

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEREMY JOSEPH DURRENBERGER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-09-0786
	§	
TEXAS DEPARTMENT OF CRIMINAL	§	
JUSTICE,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Plaintiff, Jeremy Joseph Durrenberger, brought this action against defendant, Texas Department of Criminal Justice ("TDCJ"), under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181, and the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 794. Durrenberger alleges that he has a hearing impairment that prevents him from participating in TDCJ's inmate visitation program, and that TDCJ has discriminated against him in violation of the ADA and the RA by failing to provide a reasonable accommodation. On December 2, 2010, the court issued a Memorandum Opinion and Order denying TDCJ's motion for summary judgment, and denying in part and granting in part Durrenberger's motion for summary judgment (Docket Entry No. 45). See also Durrenberger v. Texas Department of Criminal Justice, ____ F.Supp.2d ____, 2010 WL 5014338 (S.D. Tex. December 2, 2010). Pending before the court is TDCJ's Motion for Reconsideration of the Court's Order Granting Durrenberger's Motion for Summary Judgment (Docket Entry No. 51).

Durrenberger urges the court to deny TDCJ's motion for reconsideration because TDCJ "has not cited a subsection of the rule under which relief is available,"¹ and because "the Court interpreted the case law correctly."² For the reasons explained below, TDCJ's motion for reconsideration will be denied.

I. Standard of Review

"[T]he Federal Rules of Civil Procedure do not recognize a general motion for reconsideration." St. Paul Mercury Insurance Company v. Fair Grounds Corporation, 123 F.3d 336, 339 (5th Cir. 1997). The court's December 2, 2010, Memorandum Opinion and Order was interlocutory, not final. See Moody v. Seaside Lanes, 825 F.2d 81, 85 & n.3 (5th Cir. 1987) (only resolution of an entire proceeding is "final"). Courts reconsider interlocutory orders under Rule 54(b), which provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of [a final judgment]."

The standard of review for interlocutory decisions differs from the standards applied to final judgments under Federal Rules of Civil Procedure 59(e) and 60(b) . . . [R]econsideration of an interlocutory decision is available under the standard "as justice requires." . . . [t]he "as justice requires" standard amounts to determining "whether reconsideration is necessary under the relevant circumstances." . . . Nonetheless, the court's discretion under 54(b) is . . . "subject to the caveat that, where litigants have once battled for the

¹Plaintiff's Response to Defendant's Motion for Reconsideration, Docket Entry No. 52, p. 2.

²Id. at 4.

court's decision, they should neither be required, nor without good reason permitted, to battle for it again."

Judicial Watch v. Department of the Army, 466 F.Supp.2d 112, 123 (D.D.C. 2006) (citations omitted). "[W]hether to grant such a motion rests within the discretion of the court." Dos Santos v. Bell Helicopter Textron, Inc. District, 651 F.Supp.2d 550, 553 (N.D. Tex. 2009).

II. Analysis

TDCJ urges the court to reconsider its partial grant of Durrenberger's motion for summary judgment and to find, instead, that the summary judgment evidence raises two genuine issues of material fact for trial. First, TDCJ argues that "Durrenberger's admission that he has not used or carried an auxiliary device set against his claim he is entitled to an auxiliary aid at TDCJ presents a factual issue for the jury as to whether he has a disability and whether TDCJ reasonably accommodated any disability."³ Second, "TDCJ asserts the Rehabilitation Act causation requirement is a necessary element in the present case because other factors such as the security concerns motivated the denial of an auxiliary device."⁴

A. **No Fact Issue Exists Regarding Durrenberger's Disability**

³TDCJ's Motion for Reconsideration of the Court's Order Granting Durrenberger's Motion for Summary Judgment (TDCJ's Motion for Reconsideration), Docket Entry No. 51, p. 1.

⁴Id. at 3.

Asserting that "[t]he Court has determined Durrenberger is hearing impaired and that TDCJ discriminated against Durrenberger by failing to accommodate Durrenberger's disability with an auxiliary hearing device or an attorney-client booth visit,"⁵ "TDCJ asserts a factual issue remains as to whether Durrenberger's hearing disability substantially limits his ability to hear when using a phone and whether TDCJ's accommodations were reasonable."⁶

TDCJ explains that

[t]he court relies on Durrenberger's statement of his personal experience that he could not hear and finds that a reasonable fact-finder could conclude Durrenberger's impairment substantially limits his ability to hear when using a phone. However, Durrenberger has also stated in his interrogatory responses that he has not used or carried an auxiliary device. (Exhibit A). TDCJ asserts a reasonable fact-finder could conclude Durrenberger's failure to carry or use a device in the past as evidence his hearing impairment is not substantially limiting. That is, if Durrenberger in his daily life has not provided himself with an auxiliary device, particularly as he claims such a device is low cost and easily attainable, then a fact issue is presented as to Durrenberger's disability.⁷

TDCJ explains further that

[t]he same evidentiary conflict presents a second fact issue in relation to the reasonableness of TDCJ's proffered accommodations. That is, in light of the fact Durrenberger has not provided himself with an auxiliary device it is a jury issue whether TDCJ's accommodation in declining to provide an auxiliary device while at the

⁵Id. at 1.

⁶Id. at 2.

⁷Id.

same time providing alternatives in pen and paper, an end booth and use of the day room phones is reasonable.⁸

In support of its motion for reconsideration, TDCJ relies on Durrenberger's response to Interrogatory #2, and an alleged conflict between that response and statements made in an affidavit that Durrenberger submitted in support of his motion for summary judgment. Citing Cole v. Frank's Casing Crew & Rental Tools, 2005 WL 2647966 (S.D. Tex. 2005), TDCJ contends that Durrenberger's "Interrogatory response that he has not used an auxiliary device is inconsistent with his affidavit testimony."⁹

In Cole the defendant moved the court to strike certain portions of the plaintiff's affidavit because they contradicted the plaintiff's deposition testimony without explanation. 2005 WL 2647966 at *4. Observing that "[a] court considering a summary judgment motion may disregard a nonmovant's affidavit that contradicts, without explanation, previous deposition testimony," id. (citing S.W.S. Erectors, Inc. v. Infac, Inc., 72 F.3d 489, 495 (5th Cir. 1996), the court granted the motion to strike after concluding that the plaintiff's affidavit contained statements about her job responsibilities that contradicted without explanation the plaintiff's deposition testimony. Id. at *5. This case is distinguishable from Cole for at least two reasons: (1) TDCJ never moved to strike any of Durrenberger's affidavit

⁸Id.

⁹Id. at 3.

testimony on grounds that they contradict his response to Interrogatory #2; and (2) TDCJ has failed either to identify the affidavit testimony that it now alleges contradicts Durrenberger's response to Interrogatory #2, or to explain why that testimony contradicts his response to Interrogatory #2.

Moreover, after reviewing Durrenberger's affidavit testimony, the court is not persuaded that any of it contradicts without explanation his response to Interrogatory #2 because Interrogatory #2 asked about Durrenberger's use of "prosthetic devices," not about his use of "auxiliary devices." And although TDCJ repeatedly asserts that Durrenberger has not provided himself with an auxiliary device, TDCJ has failed to offer any evidence contradicting Durrenberger's statements that he relies on volume amplification devices to talk on the telephone.

Interrogatory #2 and Durrenberger's response state:

INTERROGATORY #2:

Please describe any prosthetic devices which you regularly wear or carry to accommodate your hearing disability.

OBJECTIONS:

Plaintiff objects to this interrogatory on the grounds that it is not reasonably calculated to lead to any discoverable evidence. Plaintiff also objects as this question was asked in the deposition, and Plaintiff objects to any questions beyond what was asked in the deposition.

RESPONSE:

None.¹⁰

¹⁰Exhibit A to TDCJ's Motion for Reconsideration, Docket Entry No. 51 (emphasis added).

The summary judgment record contains two declarations from Durrenberger.¹¹ The Second Declaration submitted in response to TDCJ's motion for summary judgment is the only declaration that contains statements about his use of auxiliary devices. The court is not persuaded that Durrenberger's Second Declaration contains statements that contradict without explanation his response to Interrogatory #2. In his Second Declaration Durrenberger acknowledged that he does not wear prosthetic devices such as hearing aids and explained that, instead, he relies on volume amplification devices to talk on the telephone:

2. As described in my first declaration, I have a significant hearing disability. When a speaker is not in close proximity to me, when there is more than one person speaking, or when there is background noise present, I am unable to hear what is being said.
3. Though I could probably benefit from wearing a hearing aid, I cannot afford to purchase one. I am able to live with my disability, however, through using some low-cost accommodations.
4. Most of my problems hearing people come when I am speaking on the phone. When I am talking with someone on the phone, it is much harder for me to hear than during an "in person" conversation. While I can usually hear people who I am in close proximity to, I have increased difficulty hearing people over the telephone.

¹¹Declaration of Jeremy Durrenberger, Exhibit B to Plaintiff Jeremy Durrenberger's Motion for Summary Judgment Against TDCJ ("Plaintiff's Motion for Summary Judgment"), Docket Entry No. 41; and Second Declaration of Jeremy Durrenberger, Exhibit A to Plaintiff Jeremy Durrenberger's Response to Defendants' Motion for Summary Judgment, Docket Entry No. 42.

5. I shopped around until I could find a cell phone that I could raise the volume enough on so that I could hear. I also make do with other accommodations, such as routing my cell phone through the stereo system in my car when I am driving so I can raise the volume even higher. Though I am currently unemployed, my last employer had to install a volume amplification device on the phone I used at work. Basically, I need the volume on my phone to be much higher. Turning up the volume on my phones accommodates my disability.
6. Though I do not wear hearing aids or other prosthetic devices, I do need the amplification devices built into my telephones to hear during phone conversations.¹²

TDCJ has neither argued nor made any showing that the term "prosthetic devices" used in Interrogatory #2 includes the types of volume amplification devices mentioned in Durrenberger's Second Declaration. Nor has TDCJ presented any evidence contradicting Durrenberger's declaration that he requires and/or relies on the volume amplification devices mentioned in his Second Declaration to talk on the telephone. Because Interrogatory #2 asked Durrenberger what "prosthetic devices" he used to which Durrenberger responded "[n]one," and because Durrenberger's Second Declaration acknowledged that he did not use any prosthetic devices or hearing aids, and explained that he accommodated his inability to hear over the telephone with the use of various inexpensive volume amplification devices, the court is not persuaded that Durrenberger's affidavit statements contradict his response to Interrogatory #2. Because

¹²Second Declaration of Jeremy Durrenberger, Exhibit A to Plaintiff Jeremy Durrenberger's Response to Defendants' Motion for Summary Judgment, Docket Entry No. 42, ¶¶ 2-6.

there is no contradiction between Durrenberger's response to Interrogatory #2 and the statements in his affidavits, the court is not persuaded that there is a genuine issue of material fact for trial as to whether Durrenberger is substantially limited in his ability to hear when using a telephone or whether TDCJ's proffered accommodations are reasonable.

B. No Fact Issue Exists on Causation

Asserting that "[t]he Rehabilitation Act causation standard is relevant to a determination of discrimination, based on disability," TDCJ faults the court for relying "on the case of Bennett-Nelson v. Louisiana Board of Regents, 431 F.3d 448 (5th Cir. 2005), cert. denied, 126 S.Ct. 1888 (2006), finding the causation standard irrelevant if an accommodation is required and denied."¹³ TDCJ argues that "the Rehabilitation Act causation requirement is a necessary element in the present case because other factors such as the security concerns motivated the denial of an auxiliary device."¹⁴ TDCJ explains that "because the Rehabilitation Act, like other anti-discrimination statutes, imposes remedies for intentional discrimination, the plaintiff bears the ultimate burden of demonstrating discrimination."¹⁵ Citing Stewart v. City of Houston Police Department, 372 Fed.Appx.

¹³TDCJ's Motion for Reconsideration, Docket Entry No. 51, p. 3.

¹⁴Id.

¹⁵Id.

475, 477 (5th Cir. 2010), for considering "causation as a prima facie element necessary to prove intentional discrimination under the Rehabilitation Act,"¹⁶ TDCJ argues that "unlike the Bennett-Nelson case where the accommodation was the only issue, causation is relevant to the present case."¹⁷

Durrenberger responds that

[i]n its motion, Defendant argues that the ruling from Bennett-Nelson . . . should be distinguished from the case at hand, and that the Court should have required Plaintiff to make a showing that Defendant denied him an accommodation out of animus. The Defendant contends that barring such a showing, the Court should not have found Defendant liable for its failure to provide Plaintiff with reasonable accommodations.

Defendant is incorrect. . . . Discrimination because of disability includes the failure to provide reasonable accommodation, regardless of what motivated that failure.¹⁸

In Stewart officers of the Houston Police Department ("HPD") sued the City of Houston for unlawful discrimination arising from an HPD grooming policy that prevented officers serving in four divisions from having beards. 372 Fed.Appx. at 476. The plaintiffs were African-American males who suffer from a skin condition that causes infection after shaving. The plaintiffs alleged that HPD's no-beard policy discriminated against African-American males because they are disproportionately affected by the

¹⁶Id. at 4.

¹⁷Id.

¹⁸Plaintiff's Response to Defendant's Motion for Reconsideration, Docket Entry No. 52, pp. 4-5.

condition. Id. at 477. The plaintiffs also alleged that HPD's no-beard policy violated 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, and the Rehabilitation Act of 1973. Id. HPD presented evidence that its reason for the no-beard policy was that the respirators purchased for response to a possible chemical, biological, radiological, or nuclear attack cannot be worn safely with beards, and that the no-beard policy only applied to officers assigned to the four divisions deemed most likely to serve as first responders to such attacks. Id. at 476-477. The district court granted the defendant's motion for summary judgment on all of the plaintiffs' claims and dismissed the case. Id. at 477. The Fifth Circuit affirmed the district court's dismissal. Id. at 478.

In addressing the plaintiffs' RA claims, the Fifth Circuit stated the elements required to establish a claim under the RA:

[T]he officers must show that they (1) have a disability, (2) were otherwise qualified for the particular job, (3) worked for a program or activity that receives federal financial assistance, and (4) were discriminated against solely on the basis of the disability. . . . An individual has a disability under the Act if he or she (1) has "a physical or mental impairment that substantially limits one or more major life activities;" (2) has a record of such impairment, or (3) is regarded as having such impairment. 42 U.S.C. § 12102(1).

Stewart, 372 Fed.Appx. at 477. Observing that the officers alleged that their disability impaired the major life activity of working, the Fifth Circuit held that "[t]he district court properly found no showing of a substantial limitation in working." Id. Citing Sutton v. United Air Lines, 119 S.Ct. 2139 (1999), superseded by

statute on other grounds, ADA Amendments Act of 2008, Pub. L. No. 110-325, 172 Stat. 3553 (2008) ("ADAAA"), the Fifth Circuit explained that "[t]he officers have not alleged they are 'unable to work in a broad class of jobs,' only that they cannot work in four divisions of the department. . . . If jobs utilizing an individual's skills . . . are available, one is not precluded from a substantial class of jobs." Id. Whether the district court had properly applied the RA's causation standard was not at issue in Stewart. Nevertheless, to the extent that TDCJ cites Stewart in support of its argument that plaintiffs in RA cases must show that they were discriminated against solely on the basis of their disability, TDCJ's Motion for Reconsideration has no merit because that is the standard that both parties cited in respect to Durrenberger's motion for summary judgment, and the standard that the court applied in ruling on the motion in the December 2, 2010, Memorandum Opinion and Order.¹⁹

Citing Pinkerton v. Spellings, 529 F.3d 513, 515 (5th Cir. 2008), TDCJ argued in response to Durrenberger's motion for summary judgment that

the purpose of the ADAAA and the Rehabilitation Act is to eliminate intentional discrimination against individuals with disabilities. The ADA causation standard requires

¹⁹See Plaintiff's Motion for Summary Judgment, Docket Entry No. 41, pp. 10-11; Defendant, The Texas Department of Criminal Justice's Response to Plaintiff's Motion for Summary Judgment ("Defendant's Response"), Docket Entry No. 43, p. 7; and Plaintiff Jeremy Durrenberger's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment, Docket Entry No. 44, pp. 3-4.

discrimination be a motivating factor in the entit[y's] conduct, while the Rehabilitation Act imposes a more stringent test, that the entity's action be solely motivated by discrimination. . . . TDCJ's arrangement for individuals to use their hearing aids, to be seated in the least noisy of the booths and the use of pen and paper is not indicative of discrimination against the hearing disabled. These actions belie discrimination as a motivating factor. This is particularly true with the always present security concerns and with the specific security concerns in this case. Notably, Durrenberger prison expert (unsworn) fails to address the security concerns unique to this case, that is, the history of violence between these non-familial individuals, as well as the alternative means of communication. . . . TDCJ's considerations provided to Durrenberger joined with the security parameters of the prison setting dispels discrimination as the sole motivating factor for their conduct. Durrenberger's claims fail the more stringent causation standard of the Rehabilitation Act.²⁰

The Rehabilitation Act provides that a qualified disabled person shall not, "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). One of the intended purposes of the RA is to secure for disabled individuals "evenhanded treatment" and the equal opportunity to participate in and benefit from covered programs. Alexander v. Choate, 105 S.Ct. 712, 721 (1985). The Supreme Court has explained that it is not always easy to discern when the failure to make an accommodation for a disabled individual crosses the line from rightful refusal to illegal conduct. Southeastern Community College v. Davis, 99 S.Ct. 2361, 2370 (1979). In Davis the Court

²⁰Defendant's Response, Docket Entry No. 43, p. 7.

held that fundamental modifications in program requirements and the provision of auxiliary aids and services of a personal nature that will result in undue financial hardship or the lowering of program standards are not required. Id. at 2367-70. In Alexander the Supreme Court explained that

[t]he balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals with meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

105 S.Ct. at 720.

In Bennett-Nelson, 431 F.3d at 454, the Fifth Circuit recognized that the RA "impose[s] upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals. Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant." Id. at 454-455. Citing Davis, 99 S.Ct. at 2361, the Fifth Circuit explained that "[i]n lieu of such an inquiry, the court must determine whether the requested accommodation was 'reasonable'—that is, whether it would impose 'undue financial or administrative burdens' or would require a 'fundamental alteration in the nature of the program.'" Id. at 455 n.12. The Fifth Circuit explained that when the plaintiff alleges that the defendant failed to provide a reasonable accommodation for a disability, the question is not

whether the denial of the accommodation to that disability was caused solely or only in part by the animus of the defendants. The question is whether the failure to accommodate the disability violates the [RA]; and the existence of a violation depends on whether under . . . the Rehabilitation Act . . . the demanded accommodation is in fact reasonable and therefore required. If the accommodation is required the defendants are liable simply by denying it.

Id. at 455. TDCJ attempts to distinguish Bennett-Nelson by pointing out that the Bennett-Nelson court noted the causation standard was not material in that appeal but could become so later, and by arguing that in this case "other factors such as security concerns motivated the denial of an auxiliary device."²¹

In Bennett-Nelson hearing-impaired students at a state university alleged that the university denied them equal access to education by failing to provide reasonable accommodations in the form of educational aids and services such as sign language interpreters and note takers. Id. at 449. In this case a hearing-impaired participant in TDCJ's inmate visitation program alleges that TDCJ is denying him equal access to the program by failing to provide reasonable accommodations in the form of contact visits, volume controlled telephones, or access to an attorney/client conference booth. For the reasons explained in the December 2, 2010, Memorandum Opinion and Order, the court concluded that

[t]he undisputed evidence shows that TDCJ discriminated against Durrenberger based on his disability by failing to provide simple, inexpensive accommodations, such as providing a volume amplification device for use with visitation booth telephones, or allowing Durrenberger to

²¹TDCJ's Motion for Reconsideration, Docket Entry No. 51, p. 3.

conduct visits in an attorney/client booth. TDCJ has failed to present any evidence from which a reasonable fact-finder could conclude that the provision of either of these "[a]ccommodation[s] is not reasonable [because] . . . it either imposes 'undue financial and administrative burdens' on a grantee, . . . or requires 'a fundamental alteration in the nature of [the] program.'" Arline, 107 S.Ct. at 1131 n.17 (quoting Davis, 99 S.Ct. at 2370, and citing 45 C.F.R. § 84.12(c)). Accordingly, the court concludes that Durrenberger is entitled to summary judgment that providing a volume amplification device for use with visitation room telephones or allowing Durrenberger to use the attorney/client booth for visits with Bryson would reasonably accommodate his known disability.²²

Durrenberger, ___ F.Supp.2d ___, 2010 WL 5014338 at *11.

TDCJ's attempt to raise a fact issue based on its assertion that "other factors such as security concerns motivated the denial of an auxiliary device,"²³ is foreclosed by TDCJ's failure to present any evidence in response to Durrenberger's motion for summary judgment showing that its denial of Durrenberger's request for a telephone amplification device – the only auxiliary device that Durrenberger requested – was motivated by security concerns. In response to Durrenberger's motion for summary judgment TDCJ argued that a factual dispute exists over whether Durrenberger asked for an auxiliary device, that its denial of Durrenberger's request for an auxiliary device was not unreasonable because Durrenberger had not used such a device in the past, and that provision of an auxiliary device would require a diversion of

²²Memorandum Opinion and Order, Docket Entry No. 45, pp. 30-31.

²³TDCJ's Motion for Reconsideration, Docket Entry No. 51, p. 3.

resources. The court has already rejected each of these arguments for reasons stated in its December 2, 2010, Memorandum Opinion and Order.²⁴ Id. at *10-*11.

TDCJ has failed to distinguish this case from Bennett-Nelson by citing summary judgment evidence showing that accommodation is not the only issue, or that Durrenberger's alleged exclusion from participation in the inmate visitation program was not caused solely by reason of his disability but, instead, by security concerns. The court is therefore not persuaded that its reliance on Bennett-Nelson was erroneous, or that justice requires the court to reconsider its decision to grant in part Durrenberger's motion for summary judgment.

TDCJ's argument that the court erroneously failed to require Durrenberger to prove that it intentionally discriminated against him goes to the issue of compensatory damages. "A plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination." Delano-Pyle v. Victoria County, Texas, 302 F.3d 567, 574 (5th Cir. 2002), cert. denied, 124 S.Ct. 47 (2003) (citing Carter v. Orleans Parish Public Schools, 725 F.2d 261, 264 (5th Cir. 1984)). Proof of intentional discrimination is a prerequisite to recovery of compensatory damages because the RA

²⁴Memorandum Opinion and Order, Docket Entry No. 45, pp. 27-29.

incorporates the remedies of Title VI of the Civil Rights Act of 1964. See 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.). See also Barnes v. Gorman, 122 S.Ct. 2097 (2002). In Guardians Association v. Civil Service Commission of City of New York, 103 S.Ct. 3221 (1983), a majority of the Justices held, in an otherwise fractured decision, that proof of discriminatory intent is required before compensatory relief is available in Title VI cases.

The issue is complicated, however, by the fact that "[t]he applicable standard for intentional discrimination necessary for recovery of compensatory damages remains unclear in the Fifth Circuit." Salinas v. City of New Braunfels, 557 F.Supp.2d 777, 787 (W.D. Tex. 2008). Durrenberger contends that intentional discrimination against the disabled does not require personal animosity or ill-will. Support for this view may be found in Carter, 725 F.2d at 264, where the Fifth Circuit stated that "Guardians Association precludes the recovery of damages for an [act] that violates section 504 [of the RA] unless the [act] was intentional **or** manifested some discriminatory animus." At least some authority from other circuits also supports this view. See Bartlett v.

New York State Board of Law Examiners, 156 F.3d 321, 331 (2d Cir. 1998), rev'd on other grounds by 119 S.Ct. 2388 (1999) ("In the context of the Rehabilitation Act, intentional discrimination against the disabled does not require personal animosity or ill will. . . . Rather, intentional discrimination may be inferred when a 'policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation of the [challenged] policy . . . [or] custom.'"). Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1152-53 (10th Cir. 1999) ("We . . . hold that entitlement to compensatory damages under section 504 of the Rehabilitation Act requires proof the defendant has intentionally discriminated against the plaintiff. Further, intentional 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.").

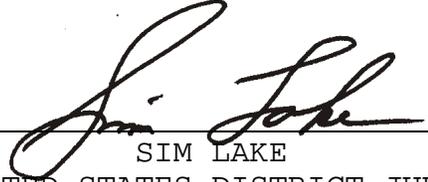
Because the court denied Durrenberger's motion for summary judgment on his claim for compensatory damages, this issue must be resolved at trial.²⁵ Durrenberger, ____ F.Supp.2d ____, 2010 WL 5014338 at *12. The applicable standard for intentional discrimination necessary for recovery of compensatory damages is an issue that the parties will need to address in either the joint pretrial order, or in briefing related to the jury instructions.

²⁵Id. at 31-32.

III. Conclusions and Order

For the reasons explained above, the court concludes that justice does not require reconsideration of the court's decision to grant in part Durrenberger's motion for summary judgment because TDCJ has failed to show that a contradiction in the summary judgment evidence raises a genuine issue of material fact regarding whether Durrenberger is disabled or that the court erroneously relied on the Fifth Circuit's decision in Bennett-Nelson, 431 F.3d at 448, because accommodation is not the only issue. TDCJ's Motion for Reconsideration of the Court's Order Granting Durrenberger's Motion for Summary Judgment (Docket Entry No. 51) is **DENIED**.

SIGNED at Houston, Texas, on this 24th day of January, 2011.



SIM LAKE
UNITED STATES DISTRICT JUDGE