

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 MOTION TO RECONSIDER

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

Plaintiffs Julianna and Madeline Barber ("the Daughters") assert claims against Defendants under Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 et seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, based on Defendants' discrimination against their mother, Marcia Barber, who is blind. The Daughters have claims against Defendants because they suffered (or will suffer) injuries caused by Defendants' discrimination.

Procedural Status

Both this Court's Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("Order") and Defendants' Response to Plaintiffs' Motion to Reconsider ("Response") have made clear that Plaintiffs' Amended Complaint was not a model of clarity. In its Order, the Court generously gave Plaintiffs leave to file an amended

complaint, albeit -- in light of the content of the Order -- one that did not include the Daughters.¹ Because Defendants' Response repeatedly attempts to rely on this lack of clarity in opposing Plaintiffs' Motion to Reconsider the Court's Ruling Dismissing the Claims of Julianna and Madeline Barber ("Motion to Reconsider"), Plaintiffs have taken the liberty of drafting -- and attaching hereto as Exhibit A -- a proposed Second Amended and Supplemental Complaint which still includes the Daughters' claims but which provides clarity concerning the claims asserted and relief requested by each Plaintiff and against each Defendant.

The proposed Second Amended and Supplemental Complaint makes clear that:

- Plaintiff Marcia Barber, and Organizational Plaintiffs Colorado Cross Disability Coalition and American Council of the Blind of Colorado assert claims for discrimination based only on failure to modify policies,² id. ¶¶ 67, 73;
- the Daughters assert claims based on injuries caused by Defendants' discrimination against their mother, Marcia Barber, id. ¶¶ 69(b), 76(b);
- the only damages sought are compensatory damages by Marcia and Julianna Barber under the Rehabilitation Act against the state agency Defendants,³ id. at 14 ¶ 4;

¹ See Order at 8-9.

² See id. at 6-7. Plaintiffs originally asserted claims for disparate impact discrimination but have elected, in order to streamline the case, to proceed only on their failure to modify claim.

³ See id. at 8.

- Plaintiffs Marcia and Madeline Barber and the Organizational Plaintiffs seek injunctive relief against all Defendants under both statutes (and thus that the only relief sought by the Organizational Plaintiffs is injunctive⁴), id. at 14 ¶ 3; and
- Defendants engaged in intentional discrimination and/or were deliberately indifferent because they repeatedly denied Plaintiff Marcia Barber's requests for reasonable modifications.⁵ ¶¶ 31-39, 74.

Should this Court grant Plaintiffs' Motion to Reconsider, Plaintiffs will move for leave to file the attached proposed Second Amended and Supplemental Complaint.

ARGUMENT

Defendants make three arguments in response to Plaintiffs' Motion to Reconsider: (1) that this Court previously addressed the argument that Plaintiffs request the Court to reconsider; (2) that one of the cases on which Plaintiffs rely does not apply in the context of disparate impact; and (3) that the Daughters are not entitled to the relief they seek. None of these arguments has merit.

Most important, none of Defendants' arguments addresses -- much less attempts to rebut -- Plaintiffs' fundamental arguments: (1) that the Daughters' substantive claims are grounded in the language of the statutes, not the regulations, because they

⁴ See id. at 7-8.

⁵ See id. at 6 n.4. In addition, Plaintiffs have substituted Joan Vecchi, the current Acting Senior Director of the Division of Motor Vehicles, for Steve Tool, who no longer holds that position, and have supplemented the Amended Complaint to allege facts that have occurred since the filing of that pleading. See, e.g., Ex. A, ¶¶ 40-47.

challenge conduct prohibited by the statutory language itself: discrimination against a person with a disability; and (2) that the Daughters may assert claims based on injuries they suffered as a result of Defendants' discrimination against their mother. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979) (holding that where standing "extend[s] to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed."). The Daughters' claims are thus valid.

I. This Court Did Not Resolve The Question Whether the Daughters had Claims Based On Injuries Caused by Discrimination Against Their Mother.

Plaintiffs have requested this Court to reconsider its dismissal of the Daughters' claims on the grounds that the Order did not rule on one of the two theories on which those claims are based. The Court held that the regulation barring discrimination against the Daughters based on their association with their mother -- 28 C.F.R. § 35.130(g) -- was not authorized by the statute. (Order at 5.) It also held that Plaintiffs' argument that the Daughters had standing to sue based on injuries caused by discrimination against their mother "offer[ed] no guidance when considering whether associational discrimination is a substantive claim under Title II." (Id. at 5 n.3.) That is, that Plaintiffs' standing argument did not inform the analysis of whether section 35.130(g) -- the substantive associational discrimination provision -- was authorized by the statute. As previously stated, Plaintiffs do not contest this holding.

With respect -- and recognizing that it may have been due to Plaintiffs' failure adequately to distinguish the two arguments in their Memorandum in Opposition to Defendants' Motion to Dismiss -- this Court did not address the separate question whether the Daughters had claims for injuries they incurred as a result of discrimination against their mother. That is, that the Daughters had claims based directly on the statutory language rather than on section 35.130(g). For the reasons set forth above and in Plaintiffs' Motion to Reconsider, Plaintiffs demonstrated that the Daughters' claims based on discrimination against their mother were valid. (See Motion to Reconsider at 4-8.) Furthermore, Plaintiffs have made clear in their proposed Second Amended and Supplemental Complaint that the Daughters proceed only on the theory that they were injured by discrimination against their mother; they do not proceed under section 35.130(g), the theory rejected by this Court. (See Ex. A, ¶¶ 69(b), 76(b).)

II. The Daughters May Assert Claims Based on Injuries They Sustained as a Result of Defendants' Discrimination Against Their Mother.

Plaintiffs allege that Defendants discriminated against Marcia Barber by denying her request for reasonable modifications of Defendants' policies. The Tenth Circuit has explicitly held that this conduct constitutes discrimination under Title II and the Rehabilitation Act, Chaffin v. Kansas State Fair Board, 348 F.3d 850, 858 (10th Cir. 2003). To demonstrate that the Daughters -- who are not disabled -- had claims for injuries caused by Defendants' discrimination against their mother -- who is disabled -- Plaintiffs cited Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972), a case in which

the Supreme Court held that white plaintiffs could assert claims based on injuries caused by housing discrimination against blacks.

Defendants attempt to distinguish Trafficante on the grounds that it did not involve disparate impact disability discrimination.⁶ The holding in Trafficante, however, was not based on the type of discrimination alleged. Rather, the Supreme Court relied on the broad language of the remedial provision of the Fair Housing Act, which granted relief to any “person aggrieved,” which was defined as “(a)ny person who claims to have been injured by a discriminatory housing practice.” Trafficante, 409 U.S. at 207-08 (quoting 42 U.S.C. § 3610 (1972)).

The remedial provisions of Title II and the Rehabilitation Act are similarly broad (see Motion to Reconsider at 7-8), and thus permit claims by any plaintiff -- including a plaintiff without a disability -- who was injured by conduct recognized to constitute discrimination under the statutes. Accordingly, at least one court has explicitly relied on Trafficante to recognize a claim brought by a corporate entity -- that is, not brought by a person with a disability -- based on reasonable modification claims under the ADA and Rehabilitation Act. Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 42, 47 (2d Cir. 1997) (relying on Trafficante and holding that corporation had standing under Title II and the Rehabilitation Act for failure to modify claim).

⁶ Response at 7. Because Plaintiffs no longer bring claims for disparate impact discrimination, this argument is moot. Defendants also imply that Trafficante is distinguishable because the case at bar involves “a claim for damages.” Id. The plaintiffs in Trafficante, however, also sought damages. See Trafficante v. Metro. Life Ins. Co., 446 F.2d 1158, 1159 (9th Cir. 1971).

III. Plaintiffs' Claims for Relief are Proper.

Defendants raise two challenges to Plaintiffs' claims for relief, one of which is new -- that is, not raised in their Motion to Dismiss -- and the other of which was raised in their Motion to Dismiss and resolved by this Court in its Order. Defendants' new argument is that the claims against the State entities under the ADA are barred by the Eleventh Amendment. They also reprise their argument that the Daughters have not sufficiently alleged intent to support claims for compensatory damages under the Rehabilitation Act. Neither argument has any merit.

A. Plaintiffs' Claims for Injunctive Relief Under Title II Against the Individual Defendants in their Official Capacities are Proper.

As Plaintiffs' currently operative Amended Complaint makes clear, the only relief Plaintiffs seek under Title II of the ADA is injunctive. Amd. Cmplt. at 10. Such relief is not barred by the Eleventh Amendment. While damages claims against the state are barred by that amendment, the Tenth Circuit has made clear that plaintiffs may bring Title II claims for injunctive relief against state officials in their official capacities under the doctrine of Ex parte Young, 209 U.S. 123 (1908). See Chaffin v. Kansas State Fair Board, 348 F.3d 850, 866-67 (10th Cir. 2003). Thus, Plaintiffs' request for injunctive relief under Title II against the individual defendants in their official capacities is proper.

B. Plaintiffs Have Alleged Intentional Conduct Sufficiently to Support a Claim for Compensatory Damages under the Rehabilitation Act.

Defendants argue that the Daughters have not alleged intentional conduct sufficient to support a claim for damages under the Rehabilitation Act. (Response at 8.)

As the proposed Second Amended and Supplemental Complaint clarifies, Madeline Barber does not seek compensatory damages, but only injunctive relief to ensure that, when she turns 15 slightly over one year from now -- a very short time in light of fact that the Parties have not yet convened a scheduling conference in this case -- she will not incur the same injury her older sister did.⁷ Julianna Barber has sufficiently alleged intentional conduct to support her claim for compensatory damages.⁸

In order to recover compensatory damages under the Rehabilitation Act, Plaintiffs are required to allege and prove intentional conduct, defined to include conduct that demonstrates “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).

Defendants made this same argument in their Motion to Dismiss. (See id. at 22.) In response, Plaintiffs demonstrated that, in the context of a request for reasonable modifications, it is sufficient to allege that the plaintiff “alerted the public entity to his need for accommodation,” and that the defendant’s failure to act was “more than negligent, and involve[d] an element of deliberateness.” Duvall v. County of Kitsap, 260

⁷ Defendants argue that Madeline has not suffered damage. Response at 5 n.2. Plaintiffs incorporate by reference their response to this argument from their Memorandum in Opposition to Defendants’ Motion to Dismiss. See id. at 14-16.

⁸ Defendants also argue that “[c]laims against the individual defendants in their individual capacities are not cognizable under the ADA or Rehabilitation Act.” Response at 7. The proposed Second Amended and Supplemental Complaint makes clear that the individual defendants are sued only in their official capacities. See Ex. A at 1.

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). The Amended Complaint alleged Marcia Barber's repeated requests for reasonable modifications and Defendants' repeated denials of those requests. (Id. ¶¶ 35-43.)

This Court denied Defendants' Motion to Dismiss on these grounds, but provided Plaintiffs leave to allege deliberate indifference in greater detail. (Order at 6 n.4.) Plaintiffs' proposed Second Amended and Supplemental Complaint does this. (Ex. A ¶¶ 31-39, 74.) These allegations make clear that Plaintiff Marcia Barber repeatedly requested reasonable modifications, explicitly asserting her federally-protected rights under the ADA and Rehabilitation Act. (Id. ¶¶ 31, 33, 34, 37, 38.) They also make clear that Defendants intentionally and deliberately refused Ms. Barber's requests, explicitly rejecting her assertion of rights under the ADA and Rehabilitation Act. (Id. ¶¶ 32, 35, 39.) Under the standard set forth in Duvall and Love, Marcia Barber alleged intentional conduct that is more than sufficient to support her claims for compensatory damages. Because Julianna Barber alleges injury based on this discrimination against her mother, her claims are thus based on intentional conduct as well.

Conclusion

For the reasons set forth above and in Plaintiffs' Motion to Reconsider, Plaintiffs respectfully request this Court reconsider its Order, and deny Defendants' Motion to Dismiss with respect to the claims of Julianna and Madeline Barber, on the grounds that

they have a private right of action -- and standing to bring it -- to challenge the discrimination against their mother.

If it would aid the Court, Plaintiffs respectfully request oral argument on this Motion.

Respectfully submitted,

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Certificate of Service

I hereby certify that on December 9, 2005, 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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