25-423-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARC H. FISHMAN, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

CITY OF NEW ROCHELLE,

Defendant-Appellee,

NEW ROCHELLE POLICE DEPARTMENT, POLICE OFFICER LANE SCHLESINGER, SHIELD NO. 1058, COMMISSIONER JOSEPH F. SCHALLER, POLICE DETECTIVE W. JOSEPH, SHIELD NO. 18, COUNTY OF WESTCHESTER, ROBERT GAZZOLA, IN HIS OFFICIAL CAPACITY AS POLICE COMMISSIONER OF THE CITY OF NEW ROCHELLE POLICE DEPARTMENT, SERGEANT MYRON JOSEPH, SHIELD #18,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The district court below identified two material issues of fact. First, whether plaintiff was a person with a qualified disability. Second, whether the defendant failed to reasonably accommodate the plaintiff. Appellee in its brief concedes that "the analysis of Plaintiff's failure to accommodate claim turns on the denial of his request for Ms. Bolivar to attend and participate in the custodial interview with P.O. Schlesinger." Instead of submitting any argument as to how the conceded failure to accommodate was lawful (nor could it) Appellee irrelevantly focuses its arguments on the supposed probable cause to arrest plaintiff.

The standard relied upon by the district court in granting the appellee's motion has not yet been adopted by this Circuit and is a creation by the district courts. The "greater injury or indignity" standard is not universally adopted or clearly defined in all circuits, and the Second Circuit has not definitively ruled that this is the only relevant standard for ADA claims in the arrest context. Instead the standard currently adopted by this Circuit is of "meaningful access." Here, the denial of plaintiff's requested accommodation (which was reasonable and necessary to afford Mr. Fishman meaningful access) constitutes

discrimination, regardless of whether the harm is "greater" than that suffered by others.

It was error for the district court to summarily conclude whether plaintiff suffered an indignity or harm greater than others without testing the credibility of the claim before a jury. A reasonable juror could find that the denial of a communications accommodation denied the plaintiff meaningful access to the police interrogation by denying him the ability to effectively communicate that his actions that day were lawful pursuant to complicated family court paperwork. The district court accepted plaintiff was disabled in determining the motion and was also required to view the facts as to disability and effective communication in a light most favorable to the plaintiff. It clearly erred by resolving these factual and credibility issues against plaintiff, the non-movant.

For example, the district court failed to assess whether plaintiff's communications disabilities for which he was denied a reasonable accommodation are aggravated or exacerbated in a high stress situation like a police interrogation. The district court was in no position as an untrained observer of persons with communications disabilities like plaintiff to determine the video evidence demonstrated a lack of difficulty

for the plaintiff. At a trial in this case the plaintiff could have presented lay or expert opinion evidence on what may not be readily apparent to untrained observers.

Moreover, the appellees do not contest that they failed to engage in any interactive process with the plaintiff in accommodating his disability. Likewise, the district court found that appellee likely did deny an accommodation. The failure to engage in the interactive process is itself an actionable claim that required denial of summary judgment.

Finally, the appellee is incorrect on the standard of liability for damages. Deliberate indifference can be shown by a failure to act on a known request for accommodation, and that the officers' failure to provide any accommodation after being put on notice of the disability. The standard is not intentional discrimination and can be established via deliberate indifference.

I. THE APPELLEE CONCEDES THAT THERE ARE MATERIAL ISSUES OF FACT AS TO APPELLANT'S DISABILITY AND WHETHER HE WAS REASONABLY ACCOMMODATED AND FAILS TO DEMONSTRATE THAT THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT

Appellee principally argues that regardless as to disputed factual issues as to plaintiff's disability and as to whether he was reasonably accommodated, that the district court was correct in granting summary judgment as plaintiff could not show he suffered a greater indignity or harm than non-disabled arrestees in a police encounter. However, this standard is not adopted by the Circuit. The current standard is "meaningful access," which the appellee is silent on. Regardless, factual and credibility issues do exist as to whether plaintiff was denied meaningful access and/or greater indignity or harm than non-disabled persons.

There is not disputed that the district court identified two material issues of fact requiring a trial. As to whether Fishman is disabled, the district court ruled "The Court concludes that a reasonable factfinder could conclude that Plaintiff is disabled and is a qualified individual for the purposes of the ADA and the RA."

Despite these two identified jury questions, the district court incorrectly found that "This dispute of fact does not mean the instant action cannot be resolved at summary judgment [because] even if the Defendant failed to accommodate him…he would not be able to demonstrate that he suffered greater injury or indignity than other arrestees as a result." The district court was wrong as even this issue was a disputed material fact for a jury to determine. And, this standard has not been adopted by the Second Circuit but is a creation of the lower courts. The district court could not make much analysis of this topic because if it did, it would have to find a disputed material fact for a jury to determine. Instead, in conclusory fashion it makes the above holding and cites to inapposite district court cases which are not binding.

As relevant to this Reply a district court previously found that even with nearly zero evidence of injury a summary judgment motion had to be denied in light of issues of fact as to disability and reasonable accommodation. *See* Dickinson v. York, 9:16-CV-0152 (LEK/TWD) (N.D. N.Y. Jan 22, 2021). The district court there found that credibility issues as to the scope and nature of the injury precluded summary judgment.

Also, this Circuit held in *Sanchez v. Butricks*, 2024 U.S. App. LEXIS 14046 (2d Cir. Jun. 10, 2024) that a genuine factual dispute over whether an entity reasonably accommodated a plaintiff rendered summary judgment inappropriate even in the face of minor injuries in the form of a slip and fall in prison arising from the denial of such reasonable accommodation.

In *Williams v. City of New York*, 121 F. Supp. 3d 354, 369 (S.D.N.Y. Aug. 5, 2015), a district court held that "Even assuming a jury finds that there was probable cause to arrest Plaintiff, the City must establish that providing her an accommodation during the police officers' investigation would have been unreasonable to rebut plaintiff's prima facie case that an accommodation was available." The district court in *Williams* denied summary judgment on a failure to accommodate claim in part as "numerous people [were available] who could have served as effective interpreters between the police and Plaintiff," therefore "the Court cannot conclude that, as a matter of law, it was reasonable for the police officers not to provide plaintiff any accommodation before placing her under arrest." *Id.*

II. THE APPELLEE FAILS TO DEMONSTRATE EVEN ON A DE NOVO BASIS THAT PLAINTIFF'S CLAIM FOR DISABILITY DISCRIMINATION WERE SUBJECT TO DISMISSAL AS IT CONCEDES MATERIAL ISSUES OF FACT AS TO DISABILITY AND REASONABLE ACCOMMODATION AND FAILS TO ELIMINATE FACTUAL ISSUES AS TO THE INJURY SUFFERED BY PLAINTIFF AS A RESULT

"To establish a claim under Title II, a plaintiff must demonstrate (1) that [he] is a qualified individual with a disability; (2) that [he] was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to [his] disability." *Tardif v. City of New York*, 991 F.3d 394, 404 (2d Cir. 2021) (*quoting Davis v. Shah*, 821 F.3d 231, 259 (2d Cir. 2016)).

On a failure to accommodate theory "The demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation." *Id* at 405 (*quoting Henrietta D. v. Bloomberg*, 331 F.3d 261, 277 (2d Cir. 2003)).

In this Circuit it is clear that "police encounters are…services, programs or activities within the meaning of Title II." *Wynne v. Town of E. Hartford*, 2023 U.S. Dist. LEXIS 199575, 2023 WL 7339543 (D. Ct.

Nov. 7, 2023) (Hall, D.J.) (*citing Williams v. City of New York*, 121 F. Supp. 3d 354, 364-65 (S.D.N.Y. 2015)).

There is no dispute that plaintiff is disabled. Appellee did not contest the plaintiff's disability in their pre-answer motion. Moreover, Schlesinger testified that he never denied plaintiff was disabled and Wenzler testified he accommodated plaintiff's disability when he released him instead of sending him to jail pending arraignment.

"A public entity discriminates against qualified individuals with a disability if it fails to provide them with a reasonable accommodation that permits them to have access to and take a meaningful part in its services, programs, or activities." *Wynne,* U.S. Dist. LEXIS 199575 (*citing Powell v. Nat'l Bd. of Med. Examiners*, 364 F.3d 79, 85 (2d Cir. 2004)). This is the applicable standard adopted by the Circuit. The standard of greater indignity or injury is a creation of the district courts and not adopted by the Circuit.

"A plaintiff bears the initial burden of demonstrating the existence of some accommodation…" *Wynne,* U.S. Dist. LEXIS 199575 (*citing McElwee v. Cnty. of Orange*, 700 F.3d 635, 642 (2d Cir. 2012)). And, "Once the plaintiff has identified a plausible accommodation, the costs of which,

facially do not clearly exceed its benefits, the defendant bears the burden of showing that the plaintiff's proposed accommodation is unreasonable." *Id* (*citing Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995)).

Here, there is no dispute that plaintiff requested a reasonable accommodation. First, plaintiff voluntarily went to the NRPD stationhouse to file a complaint and when he communicated with the employee at the window he advised he was disabled. Second, plaintiff told Schlesinger he was disabled and required assistance from his court assigned disability/ADA aide to communicate with Schlesinger during the questioning. Third, Schlesinger admitted at his deposition that he was repeatedly informed of plaintiff's disabilities but that he simply did not accept them and thus did not provide an accommodation. Fourth, Bolivar testified she also advised Schlesinger she was the court assigned disability/ADA aide and that she could assist plaintiff in communicating and explain the complex visitation orders. Fifth, Wenzler testified that they agreed to accommodate plaintiff by letting him go home instead of being sent to jail, but did not provide him any accommodation during the interview.

Even if Schlesinger's claim that a specific accommodation was not requested is believed, his refusal to engage in an interactive process to determine what accommodations could be provided is a de-facto denial of an accommodation.

There is no dispute that Schlesinger denied plaintiff an accommodation during the police interview. Schlesinger admitted he was informed of plaintiff's disabilities but rejected the claims and as such refused to provide an accommodation. He refused to permit plaintiff's disability/ADA aide to be present during the interview to assist with his cognitive and hearing deficits.

The Appellee is unable to demonstrate that the requested accommodation was unreasonable or otherwise burdensome. It would defy logic to argue that allowing a disabled person's disability/ADA aide to be present during an interrogation would burden the defendant police department. Instead it would have helped the defendant avoid the mess of the last six years in charging an innocent disabled person with crimes he did not commit. And, the defendant could have still proceeded with the same course with plaintiff even if the accommodation was granted. Its decision to deny the accommodation was discriminatory as it denied

a disabled person the same access to the police encounter as non-disabled persons.

A similar nondisabled person could have explained the legality of the conduct and the 30 plus pages of court orders rendering all conduct that day legal. However, the disabled plaintiff could not do so without the assistance of a disability/ADA aide. Since this sort of accommodation would not cost the defendant anything or create non financial burdens, the defendant cannot rebut plaintiff's *prima facie* case, rendering summary judgment appropriate and necessary.

Specifically, 35 C.F.R. § 35.160(c)(2)(ii) required the defendant to permit Bolivar to serve as the facilitator of effective communication. The section provides: "A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except…where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances." Thus, there is no dispute that Bolivar was not merely an advocate but the plaintiff's specific request as a facilitator of effective communication

for which defendant was legally prohibited from denying. The March 2018 order issued by the family court permitting plaintiff to have a cognitive aide was the equivalent to allowing an effective communication interpreter. The section also provides that "a public entity shall give primary consideration to the requests of individuals with disabilities." *Id*.

It is undisputed (and even conceded, despite in a misleading way) that a plaintiff can show the requisite *mens rea* for monetary damages pursuant to a deliberate indifference standard. Defendant's motion fails to demonstrate the absence of issues of fact as to deliberate indifference. There is clear discrimination under an intent or deliberate indifference theory as: the officer admitted he just didn't believe the disability so he refused to accommodate Fishman.

These statements alone show (1) an objective awareness by the defendant's employee that Mr. Fishman may require an accommodation and (2) a subjective refusal to provide such accommodation and could have avoided such discrimination but for his deliberate indifference to plaintiff's disability.

In *Biondo v. Kaleida Health*, 935 F.3d 68, 75-76 (2d Cir. 2019), the Second Circuit found deliberate indifference where a defendant knew of

the plaintiff's disability and refused to accommodate it. This is further buttressed by Robert Wenzler's decision to release Mr. Fishman instead of keeping him detained pending arraignment due to "poor health" and also as an accommodation. The after the fact accommodation of release on a non-bailable offense does not cure the earlier deliberate denial of an accommodation during the actual police interrogation that resulted in the arrest and charging decision.

There were multiple employees aware of plaintiff's disabilities but refused to provide any accommodation during the interrogation and questioning. Since Wenzler was able to "accommodate" plaintiff after the fact he also had the authority to order Schlesinger to provide an accommodation during the interrogation and he failed to do so. Any other supervisor or sergeant in the chain of command with Wenzler would also be liable herein on a deliberate indifference standard. Even Schlesinger himself could have provided the accommodation and deliberately refused. It is not for Schlesinger to make a judgment about a disability.

As held in *Biondo* "A jury might…find that certain staff members observed [Fishman] struggling to communicate [or comprehend] knew that he…lacked the [ability] to communicate adequately…had the

authority to [permit plaintiff's requested accommodation with assistance from his ADA aide, and the use of a note pad] and deliberately failed to do so notwithstanding repeated requests," by plaintiff and his ADA Aide. *Biondo*, 935 F.3d at 76. Only to provide an after the fact accommodation allowing release after plaintiff's statements were illegally obtained without an accommodation and without *Miranda*.

Compounding all of these failures was the defendant's refusal to provide the audio and video files at issue in this appeal in discovery during the underlying criminal case. They had the videos in their possession but refused to turn it over pretrial, creating the greater indignity and harm that the district court erroneously found did not occur.

CONCLUSION

For the reasons set forth above, the Judgment of the United States District Court for the Southern District of New York granting defendant's motion for summary judgment and dismissing this case should be reversed and the matter remanded for a trial and attorney's fees and costs should be awarded to Plaintiff-Appellant.

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure Rules 32(a)(7)(B) and (C), the undersigned attorney certifies that the accompanying brief is printed in 14-point typeface, Century Schoolbook, and, along with footnotes in 12-point typeface Century Schoolbook, contains no more than 7,000 words and does not exceed 15 pages in length. According to the data in Microsoft Word, this brief contains **2,642** words.

/s/ Caner Demirayak
Caner Demirayak, Esq.