dismissed the claims of Julianna and Madeline Barber concluding that they did not assert viable claims

under either the ADA or the Rehabilitation Act. The Court further held that Plaintiffs failed to provide any argument or authority that 28 C.F.R. § 35.130(g) creates a cause of action in the absence of express statutory authority. The Court's order reflects the law.

On October 25, 2005, Plaintiff's filed their Motion to Reconsider. The Motion raises the same issues previously addressed by the Court in its October 17, 2005 Order and should be denied. (See Order Granting in Part and Denying in Part Defendants' Motion to Dismiss at p. 5, FN 3). Additionally, the purported claims of Julianna and Madeline as stated in the Motion to Reconsider, are not set forth in the Amended Complaint. Finally, even if the claims had been asserted in the Amended Complaint, they fail as a matter of law. Accordingly, Plaintiffs' Motion to Reconsider is not supported by law and should be denied.

#### **IV. ARGUMENT**

##### **A. The Court's October 17, 2005 Order addressed all issues raised in the Motion to Reconsider.**

As correctly noted by the Court, in order to assert a cause of action under the ADA or the Rehabilitation Act, a plaintiff must prove:

(1) that he [or she] is a qualified individual with a disability;

(2) that he [or she] was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity;  
and

(3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

Gohier v. Enright, 186 F.3d 1216, 1219 (10<sup>th</sup> Cir. 1999); Amirault v. City of Roswell, 120 F.3d 270 (10<sup>th</sup> Cir. 1997). "The Rehabilitation Act is materially identical to and the model for the ADA...." Crawford v. Indiana Department of Corrections, 115 F.3d 481, 483 (7<sup>th</sup> Cir. 1997). A Rehabilitation Act claim has the additional element of receipt of federal funds. Other than this requirement, the elements are the same.

In the Motion to Reconsider, Plaintiffs allege that they opposed the motion to dismiss on two distinct theories: (1) that the daughters were discriminated against based on their association with their mother, and (2) that they were allegedly harmed by the alleged discrimination against their mother. The Motion argues that while the Court addressed the first theory, and that Plaintiffs do not contest the Court's ruling on this theory, they allege that the Court failed to address the second theory.<sup>1</sup>

The Motion raises arguments already addressed by the Court. It is undisputed that neither Julianna nor Madeline are disabled, and that they fail as a matter of law to meet the requisite elements of an ADA or Rehabilitation Act claim. This Court rejected Plaintiff's attempt to assert an association discrimination claim under Title II of the ADA. The Court

concluded that there was no statutory authorization for an association discrimination claim under Title II, and that

Plaintiffs provided no legal authority or argument that the Federal Regulation relied upon by the Plaintiffs to assert such claim “create[d] a cause of action in the absence of express statutory authorization.” (Order at p. 5). The Court also rejected Plaintiffs’ arguments that the daughter’s claims were viable because the Tenth Circuit has found that standing under Title II extends to the full limits of Article III. Specifically the Court concluded: “Whatever the legitimacy of this argument in relation to issues of standing, it offers no guidance when considering whether associational discrimination is a substantive claim under Title II.” (Order at p. 5, FN 3). Thus, Plaintiffs’ assertion that they are raising a distinct claim merely because the daughters were allegedly harmed by the alleged “discrimination targeted at their mother”<sup>2</sup> fails to raise a claim that was not previously addressed by the Court in its October 17, 2005 Order.

**B. Julianna and Madeline Barber are not entitled to relief for alleged injuries.**

Plaintiffs now allege, although not plead in the Amended Complaint, that Julianna and Madeline’s Title II and Rehabilitation Act claims are

---

<sup>1</sup> This distinction in claims is neither apparent, nor implicit in Plaintiff’s Amended Complaint.

<sup>2</sup> Moreover, it is apparent that Madeline, who is 13 years of age has not sustained any damage whatsoever, she is neither qualified nor eligible to receive a driver’s permit.

based on the alleged “fact that they were injured by discrimination against their mother” and “raise claims for injuries caused by Defendants’ discrimination against their mother.” (Motion to Reconsider at pp. 4, 6). Their claim lacks legal foundation.

First, it is apparent that both the ADA and the Rehabilitation Act are designed to prevent discrimination against disabled individuals. It necessarily follows that a disparate impact claim under these provisions is designed to eliminate discrimination and barriers that have a disparate impact on the disabled, not the able bodied. Plaintiffs cite Chaffin v. Kansas State Fair Board, 348 F.3d 850 (10<sup>th</sup> Cir. 2003) for the proposition that the rights of action under the ADA and the Rehabilitation Act extend to claims for disparate treatment, disparate impact and failure to make reasonable modifications. While this may be true, it is of no significance here. The Court ruled in its Order that the Amended Complaint did not properly assert claims for disparate impact and reasonable accommodations by the daughters.

It is apparent that in order to assert a disparate impact claim, the person asserting the claim must be a member of the class protected by the ADA and Rehabilitation Act, namely the disabled. Plaintiffs rely upon Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), a case in which the white tenants had standing under the Fair Housing Act to challenge a landlord's discrimination against

nonwhites as supportive of their argument that Julianna and Madeline have standing in this case. The purported claims advanced in the Motion to Reconsider involve alleged disparate impact disability discrimination claims for damages by able bodied individuals, an issue not addressed by Trafficante or other decisions cited by Plaintiffs relating to enforcement of the ADA or Rehabilitation Act by the non disabled. Plaintiffs' reliance on Trafficante is misplaced.

Plaintiffs unquestionably state in their Motion to Reconsider, that both Julianna and Madeline are asserting claims for alleged injuries they sustained as a result of the alleged discrimination against their mother. (See Motion to Reconsider at pp. 3-4). Therefore, it cannot be disputed that claims for injuries are claims seeking damages.<sup>3</sup> Even assuming, *arguendo*, that they had standing to assert such claims, the claims fail.

First, none of the Plaintiffs seek damages against any of the individually named Defendants in the Amended Complaint. (See Amended Complaint at p. 10). Moreover, to the extent Julianna and Madeline now seek such damages, the claim fails. Claims against the individual defendants in their individual capacities are not cognizable under the ADA or Rehabilitation Act. See Montez v. Romer 32 F.Supp.2d 1235, 1241 (D.Colo. 1999) (Applying appropriate statutory analysis determining

that claims against individuals are not cognizable under the ADA). In addition, the official capacity claims as well as the claims against the State entities under the ADA are barred by the Eleventh Amendment. See Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 374 (2001); Thompson v. Colorado, 278 F.3d 1020 (10<sup>th</sup> Cir. 2001).

Moreover, as stated above, Plaintiff's do not, and cannot, seek damages against the individually named Plaintiffs in their Amended Complaint. While a plaintiff may recover damages against a state under the Rehabilitation Act, as noted by the Court, the law in this circuit requires that a plaintiff show intentional discrimination to be entitled to compensatory damages under the Rehabilitation Act. Powers v. MJB Acquisition Corp., 184 F. 3d 1147, 1153 (10<sup>th</sup> Cir. 1999). To the extent Madeline and Julianna seek compensation for injuries under the Rehabilitation Act and the ADA under a disparate impact theory, such a claim belies any assertion of intentional discrimination. Put simply, because the claim is based upon a disparate impact theory, neither Julianna nor Madeline can allege, much less prove, that they were intentionally discriminated against in order to receive compensation for their alleged injuries.

---

<sup>3</sup> The fact that their claims are for damages is also bolstered by the fact that Julianna has already received her driver's license and thus could not be seeking injunctive relief.



WHEREFORE, Defendants respectfully request that the Court deny Plaintiffs' Motion to Reconsider.

Dated this 25<sup>th</sup> day of November, 2005.

JOHN W. SUTHERS  
Attorney General

/s/ James X. Quinn

ELIZABETH H. McCANN\*

Deputy Attorney General

JAMES X. QUINN\*

Assistant Attorney General

Litigation Section

Attorneys for Defendants

1525 Sherman Street, 5th Floor

Denver, Colorado 80203

Telephone: (303) 866-4307

\*Counsel of Record

### CERTIFICATE OF SERVICE

I certify that on November 25, 2005, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Amy F. Robertson  
arob@foxrob.com

/s/ James X. Quinn