Burriola v. Greater Toledo YMCA, et al. JUDGE: James G. Carr
Case No.: 3:00CV7593

DRAFT OF CLOSING ARGUMENTS

To establish a prima facie case of discrimination under either Title III of the ADA or Section 504, the plaintiff must show that he is disabled within the meaning of the statutes, that he is otherwise qualified to receive the accommodation, and that the defendant failed to provide a reasonable accommodation due to his disability. ***McPherson v. Michigan High Sch. Athletic Ass'n***, 119 F.3d 453, 460 (6th Cir.1997) citing ***Sandison v. Michigan High School Athletic Ass'n***, 64 F.3d 1026, 1032 (6th Cir.1995).] In ***McPherson*** the court identified two methods by which a plaintiff may establish discrimination due to disability; either (1) by demonstrating the defendant's actions were intentionally taken because of the plaintiff's disability, or (2) by showing that the defendant could reasonably accommodated the disability, but refused to do so." *Id*. at 460

In the instant case, the plaintiff can establish that the defendant, Greater Toledo YMCA, et al., discriminated against Jordan on the basis of his disability by showing that they failed and/or refused to provide the reasonable accommodations necessary for him to participate in the after-school daycare program.

To prevail on the claim of disability discrimination based on failure to provide a reasonable accommodation, plaintiffs in the instant case have the initial burden to establish a prima facie case showing that: (1) Jordan is an individual with a handicap as defined by statute; (2) he is eligible to receive a reasonable accommodation in defendants' daycare program; (3) defendants were aware of his disability; (4) Jordan needed an accommodation; and (5) the defendants failed and/or refused to provide the accommodations needed by Jordan. See ***Gaines v. Runyon***, 107 F.3d 1171, 1175 (6th Cir.1997). See also: ***Kocsis v. Multi-Care Management, Inc***., 97 F.3d 876, 882-83 (6th Cir.1996).

Once the plaintiff has established a prima facia case of discrimination, the burden then shifts to the defendants to prove why the plaintiff cannot reasonably be accommodated—for example, because the accommodation would either fundamentally

alter the nature of the program or pose an undue administrative or financial burden upon the defendants. ***Gaines v. Runyon*** at 1175-1176; citing ***Kocsis v. Multi-Care Management, Inc.*** In ***Gaines***, an ADA Title I employment case, the Sixth Circuit specifically endorses the court's application of related civil rights statutes as appropriate in dealing with alleged disability discrimination in employment cases. Furthermore, as court affirmed in ***McPherson***, "[b]ecause the standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other.", citing ***Andrews v. State of Ohio***, 104 F.3d 803, 807 (6th Cir.1997).

In the instant case, the defendants have stipulated that Jordan meets the definition of a person with a disability as defined in 42 U.S.C. 12102 (2), and plaintiff must next establish that he is otherwise qualified for the accommodation. In this regard, ample proof has been submitted by way of testimony and documentary evidence to support the claim that Jordan is otherwise qualified to receive a reasonable accommodation. [1]

The YMCA has an open policy enrollment policy for providing childcare for individuals, including persons with disabilities, with the only prerequisites for admission being timely payment of fees and the age of the child. See: YMCA Child Care Enrollment and Orientation Form, January 26, 1999, Plaintiff Exhibits 8, 9; YMCA Special Needs Guidelines, Plaintiff Exhibit 6. Testimony and documentary evidence establish that defendants' mission and philosophy promote both "accessibility" and "quality childcare".

The third element for a prima facia case is to show that defendant knew of Jordan's disability. Here again, the evidence is unequivocal and includes the special needs form completed by Mrs. Burriola on or about January 26, 1999, as well as the testimony of Defendants Miley and Spenser affirming their knowledge that Jordan is a child with autism. Further, both Ms. Miley and Ms. Spencer testified regarding discussions with Joan McCarthy related to specific training offered by the M.O.D.E.L. Community School for Y.M.C.A. staff related to autism in general and support for Jordan in a group setting in particular.

[1] Although not defined in Title III of the ADA, the term "otherwise qualified" is but is a pre-requisite element of proof in Section 504 cases. However, "eligibility to receive reasonable accommodation" versus being "otherwise qualified" are only different sides of the same coin. As the court in ***McPherson*** stated in this regard: "It is well-established that the two statutes are quite similar in purpose and scope."

The fourth element is to show that the accommodations requested by Jordan's mother and suggested by Ms. McCarthy were necessary and needed. Evidence to support this element is provided not only by the testimony of Mrs. Burriola, Jordan's mother, and plaintiff's experts Joan McCarty and Lauren Miller of the M.O.D.E.L. school, but by the testimony of defendants' own expert, Jason Dura, who testified in his deposition:

> Q: Do you think it would be important for the staff… working with Jordon [sic] in the after school program or in the all day program [to] be trained to use supports if Jordon [sic] were there?
> A: Yes.
> Q: And what would you expect to occur if supports weren't used with Jordon [sic]
> A: If they weren't used? …I would expect you would have behavioral problems.
> Q: Like the ones that are contained in the incident reports?
> A: Sure.
> [Dura Dep. p. 108.]

Thus it clear that staff training and the use of supports, such as those outlined in Ms. McCarthy's letter of August 8, 2000 to Ms. Miley, are a needed and necessary accommodation without which Jordan cannot be expected to participate successfully in defendants' after-school daycare program.

Finally, the plaintiff must show that the defendant failed or refused to provide the necessary accommodations and in this regard, the record amply replete with examples. Following Ms. Miley's receipt of the August 8, 2000 letter from Ms. McCarthy regarding staff training and setting forth serious concerns about Jordan's return to the program without any supports in place, Ms. Miley testified she took no steps to either set up the training or to assure at least minimal supports were put in place for Jordan when he returned to the after-school program on or about August 28, 2000. Despite the fact that Ms. Miley admitted to receiving the list of suggested supports from Ms. McCarthy, on or about August 8, 2000, she testified in her deposition that she provided no information regarding the supports for Jordan to new staff, beginning at the center on or about August 29, 2000, claiming that she "didn't have them". [Miley Dep. p. 125.] Testimony by Ms. Miley and Jerry Kelly, former site director at Calvary, confirm that Kelly was instructed to limit the individual support he had been providing for Jordan when no special needs counselor had been hired as expected. Ms. Miley further admitted telling Mr. Kelly to stop accompanying Jordan on swim activities and stating that special needs kids didn't have to swim if sufficient staff were not available. However, Defendant's expert, Dr.

Dura, testified in his deposition that "…swimming for autistic kids [h]as a sensory benefit, that generally they come out calmer and more ready to do things so that alone would be useful". [Dura Dep. pp 111-112.]

Plaintiffs having established a prima facie case of disability discrimination, the burden of proof shifts to defendants to prove that a reasonable accommodation would either fundamentally alter the nature of their program or impose an undue administrative or financial burden. In addition, defendants in the instant case have also raised the defense of direct threat as justification for terminating Jordan and a rationale for not permitting him to return to the after-school daycare program, supporting this position with the testimony of various counselors, as well as testimony by Ms. Miley and Ms. Spencer. [suggesting that it would be too difficult to expect a counselor to be constantly watching Jordan in order to know when he was becoming frustrated and possibly susceptible to going into a "shut down", which in turn might potentially result in physical aggressiveness. Defendants further provide testimony that there is no place or "quiet" space at the Calvary site to which Jordan could be removed once a sign of frustration is identified.] Plaintiffs, however, counter this claim with both direct and substantive indirect evidence to prove intentional discrimination utilizing the burden-shifting method set forth by the Supreme Court in ***McDonnell Douglas Corporation v. Green***, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See also: ***DeLuca v. Winer Indus., Inc***., 53 F.3d 793, 797 (7th Cir.1995); ***Robin v. Espo Engineering Corp***., 200 F.3d 1081, 1089 (7th Cir.2000). In this regard, plaintiff will present evidence including testimony expert witnesses McCarthy and Miller, Mrs. Burriola and former site Director Jerry Kelly. Plaintiffs' expert Lauren Miller and Joan McCarthy, Ms. Burriola, Jordan's mother, and former site director Jerry Kelly all testified to ease with which the supports can be utilized. Professionals from the M.O.D.E.L. School offered training for the daycare staff at no cost, and the supports outlined by McCarthy to Miley in July 2000 were developed together with YMCA daycare staff. In addition, both of the staff attending the training were site directors and neither gave any indication at that time that the supports would be unduly burdensome or would alter the fundamental nature of the daycare program. Plaintiffs will further support their argument by reference to defendants' own policies, as well as the supporting evidence in the licensing requirements governing operation of

childcare centers as found in Ohio Administrative Code §§ 5101:2-12-01, 5101:2-12-40, and 5101:2-12-52. For example, both YMCA childcare guidelines and State licensing regulations require daycare centers to provide both quiet and active play for children, as well as to provide activities that are appropriate for the age and ability of each child. State licensing also requires daycare centers to provide for the needs of handicapped children including developing and regularly reviewing an individual plan for the child and making changes as appropriate in the plan in regard to modifications and accommodations. In addition, the plan for each handicapped child must be approved by the parent and an administrator and reviewed not less frequently than once a year. Defendants' own policies even echo the State requirements, despite testimony by Ms. Spencer, Vice President of Child Care, that YMCA's policies are only "guidelines", were never "officially approved", and would only used at the discretion of the Director of Child Care Services, Kathy Miley.

Plaintiffs having established a prima facie case of disability discrimination, the burden of proof shifts to defendants to prove that a reasonable accommodation would either fundamentally alter the nature of their program or impose an undue administrative or financial burden. In addition, defendants in the instant case have also raised the defense of direct threat as justification for terminating Jordan and a rationale for not permitting him to return to the after-school daycare program. Defendants support this position with the testimony of various counselors, as well as testimony by Ms. Miley and Ms. Spencer. Plaintiffs, however, will counter this claim with both direct and substantive indirect evidence to prove intentional discrimination utilizing the burden-shifting method set forth by the Supreme Court in ***McDonnell Douglas Corporation v. Green***, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See also: ***DeLuca v. Winer Indus., Inc***., 53 F.3d 793, 797 (7th Cir.1995); ***Robin v. Espo Engineering Corp***., 200 F.3d 1081, 1089 (7th Cir.2000). In this regard, plaintiff will support their claim with testimony and documentary evidence. In addition, plaintiffs will reference defendants' own policies, as well as licensing requirements governing the operation of childcare centers as found in the Ohio Administrative Code §§ 5101:2-12-01, 5101:2-12-40, and 5101:2-12-52.

Other Case Law

Plaintiff will demonstrate how the case ***JH. v. ABC Care, Inc.*** (D. Md. 1996), 953 F. Supp. 675, referenced by defendants, is clearly distinguishable from the instant action. Finally, plaintiff will cite the following cases in support of their argument.

1. In ***Alvarez Ex Rel. Alvarez V. Fountainhead, Inc***., 55 F.Supp.2d 1048, 137 Ed. Law Rep. 592 (N.D.Cal. 1999), plaintiffs sued for a preliminary injunction after a pre-school offered to enroll an asthmatic child but refused to administer medication for asthma treatment, arguing that (1) training teachers to administer the medication would fundamentally alter the nature of their program and (2) that modifications required to accommodate the child's medication needs would be direct threat to health and safety of others due to diversion of attention from other students and danger that students might mistakenly be exposed to the medicine. The court granted the preliminary injunction with specifications requiring specific training for the pre-school staff.
2. ***Guzman V. Denny's Inc***., 40 F.Supp.2d 930, 9 A.D. Cases 463, 15 NDLR P 59 (S.D.Ohio 1999), rebuts defendants' claim regarding an exhaustion requirement, holding that Title III of the ADA does not incorporate the administrative exhaustion requirements of Title VII.

Respectfully submitted,

Thomas J. Zraik

Links: *Burriola v. Greater Toledo YMCA* (W.D. OH 2001)

Decision in pdf **Decision in html**

Motion for Preliminary Injunction and Memorandum in Support

Why This Case is Important by Thomas J. Zraik, Esq.

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