United States Court of Appeals,
Tenth Circuit.
Julianna BARBER and Marcia Barber, Plaintiffs-Appellants,
v.
STATE OF COLORADO DEPARTMENT OF REVENUE, State of Colorado Division of Motor Vehicles, M. Michael Cooke, In Her Official Capacity, and Joan Vecchi, In Her Official Capacity, Defendants-Appellees.
No. 08-1032.
July 7, 2008.

On Appeal from the United States District Court for the District of Colorado
The Honorable Robert E. Blackburn District Judge D.C. No. 05-CV-00807-REB-CBS
Statement Regarding Oral Argument

Answer Brief

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FNa. Counsel of Record

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PRIOR OR RELATED APPEALS - NONE

Pursuant to the Federal Rules of Appellate Procedure, Defendants-Appellees the State of Colorado Department of Revenue, State of Colorado Division of Motor Vehicles, M. Michael Cooke and Joan Vecchi (the "State Defendants"), through the Colorado Attorney General, respectfully submit their Answer Brief.

STATEMENT OF THE ISSUES

A. Whether the district court properly granted the State Defendants' Motion for Summary Judgment because Plaintiffs failed to present evidence to meet the elements necessary to sustain a Rehabilitation Act claim for damages.

B. Whether the district court properly granted the State Defendants' Motion for Summary Judgment because Plaintiffs failed to produce any evidence of intentional discrimination.

C. In the alternative, although not addressed in the district court's order, whether Plaintiff' s Rehabilitation Act claim failed because Plaintiffs admitted that they did not sustain any damages.

D. Whether the district court properly denied Plaintiff's Motion to Reconsider.

STATEMENT OF THE CASE

I. Nature of the Case.

Plaintiffs initially 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, maintained that a statute in effect prior to May of 2005 violated the Rehabilitation Act and the ADA because it only allowed a parent, stepparent or guardian who is a licensed driver to supervise a fifteen year old with an instructional permit prior to obtaining a driver's license. 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 turned sixteen. Plaintiffs argued that Defendants failed to make reasonable modifications by allowing Julianna's (daughter) grandfather, in the absence of any written authorization, to supervise her driving while she had her instructional permit prior to her sixteenth birthday.

II. Course of Proceedings

Plaintiffs filed their Complaint on or about May 2, 2005. Two days later they filed an Amended Complaint. On July 11, 2005, the State Defendants filed their Motion to Dismiss and Memorandum Brief in Support of Motion to Dismiss. After briefing, on October 17, 2005, the district 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 district court reconsidered a portion of its order and reinstated the claims of Julianna Barber.

After the ruling on the State Defendants' Motion to Dismiss, Plaintiffs filed a Second Amended Complaint. The Parties then stipulated to dismissal of the injunctive claims because of the expeditious amendment of the statute which allowed Marcia Barber to designate a licensed driver to supervise her daughter's driving prior to her sixteenth birthday. Thus, the sole remaining claim was a single claim for damages pursuant to the Rehabilitation Act.

III. Disposition Below

On May 14, 2007, after briefing, the district court granted State Defendants' Motion for Summary Judgment on the remaining claim. Plaintiffs filed a motion to reconsider. After briefing, on January 28, 2008 the district court denied the motion to reconsider. This appeal followed.

FACTS

Marcia and Julianna Barber are residents of Colorado Springs, Colorado. Marcia Barber suffers from retinitis pigmentosa and is limited in the major life activity of seeing. (Joint Appx. pp. 33-34). Marcia Barber does not have a driver's license. (Joint Appx. p. 37). Julianna' s father, though not disabled, does not have a driver's license. (Joint Appx. p. 36).

Colorado residents are eligible to apply for a minor's driver's license at age sixteen. Colo. Rev. Stat. § 42-2-104(l)(c). (Joint Appx. p. 36). At the age of fifteen, individuals may obtain a minor's instruction permit under certain circumstances. In order to obtain an instructional permit, a person who is fifteen years old, must be enrolled in an approved driver education course. In addition, the person must provide a written statement signed by the "parent, stepparent, or guardian and the instructor... establishing such enrollment. Colo. Rev. Stat. § 42-4-106(1)(b). (Joint Appx. p. 36). Prior to 2005, the permit issued pursuant to this section authorized the minor to drive "under the supervision of the parent, stepparent or guardian who cosigned the application for the minor's instruction permit if such parent, stepparent or guardian holds a valid driver's license." (Joint Appx. pp. 85-86). Such permit also entitled the applicant to drive a motor vehicle, which is marked so as to indicate that it is a motor vehicle used for instruction, and which is properly equipped for such instruction, upon highways when accompanied by or under the supervision of an approved driver education instructor who holds a valid driver's license. (Joint Appx. p. 85).

Julianna Barber was born on XX/XX/1989. She turned fifteen on XX/XX/2004. (Joint Appx. p. 36). One month after her fifteenth birthday, on XX/XX/2004, Julianna Barber obtained a minor's instruction permit. She completed a driver's education course on October 23, 2004, and further completed six hours of driving with her driving instructor. (Joint Appx. pp. 36, 90, 130). In late October or early November of 2004, Marcia Barber inquired if Julianna could be permitted to drive with her grandfather, a licensed driver, until Julianna turned sixteen years of age. She was ultimately referred to Steve Tool, who at that time was the Senior Director of the Colorado Division of Motor Vehicles. (Joint Appx. p. 99). Mr. Tool investigated the issue. Marcia Barber's request was initially denied because the state statute only permitted a licensed parent, stepparent, or guardian to supervise a minor' s driving.[FN1] The only reason her request was denied was because of the express statutory language. (Joint Appx. pp. 112- 113). Marcia Barber admits that Tool was very interested in finding a solution. (Joint Appx. pp. 101, 104). Along these lines Marcia Barber was advised that as a result of her inquiries, the statute at issue was in the process of being amended. (Joint Appx. p. 101).

FN1. As noted above, the statute as it previously existed also permitted supervision by a driver education instructor.

All of Marcia Barber's interactions with Mr. Tool were pleasant and professional. Marcia Barber admitted that Mr. Tool was very supportive and understood her issues. Marcia Barber never spoke with, or had any interaction with, the other individually named Defendants, Michael Cooke and Joan Vecchi.[FN2] (Joint Appx. pp. 100-101). Marcia Barber acknowledged 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. (Joint Appx. pp. 100, 110). However, because he was very interested in finding a solution he sought guidance from the Colorado Attorney General' s Office and further facilitated the amendments to the statute at issue to accommodate all parents who do not have a driver' s license. (Joint Appx. p. 111).

FN2. Indeed, Joan Vecchi was not the head of the Division of Motor Vehicles at the time relevant to the allegations of the complaint. The head of the Motor Vehicle Division at the time was Steve Tool. However, he was not named as a defendant in Plaintiff's Second Amended Complaint.

Approximately two months after her discussion with Steve Tool, in January of 2005, Marcia Barber called the Colorado Attorney General, John Suthers, to discuss the issue. Mr. Suthers advised Marcia Barber that it was pretty clear that this was a legislative oversight and that the statute should be changed. At that point Marcia Barber advised Suthers that amendment of the statute was already in the works. (Joint Appx. pp. 115-116). In addition to the long term solution of the amendment of the statute, they discussed the immediate issue of Julianna. Mr. Suthers advised Marcia Barber that he was certain that he could assist her in solving her immediate situation until the law was changed. (Joint Appx. pp. 115-119). Specifically, Mr. Suthers discussed with Marcia Barber the possibility of signing or drafting some sort of document or limited delegation of authority that would comply with the spirit of the statute to allow Marcia Barber's father to supervise the driving until such time as the statute was amended. (Id). However, Marcia Barber was unwilling to sign any document whatsoever to allow her father to supervise the driving. (Joint Appx.

pp. 102-103). She made this point very clear to Mr. Suthers. (Joint Appx. pp. 116-120). Suthers advised Marcia Barber that she would not be relinquishing any parental rights and that they simply needed to come up with some device by which she would designate the grandfather of the child, only for purposes of driving with the child, to comply with the statute. (Joint Appx. pp. 116-117). However, it became apparent to Suthers that Marcia Barber was both unwilling to sign any designation or document and that she was not intent on solving the immediate problem, but was in fact setting up a lawsuit. (Joint Appx. p. 119).

As a result of Marcia Barber's inquiries, and the efforts of the Defendants, effective May 27, 2005, approximately four months after her discussion with Attorney General Suthers, and six months before Julianna was eligible for an unrestricted driver's license, the Plaintiffs' requested amendments to the statute became effective. After this date, a minor driver under the age of 16, who obtained an instruction permit was entitled to drive under the supervision of the parent, stepparent, grandparent with power of attorney, or guardian who holds a valid driver's license. (Joint Appx. pp. 39, 121-123). The Department of Motor Vehicles was both involved in and in favor of making this legislative change as a result of Plaintiffs' request. (Joint Appx. p. 108). Later, the Colorado Legislature again amended the referenced statute to add:

If the parent, stepparent, grandparent with power of attorney, or guardian or foster parent, who signed the affidavit of liability pursuant to section 42-2-108(1)(a), does not hold a valid Colorado driver's license, the parent, stepparent, grandparent with power of attorney, or guardian or foster parent may appoint an alternate permit supervisor. An alternate permit supervisor shall hold a valid Colorado driver's license and be twenty-one years of age or older. (Effective date July 1, 2006)

The Department of Motor Vehicles suggested and supported these amendments. (Joint Appx. p. 112). Marcia Barber testified in her deposition that she was very pleased with the statutory changes and stated “that's all I ever asked for.” (Joint Appx. p. 106).

In order to be qualified to get her driver's license, Julianna needed to have a permit for 1 year, and during that year acquire 50 hours of behind the wheel experience. Thus, the earliest date she could have acquired her license was one year after receiving her permit on October 13, 2005, contrary to the assertions of Plaintiff's counsel in the opening Brief. (Joint Appx. pp. 90-91).

After obtaining her permit, Julianna practiced her driving and logged six hours in October and November of 2004 with her driving school and she logged an additional six hours with a volunteer driving instructor in May, June and July of 2005. In August, September, October and November of 2005, she drove with her grandfather and a friend of her mothers. (Joint Appx. pp. 130-133).

The statute allowing a permitted minor driver to drive with a grandparent with power of attorney went into effect on May 27, 2005. Although Marcia Barber did not want to sign a power of attorney, she signed the designation of Department of Motor Vehicles pursuant to the amended statute on August 10, 2005, designating Julianna' s grandfather to supervise, thus delaying the ability of the grandfather to supervise for three months. (Joint Appx. p. 134). In spite of Marcia Barber's delay, there was enough time for Julianna' s grandfather to supervise the driving for Julianna to have been able to get her license within a year after getting her permit, as required by law of all fifteen year olds. (Joint Appx. pp. 105, 134). Indeed, she completed her 50 hours and took her final drivers test for obtaining her license on November 10, 2005. She received her license on November 14, 2005, approximately thirteen months after obtaining her learner's permit, and one month after she was eligible. (Joint Appx. pp. 94; 129).

Julianna admits that she was not discriminated against. (*Barber v. State,* 2006 WL 213970 at *1; Joint Appx. pp. 95-96). Indeed, she acknowledges that the Defendants were not purposefully trying to discriminate against the disabled and that the issue resulted from a legislative oversight and that the law was appropriately changed. Additionally, Julianna admits that because her mother is required to sign an affidavit of financial responsibility it was important that the parent maintain some control as to who supervises the driving and designate in writing who could supervise the driving. (Joint Appx. pp. 92-93). She also admitted that she has not sustained any damages whatsoever. (Id). Marcia Barber admitted that the requirement that an unlicensed parent sign a designation document to allow someone else to supervise the driving was a requirement that any unlicensed parent would have

to meet whether or not they were disabled. (Joint Appx. p. 105). Finally, Marcia Barber did not see any psychologists, social workers or counselors and has not taken any medications for anything related to anxiety or emotional distress as a result of this incident. (Joint Appx. p. 100).

SUMMARY OF ARGUMENT

The district court' s decision should be affirmed because it is well reasoned and grounded on established legal principles. First, the district court properly granted the State Defendants' Motion for Summary Judgment because Plaintiffs failed to present evidence necessary to sustain a Rehabilitation Act claim for damages. Specifically, the 2004 statute provided Marcia Barber with an appropriate avenue to designate an alternate to supervise her daughter' s driving. Assuming arguendo that the 2004 statute discriminated, the State Defendants immediately amended the statute and offered Marcia Barber an appropriate modification. The district court also properly granted the State Defendants' Motion for Summary Judgment because Plaintiff's failed to produce any evidence of intentional discrimination or evidence of any damages. Finally, the district court properly denied Plaintiff' s motion to reconsider.

STANDARD OF REVIEW

An order granting a motion for summary judgment is reviewed *de novo. Clark v. Haas Group, Inc.,* 953 F.2d 1235, 1237 (10th Cir. 1992), *cert. denied,* 506 U. S. 832 (1992). "We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court." *Simms v. Okla. Ex rel. Dep't. of Mental Health & Substance Abuse Servs.,* 165 F.3d 1321, 1326 (10th Cir. 1999).

The purpose of summary judgment is to determine whether trial is necessary. *White v. York Int'l. Corp.,* 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions or affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.s. 317, 322 (1986). "Summary judgment procedure is properly regarded, not as a disfavored procedural shortcut, but, rather, as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action."' Id., 477 U.S. at 327.

This Court "review[s] a summary judgment fully and may affirm on grounds other than those relied on by the district court when the record contains an adequate and independent basis for that result." *Cone v. Longmont United Hospital Association,* 14 F.3d 526, 528 (10th Cir. 1994) (citation omitted). "Just as we may affirm a grant of summary judgment on any ground adequately supported by the record, we may direct that judgment be entered in favor of any moving party if the record adequately supports it." *Z.J. Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683, 685 (10th Cir. 1998).

The Court reviews a district court' s order denying a motion to alter or amend the judgment under Rule 59(e) for an abuse of discretion. *Matosantos Commercial Corp. v. Applebee's Intern., Inc.,* 245 F.3d 1203, 1213 (10th Cir.2001). Under an abuse of discretion standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Phelps v. Hamilton,* 122 F.3d 1309, 1324 (10th Cir.1997).

ARGUMENT

I.The district court properly granted the State Defendants' motion for summary judgment because Plaintiffs failed to present evidence necessary to sustain a Rehabilitation Act claim for damages.

Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability ... shall, **solely by reason of her or his disability,** be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." 29 U.S.C. § 794(a) (emphasis added). Thus, the four elements of a prima facie claim under the Rehabilitation Act are: (1) that the plaintiff is disabled under the Act; (2) that she would be "otherwise ***15** qualified" to participate in the program; (3) that the program receives federal financial assistance; and (4) that the program has discriminated against the plaintiff. *Schrader v. Fred A. Ray, M.D., P.C.,* 296 F.3d 968, 971 (10th Cir.2002); *Powers v. MJB Acquisition Corp.,* 184 F.3d 1147, 1151 (10th Cir.1999); *McGeshickv. Principi* 357 F.3d 1146, 1150 (10th Cir. 2004). The Rehabilitation Act requires a claimant to show that the defendants allegedly improper conduct was done because of claimant's disability. See 29 U.S.C. § 794 ("solely by reason of her or his disability"). "The Act prohibits programs receiving federal financial assistance from discriminating against handicapped persons solely because of that handicap. *Welsh v. City of Tulsa,* Ok. 977 F.2d 1415, 1417 (10th Cir. 1992). "The duty to provide 'reasonable accommodations' under the ADA and the Rehabilitation Act arises only when a policy discriminates on the basis of disability." *Weinreich v. Los Angeles County Metro. Transp. Auth.,* 114 F.3d 976, 978 (9th Cir. 1997) (emphasis in original). A plaintiff proceeding under Title II of the ADA must, similar to a Section 504 plaintiff, prove that the exclusion from participation in the program was "solely by reason of disability." *Id.* To establish that defendant's alleged discrimination was "based on [claimant's] disability. plaintiff must 'present some affirmative evidence that disability was a determining factor in [defendant's] decision." ***16** *Selenke v. Medical Imaging of Colorado,* 248 F.3d 1249, 1259 (10th Cir. 2001) (quoting *Morgan v. Hitli, Inc.,* 108 F.3d 1319, 1323 (10th Cir. 1997).

Because all claims except Plaintiffs' claims for compensatory damages under the Rehabilitation Act were dismissed, Plaintiffs were required to prove intentional discrimination in order to recover compensatory damages. *Powers v. MJB Acquisition Corp.,* 184 F.3d at 1153 (compensatory damages not available under section 504 of the Rehabilitation Act unless intentional discrimination); *Tyler v. City of Manhattan,* 118 F.3d 1400 (10th Cir.1997) (compensatory damages for mental and emotional injury not available under ADA absent intentional discrimination).

A. The 2004 statute provided Marcia Barber with an appropriate avenue to designate an alternate to supervise her daughter's driving.

A facially neutral governmental restriction does not deny "meaningful access" to the disabled simply because disabled persons are more likely to be affected by it. *Patton v. TIC United Corp.* 77 F.3d 1235, 1246 (10th Cir. 1996) citing *Alexander v. Choate,* 469 U.S. 287, 303-04 (1985) (holding that a ceiling on the number of inpatient hospital days paid for by Tennessees Medicaid program did not deny the disabled meaningful access to Medicaid services). Moreover, the Rehabilitation Act does not require state officials to ***17** perceive of every possible scenario when a regulation might impact the disabled.

At the same time, the position urged by respondents-that we interpret § 504 to reach all action disparately affecting the handicapped-is also troubling. Because the handicapped typically are not similarly situated to the nonhandicapped, respondents' position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden Had Congress intended § 504 to be a National Environmental Policy Act for the handicapped, requiring the preparation of "Handicapped Impact Statements" before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history. Yet there is nothing to suggest that such was Congress' purpose.

Alexander v. Choate 469 U.S. 287. "Section 504 seeks to assure **evenhanded** treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Alexander v. Choate* 469 U.S. at 287 *citing Southeastern Community College v. Davis,* 442 U.S. 397 (1979)(emphasis added). It does not require the state to evaluate the impact of facially neutral regulations and determine how they can be implemented in a way most favorable to the handicapped. ***18** Tennessee's refusal to pursue this course does not, as respondents suggest, inflict a "gratuitous" harm on the handicapped. On the contrary, to require that the sort of broad-based distributive decision at issue in this case always be made in the way most

favorable, or least disadvantageous, to the handicapped, even when the same benefit is meaningfully and equally offered to them, would be to impose a virtually unworkable requirement...

Alexander 469 U.S. 287.

Plaintiffs first argue that Marcia was denied access to the program that allowed her to supervise her daughter' s driving because she was not allowed to designate her father as a supervisor. However, she was not denied access "solely" because of her disability. Indeed, by her own admission, she faced the same obstacle that any non-disabled unlicensed parent faced in supervising his or her child's driving. She admitted that the requirement that an unlicensed parent sign a designation document to allow someone else to supervise the driving was a requirement that any unlicensed parent would have to meet whether or not they were disabled. Additionally, Julianna admitted that because a parent is required to sign an affidavit of financial responsibility, it is important that the parent maintain some control as to who supervises the driving and designate in writing who could supervise the driving. To allow such designation in the absence of a writing, as suggested by Plaintiffs would be irresponsible, and as noted by the Court, is per se not reasonable.

***19** Moreover, Marcia Barber had the ability to designate her father as a supervising driver. Under the former statute, she could have executed a limited guardianship or power of attorney allowing him the limited authority to supervise Julianna's driving.3 Contrary to her assertions, she could have made the appointment without court intervention. *See* Colo. Rev. Stat. § 15- 14-102(4) ("Guardian" means an individual at least twenty-one years of age, resident or non-resident, **who has qualified as a guardian** of a minor or incapacitated person **pursuant to appointment by a parent or** by court. The term includes a **limited,** emergency, and substitute **guardian** but not a guardian ad litem."); Colo. Rev. Stat. § 15-14-105 (A parent or guardian of a minor or incapacitated person, **by power of attorney, may delegate to another person,** for a period not exceeding twelve months, **any power regarding care,** custody, or property of the minor.); Colo. Rev. Stat. § 15-14-201 ("**a person becomes a guardian of a minor by appointment by a parent** or guardian by will or **written instrument** or upon appointment by the court....) (Joint Appx. pp. 135-138). Thus, the Plaintiffs had, but never exercised, the option of appointing Juliana' s grandfather as a limited ***20** guardian solely for the purpose of supervising Juliana' s driving under the previous statute.[FN3]

> FN3. Also as noted above, like any unlicensed parent, she could allow her daughter to drive with a driving instructor. Indeed, Julianna logged a number of hours with a driving instructor. (Joint App. pp. 91-92)

The additional requirement of a written instrument is not onerous and does not violate the Rehabilitation Act. *See e.g. Theriaut v. Flynn* 162 F.3d 46 (1st Cir. 1998) (State did not discriminate against motorist with cerebral palsy, in violation of Americans with Disabilities Act, when motorist was required to take road test, not ordinarily required, before driver's license allowing driving with hand controls was renewed); *Bailey v. Anderson 79* F.Supp.2d 1254 (D.Kan. 1999) (State did not discriminate against motorist with vision impairment in violation of ADA by requiring her to submit report from driving instructor regarding her driving ability as condition for instruction permit); *Briggs v. Walker* 88 F.Supp.2d 1196 (D.Kan. 2000) (State director of vehicles did not discriminate against wheelchair restricted applicant for instruction permit to operate vehicle in violation of the ADA, by requiring that applicant submit medical certification as to her ability to operate vehicle safely before permit would be granted). Accordingly, summary judgment properly entered because the statute at issue did not discriminate against the disabled.

***21 B. Assuming arguendo the 2004 statute discriminated, the State Defendants immediately amended the statute and offered Marcia Barber an appropriate modification.**

It is undisputed that when Marcia Barber raised the issue, the Defendants immediately implemented proceedings to change the statute. The Department of Motor Vehicles took quick action to support the amendment of the statute to address the legislative oversight. In order to resolve the immediate issue of Julianna' s driving until amendment of the statute, Marcia Barber spoke with the Colorado Attorney General himself. Mr. Suthers advised Marcia Barber that it was prestty clear that this was a legislative

oversight and that he was certain that he could assist her in solving her immediate situation until the law was changed. He discussed with Marcia Barber the possibility of signing or drafting some sort of document or limited delegation of authority that would comply with the spirit of the statute to allow Marcia Barber's father to supervise the driving until such time as the statute was amended. (Joint Appx. pp. 115-16; 118- 19). Plaintiffs maintain that there are disputed issues of fact concerning whether they were offered any accommodation other than amendment of the statute. However, Marcia Barber admitted in her deposition that she would not have accepted the accommodation Attorney General John Suthers ***22** maintains he offered her - permitting her to sign a limited delegation of authority to permit her father to supervise Julianna's driving - in any event. Thus, this alleged dispute would not preclude summary judgment. Indeed, Marcia Barber admitted that she never even explored the possibility of executing a document that would **not** relinquish any parental rights, but would instead simply empower another individual to supervise the driving. (Joint Appx. pp. 102-103). She never inquired as to whether she could simply file a piece of paper with the Department of Motor Vehicles saying she was giving a limited guardianship for the purpose of supervising her daughter's driving. (Joint Appx. p. 103). Moreover, she admitted that she was unwilling to execute any document whatsoever to permit her father to supervise.

Q: Okay. Did you follow up on his (Suthers) suggestion about exploring any kind of guardianship or limited guardianship?
A: No. That's an unreasonable requirement. That's the crux of the issue.
Q: Did you inquire with anyone or with him as to whether you could simply file a piece of paper saying that you were giving a limited guardianship for the purposes of supervising your daughter's driving?
A: No. I continued to say, I am entitled to a reasonable accommodation under the ADA.

(Joint Appx. p. 103).

***23** Marcia Barber was unwilling to sign any document whatsoever to allow her father to supervise the driving. (Joint Appx. pp. 102-103; 116- 120). Thus, while Plaintiffs maintain that this was a "hotly contested issue" it was in fact a non-issue given Marcia Barber's admission that at that time she would not sign any document whatsoever. Indeed, the district court noted this fact in its order denying Plaintiffs Motion to Reconsider.

Plaintiffs maintain that there are disputed issues of fact concerning whether they were offered any accommodation other than amendment of the statute. However, Marcia Barber admitted in her deposition that she would not have accepted the accommodation Attorney General John Suthers maintains he offered her - permitting her to sign a limited delegation of authority to permit her father to supervise Julianna's driving - in any event. Thus, this alleged dispute would not preclude summary judgment.

(Joint Appx. p. 305 fn 4). Plaintiffs refused to sign any document whatsoever to facilitate the requested accommodation until August of 2005 when Marcia Barber executed a document allowing her father to supervise Julianna' s driving.

Next, Plaintiffs argue that the delay associated with the change in the statute amounted to a denial. As noted by the district court, by legislative standards, the statute was expeditiously amended. Indeed, the statute was amended on May 27, 2005, approximately four months after the discussion with Attorney General Suthers and more than five months prior to the date ***24** that Julianna was eligible to receive her license. (Joint Appx. p. 39). That statute permitted Marcia Barber to designate her father as a supervisor by merely signing a power of attorney. Plaintiffs cite no authority, and the district court found none, to support their argument that having to await the expeditious culmination of the legislative process or that the short delay between their request for accommodation and its fulfillment constituted intentional discrimination. (Joint Appx. p. 305). *See, e.g., Trobia v. Henderson,* 315 F.Supp.2d 322, 337 (W.D.N.Y. 2004) (delays in administrative processing of plaintiff's claims for reasonable accommodation did not constitute failure to accommodate by employer), *aff'd,* 143 Fed. Appx 374 (2nd Cir. 2005); *Gregory v. Otac, Inc.,* 247 F.Supp.2d 764, 772 (D. Md. 2003) (restaurant that provided ramp for handicapped access did not violate ADA simply because ramp was not as convenient and direct as plaintiff would have preferred); *Rennie v. United Parcel Service,* 139 F.Supp.2d 159, 172 (D. Mass. 2001) (noting, in regard to "interactive process" required in employment situations, that ""[n]othing in the [ADA] regulations or in the cases indicates ... that an employer must move with maximum speed to complete [the] reasonable accommodation] process and preempt any possible concerns.... [T]he employer is entitled to move at whatever pace he chooses as long as the ultimate problem - the ***25** employee's performance of her duties - is not truly imminent.") (quoting *Loulseged v. Akzo Nobel Inc.,* 178 F.3d 731, 737 (5th Cir. 1999)).

The undisputed record revealed that the Defendants undertook extraordinary efforts to expeditiously change the statute. In fact it was the State Defendants' immediate action and investigation that permitted Julianna Barber to practice her driving and obtain her license upon becoming eligible.

II. The district court properly granted the State Defendants' Motion for Summary Judgment because Plaintiffs failed to produce any evidence of intentional discrimination.

A plaintiff cannot obtain compensatory damages from the state under the Rehabilitation Act without showing intentional discrimination. *Powers v. MJB Acquisition Corp.,* 184 F. 3d at 1153. Plaintiffs do not take issue with the district courts statement of controlling law:

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).

***26** Rather, Plaintiffs maintain that because Marcia Barber disputed the Attorney General' s deposition testimony relating to their telephone conversation, summary judgment was not proper. Their argument fails. The district court granted Defendants' Motion for Summary Judgment because there was no evidence that the State Defendants intentionally discriminated against the Plaintiffs.[FN4]

> FN4. As noted above, the Plaintiffs had absolutely no contact whatsoever with the individually named Defendants - Cooke and Vecchi. Thus, it is apparent that these Defendants could not have discriminated.

[N]o 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.

The undisputed evidence demonstrated that, rather than acting with indifference to Plaintiffs' plight, the Defendants did everything in their power to address the issues Plaintiffs raised. Specifically, Defendants immediately undertook the onerous task of changing the statute at issue. Ms. Barber dealt directly with Steve Tool, who at that time was the Senior Director of the Colorado Division of Motor Vehicles.[FN5] Mr. Tool thoroughly investigated the issue. All of Marcia Barber's interactions with Mr. Tool were pleasant and professional. She admitted that Mr. Tool was very ***27** supportive and understood her issues. (Joint Appx. pp. 99-101). She also admitted 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. (Joint Appx. p. 100). However, he was very interested in finding a solution and sought guidance from the Colorado Attorney General's Office while working to clarify the statute at issue. The Department of Motor Vehicles was both involved in and in favor of making this legislative change as a result of Plaintiffs' requests. (Joint Appx. pp. 108, 112). Marcia Barber testified in her deposition that she was very pleased with the statutory changes and stated "that's all I ever asked for." (Joint Appx. p. 106).

> FN5. Because the sole remaining claim is exclusively for damages, it is unclear why Tool is no longer a defendant. Indeed, he is the only person with whom the Plaintiffs dealt.

More to the point, Plaintiffs admitted that no intentional discrimination occurred. Both Plaintiffs conceded that the 2004 statute was a mere legislative oversight, and there was no intent to discriminate against the disabled. This necessarily mandated dismissal of the Complain*t. Tyler v. Manhattan,* 118 F.3d at 1402-03. *In Tyler,* after concluding that a plaintiff must demonstrate intentional

discrimination to recover compensatory damages under the Rehabilitation Act, the Tenth Circuit affirmed the dismissal of a claim for compensatory damages under the ADA because the plaintiff merely alleged acts that had a disparate impact upon the disabled. ***28** We have reviewed the pretrial order and agree with the district court that the order does not describe acts of intentional wrongdoing. Instead, it is apparent that the order **describes acts and omissions which have a disparate impact on disabled persons in general but not specific acts of intentional** discrimination against Tyler in particular. Furthermore, there are no allegations in the pretrial order that the City was motivated by animus toward the disabled generally or Tyler specifically.

Tyler v. City of Manhattan, 118 F.3d at 1403. Plaintiffs concede that the gravamen of their claim is based upon a theory of disparate impact. *Barber v. State,* 2005WL2657885 *3 (D. Colo. 2005). While this theory was sufficient to avoid dismissal of Plaintiff's claims for injunctive relief, it is insufficient here, in the complete absence of any evidence supporting a claim for intentional discrimination.

The admissions of the Plaintiffs as well as the efforts on behalf of the Defendants to reasonably accommodate Marcia Barber belie any claim of intentional discrimination or deliberate indifference. Moreover, the undisputed testimony of the Director of the Department of Motor Vehicles provided that he had no intention or desire in any way to discriminate against Marcia Barber. (Joint Appx. pp. 112-113). Defendants sought to amend the statute as soon as possible to enable Julianna's grandfather to supervise her driving. Accordingly, there is a complete absence of any evidence that the challenged conduct was motivated by "discriminatory animus." *See Tyler v. City of Manhattan,* 118 F.3d at 1405.

***29** In concluding that a plaintiff must prove intentional discrimination to recover compensatory damages, the Tenth Circuit in Powers relied heavily upon *Ferguson v. City of Pheonix,* 157 F.3d 668 (9th Cir. 1998). See *Powers v. MJB Acquisition Corp.,* 184 F. 3d at 1153. Ferguson is particularly instructive here, where the Defendants have already voluntarily and expeditiously remedied the equitable or injunctive claims. In Ferguson, deaf and hearing- impaired users of 9-1-1 emergency telephone service commenced an action under the ADA, the Rehabilitation Act, and § 1983 against city and the police department commander seeking declaratory, injunctive and damages relief. They maintained that the City's 9-1-1 emergency service did not respond effectively, or in some instances at all, to their Telecommunications Device for the Deaf ("TDD"). Plaintiffs relied on TDDs to communicate by telephone. It was undisputed that the Plaintiffs had been victims of various crimes and when they attempted to call 9-1-1 via their TDDs, the City's 9-1-1 system failed to work. Further, the city's TDD was operated in contravention of Department of Justice Regulations. After entering into a consent decree and settling the injunctive issues, the defendants filed a motion for summary judgment on the damage claim. The trial court found no evidence of intentional discrimination or deliberate indifference and granted summary judgment to the defendants on ***30** the compensatory damage claim. In affirming summary judgment, the Ninth Circuit first noted, that:

Substantial corrective remedies are available to plaintiffs, however, regardless of intent. In the present case, equitable relief is sufficient to remedy the problem. The principal purpose of this litigation as evidenced by the prayers for relief was to gain declaratory and permanent injunctive relief compelling compliance with the ADA and the Rehabilitation Act. The corrective action has already been taken by the City, so the basic problem itself has been solved.

Ferguson v. City of Phoenix 157 F.3d at 674 -675. As noted by the district court in that case, "The district court found no intentional violations, even saying that plaintiffs' evidence 'is hardly the stuff of intentional conduct or deliberate indifference."' Ferguson v. City of Phoenix, 157 F.3d at 675 quoting Ferguson, 931 F.Supp. 668, 697 (D. Ariz 1996).

The district court held that in order to show intentional discrimination, the plaintiffs had to show that the City had been "deliberately indifferent to the strong likelihood that their action or inaction was violating plaintiffs' federally protected rights." In so doing, the court utilized a "deliberately indifferent" standard in place of the "discriminatory animus" test laid out in *Guardians. Guardians,* 463 U.S. at 584, 103 S.Ct. 3221. In the present case, we need not determine which standard is proper, since plaintiffs' claims fail under either one. In light of the evidence in the record, the situation clearly appears to be no more than at times some not uncommon bureaucratic inertia as well as some lack of knowledge and understanding about the DOJ Manual's requirements. There is nothing to show, even suggest, any deliberate indifference or discriminatory animus on the part of the City towards plaintiffs.

Ferguson v. City of Phoenix 157 F.3d at 675.

***31** Similarly in the case at hand, when the Barbers raised the issue, they were directed to the most senior individual in the Department of Motor Vehicles who immediately sought advice from the Attorney General's office. Mr. Tool, as the head of the Department, relied on that advice to tell Ms. Barber that a grandfather was not a guardian *per se.* (Joint Appx. pp. 164-165). The letter simply states the legal conclusion of the Attorney General that a grandparent is not a guardian by virtue of being a grandparent. The letter then goes on to state that the division is working with legislative staff to get the statute amended, a direct response to Ms. Barber's request for accommodation. As a result, the Department then worked on amending the statute to accommodate her request as expeditiously as possible. The Department acted in reliance on the language of the statute and the advice of the Attorney General's office in concluding that without some written document, the grandfather could not supervise the driving. These actions belie any claim of discriminatory animus or deliberate indifference.

As noted by the district 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)." (Joint Appx. p. ***32** 253). Plaintiffs concede that in order to meet this burden, they were required to demonstrate that the State Defendants' 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). They failed to present evidence sufficient to meet this burden. Thus, the district court correctly concluded that "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."

Plaintiffs also invoke the Supremacy Clause in support of their argument that Defendants' actions constitute intentional discrimination. This argument is not directly raised in prior briefing. See Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (noting that a motion to reconsider "is not appropriate to ... advance arguments that could have been raised in prior briefing"). Moreover, Plaintiffs fail to recognize that the statutes at issue did not conflict. They cited no authority for the proposition that the Supremacy Clause required defendants to ignore duly enacted state statutes. Whether a federal law pre-empts state law is determined by explicit language of preemption in the statute. *Choate v. Champion Home Builders Co.,* 222 F.3d 788 (10th Cir. 2000). "The ***33** exercise of federal supremacy is not lightly to be presumed. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intent to do so." *Los Alamos School Bd. v. Wugalter,* 557 F.2d 709, 714 (10th Cir. 1977)(citations omitted). "[W]here the conflict is only a potential one or peripheral to the purpose of the federal statute, state legislation will be allowed to stand." *Id.* State law is pre-empted when it conflicts with federal law so that a private party cannot comply with both the federal and the state law, or where the state law impedes the accomplishment of the objectives of the federal law. *Choate v. Champion Home Builders Co.,* 222 F.3d at 792.

Here, the prior statute permitted the State Defendants to comply with both the state statute and the Rehabilitation Act. As noted above, Plaintiffs had options. They always had the ability to execute a written document that would have permitted the grandfather's supervision, or allow a driving instructor to supervise. Moreover, the State Defendants immediately clarified the statute at issue. Thus, here is simply no conflict which warrants preemption into the driver's license arena - an area traditionally regulated by the states. Moreover, even if there were, the State Defendants' clarification ***34** and amendment of the statute at issue negates any implication that they were deliberately indifferent to the Plaintiffs' concerns.

A. 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.

Plaintiffs next argue that summary judgment was improper because Marcia Barber was entitled to her "requested accommodation." This is not an accurate statement of the law which requires states to make "reasonable accommodations." Defendants' duty is to offer a reasonable accommodation, not plaintiffs' preferred accommodation. *See Selenke v. Medical Imaging of Colorado,* 248

F.3d 1249, 1263 (10th Cir. 2001). As noted by the district court:
Plaintiffs suggest that these proposed accommodations were not reasonable because they required Marcia to relinquish her 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.**[FN6] **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 ***35** 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.

FN6. Both Plaintiffs admitted in their depositions that such informal designation was not reasonable.

(Joint Appx. p. 254). Plaintiffs contend that the district 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. Defendants maintain that Plaintiffs were able to access the driving supervision program by a simple act of signing a limited guardianship or power of attorney limited to the sole issue of supervision of driving. As noted by the district court in its order granting summary judgment, requiring the Defendant to willfully ignore or violate the law in this context is not reasonable, particularly in light of the options presented to Marcia Barber.

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 carts 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 ***36** Plaintiff, 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 that being permitted to designate without a writing or limited guardianship in contravention of state law at the time.

Plaintiffs themselves point to the fundamental interest parents have in raising their children. Statutes require a written document from a parent when allowing someone else to supervise his or her child's driving in order to ensure that a parent has ultimate responsibility and agreement regarding supervision. This Court should remain mindful of the general principle that courts will not second guess the public health and safety decisions of state legislatures. See Young v. City of Claremore, Okla., 411 F. Supp. At 1310. Moreover, even the Plaintiffs acknowledge the importance of a writing supporting such designation. Julianna admitted that it was important that her mother maintain some control as to who supervises the driving and designate such in writing.

***37 III. In the alternative, although not addressed in the district court's order, the remaining claim was properly dismissed because Plaintiffs admitted that they did not sustain any damages.**

Rule 56 "mandates the entry of summary judgment... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. at 322. Even assuming *arguendo* that Plaintiffs could prove an intentional violation of the Rehabilitation Act, this in and of itself does not entitle them to an award of compensatory damages.
Consequently, we hold that damages liability under section [the ADA] must be based on something more than a mere violation of that provision. There must be some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation.

Armstrong v. Turner Industries, Inc., 141 F.3d 554, 562 (5th Cir. 1998). "Compensatory damages are such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him." Black's Law Dictionary 390 (6th ed.1990).

Here, Plaintiffs admitted no cognizable injury exists. Marcia Barber testified in her deposition that she was very pleased with the statutory ***38** changes and stated "that's all I ever asked for." Julianna admitted that she did not sustain any damages whatsoever. While Marcia Barber is exclusively claiming emotional distress damages, she has not seen any psychologists, social workers or counselors and has not taken any medications for anything related to anxiety or emotional distress as a result of this incident. Thus, even assuming *arguendo* that Plaintiffs could muster the evidence to prove an intentional violation of the Rehabilitation Act, they admittedly sustained no damage whatsoever.

In addition, the only possible damage is the one month delay in obtaining Julianna Barber's license and the allegation that she had to compress her driving experience into a few months and did not get driving experience in a full range of road conditions. However, the evidentiary record reveals that the Defendants' efforts permitted Julianna Barber to receive her license in a timely manner. Julianna needed to have a permit for one year, and during that year acquire 50 hours of behind the wheel experience. Thus, the earliest date she could have acquired her license was one year after receiving her permit, October 13, 2005. She practiced her driving with various people, including her grandfather, during nine of the thirteen months between receiving her permit and getting her license. She acquired her 50 hours of driving experience in one year and one month from ***39** the date she obtained her permit and obtained her driver' s license on November 14, 2005, one month after she was eligible. Plaintiffs have not identified any compensable damages associated with this one month time frame.

IV. The district court properly denied Plaintiff's motion to reconsider.

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 at 1012 (citing *Brumark Corp. v. Samson Res. Corp.,* 57 F.3d 941, 948 (10th Cir.1995). "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).

Plaintiffs maintain that the Court committed manifest errors of law in granting Defendants' Motion for Summary Judgment. Specifically, Plaintiffs maintain the district court made manifest errors of law by: (1) making factual determinations; (2) determining that Plaintiffs' requested ***40** 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 presented no proper grounds for reconsideration. They fail to demonstrate an intervening change in the law, the existence of new evidence, a mistake, or the need to correct clear error or to prevent manifest injustice. Plaintiffs' disagreement with the district court's legal conclusions does not present proper grounds for reconsideration. Accordingly, their motion was properly denied.

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

***41** All of the issues raised in the Plaintiffs' Motion were briefed prior to the district court's Order granting Defendants' Motion for Summary Judgment. Plaintiffs were simply re-raising issues that were raised in prior briefing. Accordingly, the district court did not abuse its discretion in denying the motion to reconsider.

CONCLUSION

For all the reasons stated above, the decision of the district court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellees do not desire oral argument and do not believe oral argument would significantly aid or enhance the decisional process. Therefore, pursuant to Fed. R. App. P. 34(a)(3) and 10th Cir. R. 34.1.9, Appellees ask the Court to dispense with oral argument and to decide the appeal on the briefs.

Julianna BARBER and Marcia Barber, Plaintiffs-Appellants, v. STATE OF COLORADO DEPARTMENT OF REVENUE, State of Colorado Division of Motor Vehicles, M. Michael Cooke, In Her Official Capacity, and Joan Vecchi, In Her Official Capacity, Defendants-Appellees.
2008 WL 2805252 (C.A.10) (Appellate Brief)