

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

JULIANNA BARBER, by and through her next friend, Marcia Barber; and
MARCIA BARBER;

Plaintiffs,

v.

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

Defendants.

**DEFENDANTS' RESPONSE TO MOTION TO RECONSIDER AND TO ALTER
JUDGMENT**

The Defendants, through the Colorado Attorney General, respectfully submit the
following Response to Plaintiffs' Motion to Reconsider and to Alter Judgment. Document #
76, filed May 29, 2007.

PRELIMINARY STATEMENT

The sole remaining claim in this case was a claim for compensatory damages
pursuant to section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (the "Rehabilitation
Act").¹ On May 14, 2007, this Court granted Defendants' Motion for Summary Judgment
on the remaining claim. In doing so the Court properly defined the remaining issue and
the Plaintiffs' burden of proof with respect to the remaining claim:

¹ Plaintiffs' claims for injunctive relief were mooted when, as a result of Plaintiff's concerns,
the Defendants sought and achieved an amendment to the statute that addressed
Plaintiffs' concerns.

Compensatory damages are available under section 504 only if plaintiffs can establish that defendants intentionally discriminated against them. ***Powers v. MJB Acquisition Corp.***, 184 F.3d 1147, 1153 (10th Cir. 1999). “[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.” ***Id.*** 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].” ***Duvall v. County of Kitsap***, 260 F.3d 1124, 1139 (9th Cir. 2001).

Order Granting Defendants’ Motion for Summary Judgment, Doc # 74 at p. 3. Plaintiffs do not take issue with the Court’s statement of controlling law. Plaintiffs now seek to re-litigate the issues resolved by this Court’s Order via their Motion to Reconsider and to Alter Judgment. For the reasons set forth below, the Motion should be denied.

STANDARDS FOR RULE 59(e) REVIEW

The Tenth Circuit has explained, “[g]rounds warranting a motion to reconsider include[:] (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.” *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir.1995); “Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party’s position, or the controlling law.” *Id.* “Such problems rarely arise and the motion to reconsider should be equally rare.” *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va.1983); see *M.K. v. Tenet*, 196 F.Supp.2d 8, 12 (D.D.C.2001) (“A motion pursuant to Fed.R.Civ.P. 59(e) to alter or amend judgment after its entry is rarely granted.”). *Gotfredson v. Larsen LP* 2006 WL 2943008, *3 (D. Colo. 2006).

SUMMARY OF ARGUMENT

Plaintiffs maintain that the Court committed manifest errors of law in granting Defendants' Motion for Summary Judgment. Specifically, Plaintiffs maintain the Court made manifest errors of law by: (1) making factual determinations of facts in dispute; (2) determining that Plaintiffs' requested accommodation was unreasonable because it was not argued by Defendants; and (3) determining that the requested accommodation that would require Defendants to violate the law was *per se* not reasonable.

Plaintiffs present no proper grounds for reconsideration. They fail to demonstrate an intervening change in the law, the existence of new evidence, a misapprehension of facts, or the need to correct clear error or to prevent manifest injustice. In addition the Court properly evaluated applicable law and applied that law to the facts of this case. Plaintiffs' disagreement with the Court's legal conclusions does not present proper grounds for reconsideration. Accordingly, their motion must be denied.

ARGUMENT

I. Plaintiffs' Motion fails to state a proper ground for Rule 59 Relief.

Rule 59(e) does not offer a party the opportunity to re-litigate its case after the court has rendered a decision. *Servants of the Paraclete*, 204 F.3d at 1012 ("It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing."); *All West Pet Supply Co. v. Hill's Pet Prods. Div., Colgate-Palmolive Co.*, 847 F.Supp. 858, 860 (D.Kan.1994) ("A motion to reconsider or to alter or amend may not be used as a vehicle for the losing party to rehash arguments previously considered and rejected by the district court."). Thus, it is not a tool to re-raise issues that

were or could have been raised in prior briefing. *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991).

Plaintiffs are simply re-raising issues that were or could have been raised in prior briefing. Accordingly, their motion should be denied.

II. The Court properly defined the applicable legal standard and applied the undisputed facts thereto.

Plaintiffs have missed the essential holding in the Court's Order granting summary judgment to the Defendants. The Court held that

“no reasonable jury could conclude based on the evidence presented that defendants failed to act on that knowledge [that the statute potentially violated plaintiffs' rights] in such a way as to constitute deliberate indifference.”

Order Granting Summary Judgment, Document #74, p. 3

This is the issue in the case. The Plaintiffs have the burden of proving that the Defendants acted intentionally to discriminate against them so as to entitle them to monetary damage, by inferring that they acted with deliberate indifference to the strong likelihood that following the statutory language would likely result in a violation of federally protected rights. They have failed to produce any evidence of intentional discrimination by the Defendants, the Director of the Division of Motor Vehicles at that time, Mr. Tool, or by the agency. In fact, as the Court correctly noted in its Order, the evidence produced on this point and referenced in the brief in support of the Defendants' Motion for Summary Judgment, establishes just the opposite: the agency not only was **not** indifferent to the interests of the Plaintiffs, it took immediate action to seek guidance from the Attorney General's office and to change the statute so as to address an unintentional oversight in the statute.

The Court granted Defendant's Motion for Summary Judgment because there is no evidence that Defendants intentionally discriminated against the Plaintiffs. The undisputed evidence demonstrated that rather than acting with indifference to Plaintiffs' plight, the Defendants did everything in their power to appease the Plaintiff. Ms. Barber dealt directly with Steve Tool, who at that time was the Senior Director of the Colorado Division of Motor Vehicles. (**Exhibit C** to Defendants' Motion for Summary Judgment, Deposition of Marcia Barber at p. 32, ll. 11-20). Mr. Tool thoroughly investigated the issue. All of Marcia Barber's interactions with Mr. Tool were pleasant and professional. Marcia Barber admits that Mr. Tool was very supportive and understood her issues. (**Exhibit C**, Deposition of Marcia Barber at p. 45, ll. 2-25; p. 46, ll. 1-18). Indeed, even Marcia Barber admits that Steve Tool could not simply disregard the statute and allow Julianna's grandfather to supervise because "his hands were tied" as a result of the statutory language. (**Exhibit C** Marcia Barber Deposition at p. 45, ll. 14-23; **Exhibit D**, Deposition of Steve Tool at p. 22, ll. 15-20). However, he was very interested in finding a solution and sought guidance from the Colorado Attorney General's Office and further inquired into amending the statute at issue to accommodate all parents who do not have a driver's license. (**Exhibit D**, Deposition of Steve Tool at p. 28, ll. 7-13). Marcia Barber was advised that as a result of her inquiries, the statute at issue was in the process of being amended. (**Exhibit C** Marcia Barber Deposition at p. 46, ll. 2-7). The Department of Motor Vehicles was both involved in and in favor of undertaking the onerous task of making this legislative change as quickly as possible as a result of Plaintiffs' requests. (**Exhibit D**, Deposition

of Steve Tool at pp. 11-13; **Exhibit D**, Tool Deposition at p. 33, ll. 2-20; **Exhibit C** Marcia Barber Deposition at p. 46, ll. 2-7). Marcia Barber testified in her deposition that she was very pleased with the statutory changes and stated “that’s all I ever wanted.” (**Exhibit C**, Marcia Barber Deposition at p. 75, ll. 5-9).

Far from intentionally discriminating, or being deliberately indifferent to Plaintiffs by failing to act, Defendants did everything they could to accommodate. Although it was late in the process, they were able to get the statute clarified that very year in such a way that would have allowed Julianna Barber to obtain her driver’s license within a year after getting her permit, as required by law of all 15 year olds. (**Exhibit J**, Designation Form; **Exhibit C** Marcia Barber Deposition at pp. 66-67). Accordingly, the Court correctly concluded that in light of the undisputed evidence, “no reasonable jury could conclude based on the evidence presented that defendants failed to act on that knowledge in such a way as to constitute deliberate indifference.” (See Order Granting Defendants’ Motion for Summary Judgment, Doc # 74 at p. 3)

III. There are no genuine issues of material fact as to whether Defendants acted with deliberate indifference and no manifest error by the Court

Plaintiffs maintain that because Marcia Barber disputed the Attorney General’s deposition testimony relating to her telephone conversation, summary judgment was not proper. This argument fails. There is no dispute that Ms. Barber did not want to designate anyone as a guardian for the limited purposes of supervising her daughter’s driving (Marcia Barber deposition, attached to Defendant’s brief in support of Motion for Summary Judgment as Exh. C , Doc. #61 , p. 51-52. (See Defendants’ Reply in Support of Motion for Summary Judgment at pp. 7-10). Any accommodation offered to her short of the one she wanted would not satisfy her. The Plaintiffs note that it is unclear if the Court relied on

Mr. Suthers' proposals in granting summary judgment to the Defendants. Whether or not these facts are disputed is not relevant to the Court's determination of the Motion. What is relevant is that the Defendants did all they believed they could reasonably do to accommodate Ms. Barber and address her concerns within the dictate of the law and there is no evidence, disputed or otherwise, that suggests they intentionally discriminated against her or her daughter.

Both Plaintiffs concede that the 2004 statute was a mere legislative oversight, and there was no intent to discriminate against the disabled. Moreover, there is no dispute that Defendants undertook significant efforts to change the statute prior to Julianna's sixteenth birthday. Defendant Tool, the Senior Director of the Colorado Division of Motor Vehicles, investigated the issue. Marcia Barber admits that he was very supportive and understood her issues and pursued an amendment to the statute. In their very short section of the brief addressing this crux of the issue of summary judgment, the Plaintiffs did not cite any disputed facts. The only other facts cited by Plaintiffs in their brief are that Mr. Suthers knew that federal law could trump state law and that the Defendants were informed by the plaintiff and her attorneys that they believed the state had an obligation under federal law to permit the requested accommodation and citations to law they alleged that supported their position. These are not factual disputes that would negate the ability of the Court to grant a summary judgment motion. The clear conclusion remains that there are no facts from which a jury could find intentional discrimination on the part of the defendants against the plaintiffs.

As noted by the Court in its Order: "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].’ *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).” (Order Granting Defendants’ Motion for Summary Judgment, Doc 72 at p. 3). Plaintiffs concede that in order to meet this burden, they were required to demonstrate that “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 at 1139 (9th Cir. 2001); see also *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996). Plaintiffs failed to present evidence sufficient to meet this burden.

IV. The cases cited by the Plaintiffs are Distinguishable and are not on Point to the Issue of Summary Judgment

Plaintiffs cite a number of cases seeking injunctive relief, all but one from other jurisdictions, concerning whether states and municipalities must comply with the ADA in enforcing municipal zoning regulations (*Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997), *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775 (7th Cir. 2002)), enforcing Medicaid prescription regulations (*Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003), the manner in which a state Department. of Public Welfare operates attendant care programs (*Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995)), and enforcing regulations to enforce a quarantine requirement for animals (*Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996). These cases do not address the issue in this case: whether a reasonable jury could conclude based on the evidence presented that Defendants acted with intentional discrimination against them in the context of a damages claim.

In the *Innovative Health Systems* case, *supra*, the Court reviewed a grant of a preliminary injunction in favor of a drug and alcohol rehabilitation center and its clients against a city Board of Zoning Appeals with respect to whether its decision applying

zoning regulations to the center violated Title II of the ADA. The court addressed several issues concerning proper grounds for a preliminary injunction and standing issues, and found that zoning decisions could come within the purview of the ADA. There was no claim for damages presented nor was there any discussion of the type of evidence that would support a claim for damages under the ADA even though there was explicit and substantial evidence that the Board based its zoning decision on discriminatory animus toward those people who used drugs and alcohol. Id. at 49. The Court found a cognizable injunctive claim. In that case, the Commissioner of Zoning and the attorney for the City had previously found that the center was not in violation of the zoning code and it was only the Board that had found otherwise.

The Court in Oconomowoc Residential Program, Inc. v. Wilwaukee, supra also addressed a city zoning issue in the context of an injunctive case. The city denied a zoning variance for a community living facility for disabled individuals. The Court found that a zoning variance was a reasonable accommodation under the facts of the case and did not address the question of whether the ADA preempted the City's spacing ordinance. There was no damages claim.

In Fisher, supra, the Tenth Circuit decided not to grant summary judgment to the state agency that administered the Medicaid program for Oklahoma and its director in an injunctive case. The state had decided administratively to limit the number of free prescriptions per month it would provide to patients in home placement versus those in nursing homes. The Court gave great deference to a regulation passed by the Dept. of Justice that required a public entity to administer services, programs and activities in the most integrated setting appropriate. The Court noted that a public entity could be relieved

of its duties under the ADA's integration mandate if it could show that making the modifications would fundamentally alter the nature of the service, program or activity. The Court's decision addressed the requirements of the integration regulation and whether the state had shown that compliance would cause it to fundamentally alter its program in the context of the specific facts of the case. The Court noted factual disputes in connection with these claims and found that summary judgment for the defendants was not appropriate. Again, there was absolutely no discussion of the requirements for a damages claim nor discussion of state statutes.

The case of Helen L. v. DiDario, supra dealt with this same DOJ regulation requiring a state to house a disabled person in the most integrated setting possible. This was also a declaratory and injunctive case in which the plaintiffs alleged violation of the ADA by the state department of public welfare through its regulations or policies requiring the plaintiff to receive services in a nursing home rather than in her home. Her challenge was based on the afore-mentioned regulation. The Court found in favor of the plaintiff, noting that a state cannot rely on a funding mechanism of the state and then argue that it cannot comply with the ADA without fundamentally altering its program. There was no discussion of the evidence necessary to support a damages claim under the Rehabilitation Act.

Crowder, supra was also an injunctive case in which plaintiffs challenged the Hawaiian procedures regarding quarantine of guide dogs. The Court found that there were genuine issues of fact as to whether modifications to the quarantine requirements proposed by the plaintiffs were reasonable, thus summary judgment was inappropriate. The case did not involve a request for damages.

These cases address various factual situations concerning the application of the ADA to city and state regulations but they do not consider the requirements for a claim for damages under the Rehabilitation Act. Contrary to Plaintiffs' assertion, they do not establish that the Court made a manifest error of law in concluding that an accommodation that would have required the defendants to willfully ignore or violate the law is *per se* not reasonable.

V. The issue of the reasonableness of Plaintiffs' requested accommodation was argued by the parties.

Plaintiff is entitled to a reasonable accommodation, not her requested accommodation. This issue was briefed and argued by the parties. (See Memorandum Brief in Support of Motion for Summary Judgment, Doc # 62 at pp. 6,713-14, 15). Indeed, in Plaintiffs' Response to the Motion for Summary Judgment, Plaintiffs devoted an entire section of their brief to this issue. (See Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Doc # 65 at pp. 8-9). That section is specifically titled "The Accommodation Requested by Ms. Barber was Reasonable." Additionally, the Defendants replied to Plaintiff's argument. (See Defendants' Reply in Support of Motion For Summary Judgment, Doc #66 at pp. 7-10).²

VI. Plaintiffs are not entitled to their 'requested accommodation' instead they are entitled to a "reasonable accommodation" and thus failed to meet the elements necessary to sustain a Rehabilitation Act claim for damages.

As noted by the Court:

Plaintiffs suggest that these proposed accommodations were not reasonable because they required Marcia to relinquish her

² Moreover, even assuming *arguendo* that the issue was not argued, as delineated above, Rule 59 cannot be used to "revisit issues already addressed **or advance arguments that could have been raised in prior briefing.**" *Servants of the Paraclete*, 204 F.3d at 1012 (emphasis added).

parental rights. She claims that instead, she should have been allowed simply to designate Julianna's grandfather to supervise her driving without creating a legal guardianship. However, it is **clear that defendants reasonably viewed the statute** as then worded to prohibit this type of informal designation, and **plaintiffs do not contend that this interpretation of the then-existing law was inaccurate or improper. An accommodation that would have required defendants to willfully ignore or violate the law is *per se* not reasonable.** Plaintiffs' frustration with the limited legal options available to them short of amendment of the statute is insufficient to sustain their burden of showing that defendants were deliberately indifferent to their federally protected rights.

Plaintiffs contend that the Court's determination that "an accommodation that would have required defendants to willfully ignore or violate the law is *per se* not reasonable" constituted manifest error of law is inaccurate.

The Court understood in its ruling that the defendants reasonably viewed the statute at the time to prohibit an informal designation without a written document (based on an opinion from their legal counsel, the Attorney General's office) but once they became aware of the potential application of the statute to disabled individuals, they took immediate steps to correct the clearly unintentional oversight.

As noted by the Court in its order granting summary judgment, requiring the Defendants to willfully ignore or violate the law in this context is not reasonable, particularly in light of options available to Ms. Barber in accordance with the statute as it existed before amendment. The Court's conclusion that Defendants did not act improperly in relying upon the previous statute, and that Marchia Barber's request to informally designate her father was unreasonable does not constitute manifest error. Indeed, in *Young v. City of Claremore*, 411 F.Supp. 2d 1295 (2005), the United States District Court in Oklahoma came to the same result. In that case, a golf cart user, who had cerebral

palsy, sued the city, claiming that the ordinance barring use of the cart on streets violated the ADA. The City moved for summary judgment. In granting the motion the Court held:

After careful consideration of (1) the Oklahoma state law allowing (rather than rejecting) particularized modifications of the ban on operation of golf carts in specific circumstances, which is expressly designed to reduce the safety risks associated with operation of golf carts on streets; and (2) the only alternative proposed by Plaintiffs, which is unfettered access to operate his golf cart around Claremore, the Court finds the modification requested by Plaintiff in this case is unreasonable as a matter of law.

Young v. City of Claremore, Okla. 411 F.Supp.2d at 1310. Similarly, Marcia Barber was unwilling to accept any accommodation other than being permitted to informally designate her father. Thus the Court properly held that her requested accommodation was not *per se* reasonable in light of all the circumstances.

IV. Conclusion

The Court correctly concluded that there is no disputed evidence in this case that supports a conclusion by a jury that the defendants intentionally discriminated against the Plaintiffs. As the Court noted: "Plaintiffs frustration with the limited legal options available to them short of amendment of the statute is insufficient to sustain their burden of showing that defendants were deliberately indifferent to their federally protected rights." (Order, document #74, p. 4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 21, 2007, 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:

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