IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. 34-36 MAP 2021

37-39 MAP 2021

40-45 MAP 2021

MARIA POVACZ
LAURA SUNSTEIN MURPHY
CYNTHIA RANDALL AND PAUL ALBRECHT

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

On review of the Commonwealth Court's October 8, 2020 Order at Docket Nos. 492 C.D. 2019, 606 C.D. 2019, and 607 C.D. 2019, which affirmed in part, reversed and remanded in part, and vacated and remanded in part the Pennsylvania Public Utility Commission's Opinion and Orders entered at Docket Nos. C-2015-2475023, C-2015-2475726, and C-2016-2537666

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF JENNINGS FAMILY

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Pursuant to Rule 531(b)(1)(i) of the Pennsylvania Rules of Appellate Procedure, the Jennings Family hereby requests leave to file the accompanying *amicus curiae* brief for the Court's consideration in the above-captioned appeal, and avers as follows:

1. Rule 531(b)(1)(i) provides that an *amicus curiae* may file a brief during the merits briefing of a matter pending in an appellate court.

2. Here, each of the members of the Jennings Family is a person with a disability. Michael Jennings has been diagnosed with Stage 4 colon cancer. Susan Jennings has been diagnosed with multiple sclerosis and hypothyroidism. McKenzie Jennings is the most impaired member of the family, having numerous comorbid neurological diagnoses, some of which are congenital. He has Sturge-Weber Syndrome, PDD-NOS (autism), epilepsy with refractory seizures, brain atrophy, hypothyroidism, Pediatric Acute-Onset Neuropsychiatric Syndrome (PANS), and a mild heart murmur. He is significantly impaired, both intellectually and developmentally.

3. Due to these disabilities and the attendant health impacts, the Jennings Family's doctors have recommended that they not have a smart meter in or on their home.

4. The Jennings' Family's brief seeks to aid this Court by explaining the relevance of background principles of federal anti-discrimination law in a manner that may help the Court in interpreting the matters on appeal.

5. The Jennings Family's brief would comply with the standard under Rule 531 regarding a brief filed during merits briefing.

WHEREFORE, the Jennings Family respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully Submitted,

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I. INTRODUCTION

Electric power consumers in Pennsylvania reside in one of the very few states in which opting-out from the installation of a smart meter on their home is forbidden. They are denied this choice solely because of the PUC's misrepresentation and interpretation of the Omnibus Amendments Act of Oct. 15, 2008, P.L. 1592, No. 129, §2807(f)(2) ("Act 129").

In proceedings below, the *en banc* Commonwealth Court rejected the PUC's interpretation, concluding that nothing in the law "requires every customer to endure involuntary exposure to RF emissions from a smart meter." The Commonwealth Court remanded the matter to the PUC "to allow consideration of Consumers' requests for accommodations, and determination of what, if any, accommodations are appropriate."

In this brief, *amicus curiae* encourage this Court to consider these matters in the context of federal anti-discrimination law for two reasons. First, because those laws provide a robust framework for assessing matters of accommodation and reasonableness, and second, because federal anti-discrimination laws provide the legal background against which Act 129 was passed.

II. STATEMENT OF INTEREST

Amicus curiae here are the three members of the Jennings Family: Susan Jennings, Michael Jennings, and their son, McKenzie Jennings.

The Jennings Family lives in Mount Pleasant, Pennsylvania. Each of the members of the Jennings Family is a person with a disability. Michael Jennings has been diagnosed with Stage 4 colon cancer. Susan Jennings has been diagnosed with multiple sclerosis and hypothyroidism. McKenzie Jennings is the most impaired member of the family, having numerous comorbid neurological diagnoses, some of which are congenital. He has Sturge-Weber Syndrome, PDD-NOS (autism), epilepsy with refractory seizures, brain atrophy, hypothyroidism, Pediatric Acute-Onset Neuropsychiatric Syndrome (PANS), and a mild heart murmur. He is significantly impaired, both intellectually and developmentally.

According to McKenzie's doctors, his condition may be exacerbated by excess exposure to radiation. Based on the recommendations of their doctors, the Jennings Family have substantially modified their living conditions to minimize McKenzie's exposure. They moved to a residence that is far from WiFi networks, turn off their electric breakers every night, and use wired connections for most devices.

The Jennings Family's doctors also recommended that they not have a smart meter in or on their home. For example, Dr. Michael Semelka of EHMG Norvelt Family Medicine recommended that they not have a "Smart Meter placed on or in

their house due to concerns about it potentially exacerbating McKenzie's severe seizure disorder." *Michael T. Jennings v. West Penn Power Company*, Docket No. C-2018-3006031, Ex. B-1 to Main Brief of Complainant. Dr. Gil Perez of the Highlands Hospital Family Health & Wellness center wrote that:

> EMFs emitted by a smart meter could directly or indirectly cause McKenzie to experience a seizure, which is a problem he has already; directly from lowering the threshold and indirectly from causing a stress-induced seizure. In summary, it is my professional medical opinion that a smart meter not be installed at the residence where McKenzie lives for reasonable fear that EMFs may cause a worsening of his medical conditions.

Id. at Ex. B-2.

Dr. Lyla Gumbs of the Cleveland Clinic Center for Functional Medicine wrote that due to the health effects on "medically vulnerable populations, it is my professional opinion that the Jennings household be exempted from the requirement of Smart Meter usage." *Id*. at Ex. B-3.

Based on the recommendations of these and other doctors, the Jennings Family objected to the installation of a smart meter on their home or property, and requested the reasonable accommodation of a non-electronic electromechanical analog meter (i.e., one with no transmitting device installed), rather than a smart meter. When their utility refused, Mr. Jennings filed *Michael T. Jennings v. West Penn Power Company*, Docket No. C-2018-3006031, an administrative proceeding before the Pennsylvania Public Utility Commission. That proceeding is stayed pending resolution of the above-captioned matter. If no accommodation becomes

available to the Jennings Family, they will have to choose between a doctor-contraindicated smart meter and forgoing electric service entirely.

The Proudfoot Insight Foundation paid in whole or in part for the preparation of the brief. No person other than amicus and their counsel authored the brief in whole or in part.

I. DISCUSSION

A. The *Povacz* appeal raises questions of accommodation and reasonableness. Federal anti-discrimination law provides a framework for analyzing those matters, and formed the background against which Act 129 was passed.

In proceedings below, the PUC contended that Pennsylvania electric service consumers must have a smart meter installed on their homes, even over the consumers' objections or requests for accommodation. The Commonwealth Court rejected that interpretation, noting that nothing in the law "requires every customer to endure involuntary exposure to RF emissions from a smart meter." *Povacz v. Pennsylvania Pub. Util. Comm'n*, 2020 WL 5949866, at pg. 13 (Pa. Commw. Ct. Oct. 8, 2020). It remanded the matter to the PUC "to allow consideration of Consumers' requests for accommodations, and determination of what, if any, accommodations are appropriate." *Id.*

In assessing those requests for accommodation, the court held that "[l]ogic, safety concerns, and fairness require some balancing of the parties' interests." *Id*. at 18. And significantly, the Commonwealth Court held that Consumers may establish a violation of Section 1501 of the Public Utility Code by showing the

wireless smart meter requirement unreasonable – independent of whether it is unsafe. *Id*. at 15. The PUC appealed based on these and other matters; as a result, there are questions of accommodation and reasonableness currently before the Court.

As described herein, this Court should consider those matters in the context of federal anti-discrimination laws, both because those laws provide an analytical framework and also because they formed the legal backdrop against which Act 129 was passed. Specifically, courts have applied at least three federal anti-discrimination laws to questions surrounding the smart meters: the Americans with Disabilities Amendments Act, 42 U.S. Code § 12101 *et seq*.; the Rehabilitation Act of 1973 as Amended, 29 U.S.C. § 701 *et seq*.; and the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.* In brief, those laws establish the following:

1. The Americans with Disabilities Amendments Act.

The ADAA prohibits discrimination against persons with disabilities by places of public accommodation and by public entities. Title II of the Act protects persons with disabilities from discriminatory practices by state or local governments or public transportation system. 42 U.S.C. §§ 12131–65. Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations. 42 U.S.C. §§ 12181–89; *see Spector v. Norwegian Cruise Line Ltd*., 545 U.S. 119, 128 (2005). Under Section 12184(a)(2) of the ADA, discrimination includes the failure of an entity to "make reasonable modifications"

when such modifications are "necessary to afford such goods, services, . . . or accommodations to individuals with disabilities."

2. The Rehabilitation Act.

Section 504 of the Rehabilitation Act provides that "[n]o 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. The Rehabilitation Act extends relief to "any person aggrieved" by discrimination in violation thereof. 29 U.S.C. § 794a(a)(2). Under Section 504, companies receiving federal funds must provide "the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Alexander v. Choate*, 469 U.S. 287, 304 (1985).

3. The Fair Housing Amendments Act.

The Fair Housing Amendments Act (FHA) outlaws discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap" of an individual. 42 U.S.C. § 3604(f)(2). "By its express terms, Section 3604 applies to 'the provision of services or facilities' to a dwelling, such as sewer service." *Community Services Inc. v. Wind Gap Mun. Auth*., 421 F.3d 170, 184 (3d Cir. 2005). Electricity is among the services that are essential to a safe living environment, and so is included in the "provision of services" 24 C.F.R, §§ 982.401(e)(1), (f)(1), (i).

Like the Rehabilitation Act and the ADA, the FHA defines discrimination to include a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

Together, these three laws provide a robust analytical framework for assessing matters of accommodation, reasonableness, and the balancing of parties' interests. These laws and the regulations interpreting them provide concrete criteria for breaking down questions of what kinds of accommodations are readily achievable (*e.g*, 28 C.F.R. § 36.104), explain what kinds of practices must be modified to achieve accommodation (*e.g*., 28 C.F.R. § 36.302), and explain the conceptual reasoning behind these rules (*e.g.*, 28 C.F.R. Appendix A to Part 36).

B. Pennsylvania's Statutory Construction Act requires consideration of the legal background in which Act 129 was passed, including federal anti-discrimination law.

In interpreting Act 129, this Court will be guided by the Statutory Construction Act. *See Berner v. Montour Twp. Zoning Hearing Bd.*, 217 A.3d 238 (Pa. 2019), *citing* 1 Pa.C.S. § 1501 *et seq*. Under the Statutory Construction Act, it is presumed that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable," that "the General Assembly intends the entire statute to be effective and certain," and that the "General Assembly does not intend to violate the Constitution of the United States." 1 Pa.C.S. § 1922 (1)-(3).

Given the Supremacy Clause of the United States Constitution, it is therefore presumed that the General Assembly did not intend for Act 129 to have effects that would be impossible of execution or ineffective due to federal anti-discrimination law. *See Commonwealth v. Jemison*, 626 Pa. 489, 98 A.3d 1254, 1257 (2014) ("Pursuant to the Supremacy Clause of the United States Constitution ... this Court, like all state courts, is bound by decisions of the U.S. Supreme Court with respect to the federal Constitution and federal substantive law.") Furthermore, federal anti-discrimination law would have informed what the General Assembly intended as "unreasonable." *See* 1 Pa.C.S. § 1922 (1).

Given those principles, it is useful to assess the state of federal anti-discrimination law as of October 15, 2008, the date that Act 129 was passed. At that time, federal disability law had been long established. The Rehabilitation Act of 1973 – "commonly known as the civil rights bill of the disabled" – had been law for thirty-five years. *ADAPT v. Skinner*, 881 F.2d 1184, 1187 (3d Cir. 1989). The Fair Housing Amendments Act of 1988, which extended fair housing protections to persons with disabilities, had had been in place for twenty years. And the ADA, signed into law in 1990, had been law for eighteen years.

And in the immediate run-up to Act 129's passage, there was a significant development in federal disability law. On September 25, 2008, just three weeks prior to Act 129's passage, the President signed the ADA Amendments Act of 2008 into law. In the findings and purpose of that law, Congress explained that it explicitly

intended to overturn the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), two cases which had "narrowed the broad scope of protection intended to be afforded by the ADA." P.L. 110-325, § 2. The law explained it was the "intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.*, § 2(b)(5).

Accordingly, this Court should interpret Act 129 in light of the long-standing federal anti-disability-discrimination laws, and the reaffirmation of those laws by Congress in the weeks leading up to Act 129's passage.

C. Courts have applied federal anti-discrimination law to matters surrounding smart meters, without requiring proof of harm.

The Commonwealth Court held that "in considering accommodations to Consumers on remand, the PUC should consider whether accommodations are appropriate ***without*** proof of harm, so that Consumers may choose to avoid RF emissions from wireless smart meters, while allowing PECO to comply with Act 129's mandate concerning availability of smart meter technology." *Povacz* at 17 (emphasis in original).

That holding is consistent with federal anti-discrimination law. Federal courts have analyzed smart meter matters in the context of the ADA, the FHA, and

the Rehabilitation Act. And some courts have held that the need for accommodation can flow from a risk of future harm, rather than proof of past harm.

One recent example is *Friedman v. CMP*, 20-cv-00237, R. Doc. 26 (D. Me. March 31, 2021). In that case, Plaintiff Ed Friedman had a form of lymphoma that his oncologist opined could have exacerbated his symptoms if exposed to excess radiation. Mr. Friedman therefore opted-out of the smart meter program offered by Central Maine Power, the state's electric utility.[1] CMP, however, required all persons opting-out of the smart meter program to pay a monthly fee in perpetuity to not have a smart meter on their home. Mr. Friedman sued, arguing that such a surcharge was a violation of the ADA, the FHA, and the Rehabilitation Act when applied to a person with a disability like himself. *Id.*, R. Doc. 1. Specifically, he argued that he was denied equal access to the utility's services because he was charged more due to his disability than his non-disabled neighbor must pay.

The federal court denied CMP's motion to dismiss, holding that "it is the plausible risk to Friedman's health, not a probable physical toll, that makes a fee waiver 'necessary' to afford him equal access to CMP's services." *Friedman*, *supra*, at *7-8. Accordingly, the court held that Mr. Friedman had stated a claim for "discrimination under the ADA, Rehabilitation Act, and FHA." *Id.* at *9.

[1] In Maine, the state's Public Utilities Commission ordered CMP to allow customers to opt out of the smart meter program. *See Boxer-Cook et al. v. Maine Public Utilities Commission*, Docket No. 2010-345 Order (Part I) (Me. P.U.C. May 19, 2011) and (Part II) (Me. P.U.C. June 22, 2011).

Shortly after the federal court's denial of the motion to dismiss, CMP sought permission from the Maine PUC to waive Mr. Friedman's opt-out fees.[2]

Similarly, *Metallo v. Orlando Utilities Commission,* 14-cv-01975, R. Doc. 45 (M.D. Fl., Sept. 1, 2015) involved a plaintiff with electromagnetic hypersensitivity who opted out of the Orlando Utilities Commission's smart meter program after the meter caused him to suffer "many physical and emotional problems." *Id*. at *2. He sued in federal court after the OUC charged him an ongoing monthly fee to not have the smart meter on his home. The court assessed the smart meter matters under the ADA, and found that "the Court can reasonably infer that OUC has placed impermissible surcharges on equipment and services that are required for OUC to comply with Metallo's ADA rights. As a result, Metallo has sufficiently alleged a connection between OUC's fees and Metallo's alleged disability." *Id.* at *7.

Other federal entities have likewise recognized the intersection between electromagnetic sensitivities and the ADA. For example, the Access Board "is an independent Federal agency established by section 502 of the Rehabilitation Act whose primary mission is to promote accessibility for individuals with disabilities." 67 Fed. Reg. 56352, fn. 1 (Sept. 3, 2002). In 2002, the Access Board

[2] Below, the Commonwealth Court suggested that "if Consumers obtain the relief they seek, it is difficult to imagine that large numbers of other PECO customers will then flood the utility with requests to avoid RF emissions at increased cost." *Povacz* at *18. This is corroborated by the proceedings in *Friedman,* in which CMP disclosed that it only had three customers total "who have expressed concerns about both the health effects of smart meters and the requirement that they pay an opt-out fee."

recognized “that multiple chemical sensitivities and electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual's major life activities.” 67 Fed. Reg. 56353. Likewise, the National Institute of Building Sciences, an entity established by the U.S. Congress in the Housing and Community Development Act of 1974, found that “[a]ccording to the Americans with Disabilities Act (ADA) and other disability laws, public and commercial buildings are required to provide reasonable accommodations for those disabled by chemical and/or electromagnetic sensitivities.” NIBS IEQ Final Report at *52 (July 14, 2005).

And most recently, on August 13, 2021, the U.S. Court of Appeals for the D.C. Circuit Court ruled that the Federal Communications Commission failed to provide a reasoned explanation for its determination that its current guidelines adequately protect against harmful effects of exposure to radiofrequency radiation. *Environmental Health Trust, et al. v. FCC*, 20-1025 (D.C. Cir., Aug. 16, 2021). The court found the FCC violated the Administrative Procedure Act by acting in an “arbitrary and capricious” manner regarding its assessment of those health impacts. It ordered the FCC to “address the impacts of RF radiation on children, the health implications of long-term exposure to RF radiation, the ubiquity of wireless devices, and other technological developments that have occurred since the

Commission last updated its guidelines and to address the impacts of RF radiation on the environment." *Id.* at *31.[3]

III. CONCLUSION

Given that federal disability anti-discrimination law forms the backdrop against which the General Assembly passed Act 129, it is difficult to imagine how the PUC's interpretation of "no accommodations" can be upheld. This Court should look to those anti-discrimination laws when it assesses the matters on appeal. In particular, this Court should be guided by those laws' (1) expansive definitions of what constitutes a protected disability, (2) focus on *risk* of harm, and not just actual or ongoing harm, and (3) respect for the autonomy and choice of persons with disabilities.

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[3] In the Commonwealth Court, *amicus curiae* Friends of Merrymeeting Bay filed a brief that addressed the environmental toxin aspect of RF radiation. *See* FOMB Amicus Curiae Brief, filed Sept. 13, 2019.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, true and correct copies of the APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF were served on the following via email, per the requirements of Pa.R.A.P. 121:

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