CASE NO. 18-5697

IN THE COURT OF APPEALS OF THE UNITED STATES
SIXTH DISTRICT

MATTHEW MARBLE

Plaintiff

v.

STATE OF TENNESSEE
DEPARTMENT OF CHILDREN'S SERVICES

Defendant

On Appeal from the United States District Court
For the Middle District of Tennessee
Case 3:15 cv 0508

BRIEF OF PLAINTIFF/APPELLANT MATTHEW MARBLE

Submitted by:
Connie Reguli
LawCare- Family Law Center, P.C.
1646 Westgate Circle, Ste 101
Brentwood, TN 37027
615-661-0122
615-661-0197 FAX
Sup. Ct. 16867

Attorney for Plaintiff

I. NATURE OF THE PROCEEDINGS

This case arises out of the District Court on an action brought by the Plaintiff, Matthew Marble, for violation of his rights under the Americans with Disability Act (ADA) by the Department of Children's Services (DCS) (a state agency) in an underlying action taken against him alleging dependency and neglect[1] against his daughter, H.S. (a minor child).

The case was dismissed on summary judgment. Plaintiff appeals the dismissal of his action.

II. CORPORATE DISCLOSURE STATEMENT

The plaintiff, Matthew Marble, is an individual person and not a corporation, therefore, no other disclosure is required.

[1] Actions for dependency and neglect are found at Tenn. Code Ann. § 37-1-102. Such actions can result in the loss of the parental rights.

III. TABLE OF CONTENTS

IV. TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

V. STATEMENT IN SUPPORT OF ORAL ARGUMENT

There is very limited case law on the application of the Americans with Disabilities Act in relation to the disability rights of parents who are dealing with a state agency (Department of Children's Services – DCS) in state court proceedings that seek to impair their constitutional right to parent.

As is expressed in this brief, the Plaintiff raises the concern that the state agency failed to do an individualized assessment and engage in an interactive process with Marble once they had identified his impairments that affected his ability to walk, see, and work.

Plaintiff likens this issue to that of the discrimination against persons with mental disabilities who were confined in mental institutions prior to *Olmstead v. L.C.*, 527 U.S. 581 (1991) Where *Olmstead* dealt with the constitutional loss of personal freedom, the case at bar deals with the state's interference with one of the most fundamental private liberty interests, i.e., the right to parent and familial integrity. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)

The position argued by the State, and adopted by the court, was that the disabled parent's failure to request an accommodation relieved the state of its duty to conduct an individualized assessment. As argued below, this district court erred in it analysis. Parents must be provided the protection of ADA when their parental

rights are at the mercy of the state agency. An oral argument on this issue would allow the court to engage in an exchange of questions relevant to this vital issue.

Appellant prays for an oral argument.

VI. STATEMENT OF JURISDICTION

The District Court's subject matter jurisdiction was based on a federal question. See 28 U.S.C. § 1331. Plaintiff filed a complaint under the Americans with Disability Act. 42 U.S.C. §§ 12131-12134.

This appeal is made under FRAP 3 – Appeal by Right from a dismissal of this case on a summary judgment.

Appellant filed a timely appeal on July 2, 2018 under the applicable Appellate Rules.

This appeal is from a final order of dismissal on summary judgment.

VII. STATEMENT OF ISSUES

The summary judgment entered by the District court should be reversed and this case remanded for further proceedings. The Plaintiff would show that:

I. The District court erred in dismissing Plaintiff's claim for violations of the Americans with Disabilities Act.

II. Sovereign immunity is abrogated in this case, in that the parent and the child have Fourteenth Amendment procedural and substantive rights to maintain family integrity.

VIII. STATEMENT OF THE CASE

This case arises from a claim brought by plaintiff, Matthew Marble, in the District Court for violations against him under Title II of the Americans with Disabilities Act. (ADA) 42 U.S.C. §§ 12131-12134.

Marble is the biological and legal father of H.S., a child born in the State of Tennessee in 2012. RE 99 PageID # 1005. Marble was 18 years old and was not married to the Mother. RE 99-1 PageID # 1021; RE 101 PageID # 1150. The child was conceived in the State of Michigan and the Mother returned to Tennessee to reside with her mother where the child was born. RE 99 PageID # 1005; RE 101 PageID # 115. Marble had not completed high school and he suffered from multiple disabilities that affected his ability to walk, see, read, and work. RE 99-1 PageID # 1022-1030. He also suffered from a history of seizure disorder and depression. RE 134 PageID # 1418.

In June 2013, the minor child was injured while in the care of her mother and taken to the hospital. RE 99-1 PageID # 1022; RE 101 PageID # 1150. She was treated for head trauma and multiple bruises. RE 134 PageID # 1418. Her injuries contributed to her development of cerebral palsy. RE 134 PageID # 1418. DCS received a referral of abuse on the child. RE 99-1 PageID # 1022. Because the mother did not identify the father, DCS placed the child in foster care. Marble learned about the incident from a relative and came to Tennessee to be involved in

the placement of the child. RE 134 PageID # 1419. Marble never moved to the State of Tennessee and throughout the entire course of this case, he has remained a resident of Michigan. RE 99-1 PageID # 1022.

Importantly, there is no evidence that Father ever abused or neglected his child or that he posed a substantial risk of harm to the child. RE 99-2 PageID # 1033.

Tennessee held a permanency plan meeting which was attended by Marble in September 2013. As a result of this meeting, a permanency plan was established as provided in the record at RE 98-2 PageID # 904-924. See Tenn. Code Ann. 37-2-403(a)(1)(A). RE 134 PageID # 1419. It is signed by DCS worker Lindsey Kenyon and her supervisor, Lois Gregory. The document indicates that Marble disclosed a history of a seizure disorder, depression, and some substance abuse. RE 98-2 PageID # 911, 917; RE 99-1 PageID # 1022-23. The plan stated that "return to parent" and "exit custody to relative" were both available goals for permanency. RE 98-2 PageID # 904. The plan required Marble to do the following: pay child support; refrain from using illegal drugs, non-prescribed medications and alcohol; use prescription and over the counter drugs per label instructions; sign a release of information; develop a relapse prevention program; deliver to the case manager an affidavit from the medical provider listing all medications and dosages; obtain an alcohol and drug assessment; complete

treatment recommendations; submit to drug testing; submit to random pill counts; maintain sobriety for 6 months; obtain and maintain housing for no less than 6 months; contact community resources for help in obtaining housing and provide documentation; pay bills for food and housing utilities; provide proof of housing; have a legal income to provide for H.S. needs; establish a means of legal financial support; provide proof of income monthly; maintain a relationship with the child; take a parenting class; keep case manager informed of current living arrangements; have a clinical intake to assess mental health and follow recommendations. RE 134 PageID # 1419, 1420.

By October 2013, Marble sought the assistance of his aunt and uncle as an option for placement because he believed he would be unable to meet all the state's requirements. RE 134 PageID # 1420. It was no later than November 2013, that DCS knew of the alternate placement for H.S. The aunt and uncle, Bobbi Duboise and Will DuBoise, Jr., complied with all the state requirements for placement and transfer of the child to Michigan[2]. This was complete by July 2014. RE 134 PageID # 1420. Instead of placing the child with the relatives as provided by law,

[2] All states are under a federal requirement to have a "plan" consistent with 42 USC § 671 regarding care and placement of a child eligible to receive Title IVE funds. The plan requires timely completion of an ICPC (Interstate Compact for the Placement of Children) stating that the "receiving" state (Michigan) must conduct a home study within 60 days of the request, but for any training and education required for the prospective placement. Tennessee also codified the requirement of the ICPC at Tenn. Code Ann. § 37-4-201 (2014).

DCS allowed the Judge to have a hearing regarding this placement, and the Judge denied it in August 2014. RE 134 PageID # 1421.

In January 2014, the DCS records document a "family functioning assessment" which states that Marble is working on his GED, he has the support of his mother and step-father, and he reports to be sober for over a year. RE 98-3 PageID # 947-48. The family "needs/risks/concerns" states that Marble will develop and maintain a relationship with H.S. through visitation and will demonstrate appropriate parenting and responsibility for the child. He will have stable mental health and be cleared by a medical provider due to a history of seizures or have support system in place. RE 98-3 PageID # 948.

There is no evidence in the record of Marble abusing drugs during the course of DCS's involvement or exhibiting behaviors that would be a danger to the child.

On September 18, 2014, DCS filed a petition to terminate the parental rights of Marble on the grounds that he did not pay child support to the state and he did not comply with the terms of the permanency plan. Tenn. Code Ann. § 36-1-113 (g)(1)&(2). RE 134 PageID # 1421. The state prevailed on this petition and the decision was upheld on appeal. RE 134 PageID # 1421-22.

This Complaint was filed May 4, 2014 and amended September 5, 2016. RE 1; RE 88. The state filed a motion for summary judgment and Marble responded in opposition. RE 98; 98-1; 99; 99-1; 99-2; 99-3; 99-4; 99-5. Marble included the

Department of Justice opinion letter in the case of Sara Gordon published in February 2015 as persuasive authority. RE 99-6. PageID #134 PageID # 1423.

The District Court granted the Defendant's summary judgment dismissing Plaintiff's claim under American's with Disabilities Act (ADA) on June 7, 2018. RE 134.

SOVEREIGN IMMUNITY:

The Court first examined the Defendant's request to dismiss the claim under the doctrine of sovereign immunity. RE 134 PageID # 1425. The Court opined that in assessing whether a claim under Title II of ADA can overcome sovereign immunity courts must determine: (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid. *United States v. Georgia,* 546 U.S. 151, 159 (2006). RE 134 PageID # 1425.

The Court concluded that since the case would be dismissed on other grounds, i.e, there was no genuine issue of material fact as to Marble's claim that Defendants violated Title II, the Court was not required to engage in the constitutional analysis. *Babcock v. Michigan,* 812 F. 3d 531, 539 (6th Cir. 2016) RE 134 PageID # 1425.

AMERICANS WITH DISABILITIES CLAIMS GENERALLY

The District Court analyzed the Title II ADA claims of Plaintiff Marble making a distinction between (1) a claim of intentional discrimination and (2) a claim for failure to make reasonable accommodations, citing *McPherson v. Mich High Sch. Athletic Ass'n, Inc.*, 119 F. 3d 453 (6th Cir 1997). RE 134 PageID # 1427. The Court admitted that methods of proving discrimination under Titles I and III of the ADA also apply to Title II, and that cases involving reasonable-accommodation under Title I of the ADA are useful interpretive tools for analyzing reasonable-accommodation claims brought under Title II. RE 134 PageID # 1472, 1436.

Marble's claims where articulated in the Court's order as (1) DCS failed to do an individualized assessment of Marble's needs and limitations as a parent in violation of the ADA; (2) DCS refused to consider Marble's extended family and their willingness to do whatever was necessary to help; (3) DCS refused to transfer his child to Marble's aunt and uncle which would have maintained the integrity of the family; and (4) DCS intentionally imposed requirements on Marble that were beyond his capabilities allowing them to pursue termination of his parental rights. RE 134 PageID # 1427.

For the purposes of the motion, the defendants admitted that Marble is a qualified individual with a disability and that DCS was aware of his disability. RE

134 PageID # 1428, 1440. The Defendants acknowledged Plaintiff's disabilities as (1) Osgood-Schlatter's disease, which affects his knee and can make it painful to walk or sit; (2) a seizure disorder; (3) memory issues; (4) blindness in one eye; and (5) a history of depression. RE 98 PageID # 840.

The District Court also found that Title II extended to DCS's action in this matter relying on *Schweitzer v. Crofton*, 935 F. Supp. 527, (E.D.N.Y. 2013); *M.K. ex rel. Mrs. K. v. Sergi*, 554 F. Supp. 2d 175, (D. Conn. 2008); and *Ward v. Murphy*, 330 F. Supp. 2d 83 (D. Conn. 2004) RE 134 PageID # 1428-29.

The District Court considered the opinion letter of the Department of Justice and the Department of Health and Human Services, issued February 2015 as persuasive authority on this issue. RE 134 PageID # 1429. See Gordon Letter, RE 99-6.

The February 2015 Department of Justice letter opined that the Massachusetts state child welfare office had violated the Mother's ADA rights and her constitutional right to parent when they failed to allow the maternal grandmother to assist her in parenting her child to accommodate her disability. RE 99-6 PageID # 1069-70. In Gordon, the mother suffered from a mental health disability and after giving birth she had difficulties attending to the basic needs of the child, such as feeding times. RE 99-6 PageID # 1069-71. The state agency sought to terminate her parental rights for mental incompetence; however her

mother (the maternal grandmother of the child) offered to take guardianship of the child and allow the mother to continue her parent-child relationship. RE 99-6 PageID # 1069-70. The Department of Justice and the Department of Health and Human Services investigated and issued an opinion that they had violated the mother's disability rights by refusing to rely upon the grandmother to assist the Mother. RE 99-6 PageID # 1066, 1075. No District or Circuit Court has directly addressed this question since the Gordon letter was released.

INTENTIONAL DISCRIMINATION:

The District Court granted summary judgment to the Defendants on Plaintiff's claim of intentional discrimination finding that Plaintiff (1) could not show that he was excluded from participation in, denied benefits of, or subjected to discrimination under the program because of his disability[3]; or (2) present significant evidence that animus toward the disabled motivated the protested behavior[4]. RE 134 PageID # 1428-1436. In its analysis, the Court relied on the lack of evidence of "animus" against Marble by state agency worker, Kenyon. RE 134 PageID # 1429. The Court acknowledged that Marble testified that the DCS workers looked at him like he was "downright stupid"; and that DCS staff members were trying to take advantage of the fact that he was "a little slow", "very forgetful", and "not the brightest." RE 134 PageID # 1429-30. The Court also

[3] *Anderson v. City of Blue Ash,* 798 F. 3d 338, 357 (6th Cir. 2015)
[4] *Gohl v. Livonia Pub. Sch. Dist.* 836 F.3d 672, 682 (6th Cir. 2016)

identified in Marble's testimony that his physical disability was a limitation on his ability to work; and that his inability to pay the state agency child support was limited by his inability to work. RE 134 PageID # 1431. The Court then opined that the Plaintiff's inability to meet the requirements imposed on him by the state agency were, admittedly, the sole reason his parental rights were terminated. However, the Court also found that because the plaintiff did not set forth specific facts that DCS intentionally imposed requirements on him that were beyond his capabilities that his claim for intentional discrimination must fail. RE 134 PageID # 1432, 1435-36.

The Court acknowledged that the state's petition to terminate his parental rights alleged that he had not paid child support, cannot provide housing, has not provided proof of payment of utilities, cannot financially support himself, and has not provided proof of income, as providing grounds to terminate his parental rights forever. RE 134 PageID # 1434. The Court stated that, "Although DCS did reference Marble's mental health assessment in pursuing termination, it did so not to highlight Marble's cognitive limitations and their effect on his parenting, but instead to show that he failed to comply with his counselor's recommendations, including participation in individual counseling, involvement in his child's medical care, completion of his GED, and continued pursuit of employment." RE 134

PageID # 1434. The Court likened this to *Schweitzer*[5] and *Bartell*[6] which have little semblance to the case at bar because of the obvious risk factors identified in those cases. RE 134 PageID # 1434-35. The court also acknowledged that "there is nothing in [DCS] Kenyon's testimony accounting for the known disabilities of Marble and how they would affect his ability to meet the requirements of becoming a safe and effective parent." RE 134 PageID # 1433. Yet, the Court found that this absence of any evidence of individually assessing Marble, benefited the Defendants, stating that Plaintiff had failed to create a genuine issue of material fact of intentional discrimination. RE 134 PageID # 1433, 1435.

---

[5] In *Schweitzer*, the Mother had a long psychiatric history and past non-compliance with treatment and medications. She had been previously hospitalized for her mental health disorder. Id. 534-537. After the birth of her baby, personal observations were made that the Mother was extremely uncomfortable while holding the baby, she could not support his head properly, she became extremely alarmed when the baby sneezed; and she displayed other erratic and agitated behavior. Based on these personal observations, removal from the Mother was based on a determination that the child would be in imminent danger if she was taken from the hospital by the Mother. Id. 539. The court found that it was not a violation of ADA because the state had relied on the risk assessment provided by service providers and medical professionals in making a removal determination. Id. 553. *Schweitzer v. Crofton,* 935 F. Supp. 527 (E.D.N.Y. Mar. 25, 2013)

[6] In *Bartell*, the Mother suffered bouts of depression and was hospitalized for an attempted suicide. She voluntarily relinquished her child to state's custody because of his behavioral and psychological challenges. When, a petition to terminate her parental rights was filed, she filed for custody and did not prevail in the state court. She then filed a complaint for ADA violations. The Court found that she had not been discriminated against because of her disability. Therefore, her ADA claims were foreclosed. *Bartell v. Lohiser,* 215 F. 3d 550 (6th Cir. 2000)

REASONABLE ACCOMMODATIONS:

The Court also granted summary judgment to the defendants on Plaintiffs claims that his ADA rights were violated for the state's failure to make reasonable accommodations. RE 134 PageID # 1438. The Court found two separate bases upon which the Plaintiff had stated his claims. The first was Marble's claim that the state did not make an individualized inquiry[7] as to whether his disabilities would affect his ability to meet the requirements of the permanency plan suggesting that a modification of those terms could have been a reasonable accommodation. RE 134 PageID # 1438. The second was that the state failed to make the reasonable accommodation of placing his child in the care of his aunt and uncle when he acknowledged that he could not provide for her care on his own. RE 134 PageID # 1437.

The Court acknowledged that the "individualized inquiry" applies to ADA Title II cases. *Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 77 (2nd Cir. 2016) RE 134 PageID # 1437. The Court, however, discounted this requirement stating

[7] The case law uses the terms "individualized assessment" and "individualized inquiry" interchangeably. 28 C.F.R. 35.108(d)(2) discusses the necessity of conducting an individualized assessment in Title II cases to determine whether the disability substantially affects a major life activity. Section (d)(3) discusses the necessity of determining the condition, manner, and duration of the difficulties associated with the disability. Section (d)(4) discusses the assessment of mitigating measures. Similarly, 29 C.F.R. 1630.20 mirrors the language of in 28 C.F.R. 35.108 on the same issues for Title I employment cases.

that it is not an independent violation of ADA unless the plaintiff established prima facie showing that he proposed a reasonable accommodation. *Rorrer v. City of Stow*, 743 F. 3d 1025, 1041 (6th Cir. 2014)

The district Court stated the Marble's complaint made only "vague references to reasonable accommodations or modification that should have been provided," but acknowledged that Marble stated that DCS "offered no accommodations or modifications commensurate with his skill level that would enhance his access to various social services or that would facilitate his reunification with his daughter." RE 134 PageID # 1437-38.

Even though the District Court acknowledged that Marble specifically requested an accommodation in asking that his aunt and uncle be allowed to take custody of his child, it failed to find that the state's failure to conduct an individualized inquiry (or individualized assessment) existed as a claim against the state agency. RE 134 PageID # 1437, 1438.

The Court stated that the failure to make the reasonable accommodation of placing the child with his aunt and uncle must fail because the relative placement was "blocked" by the juvenile court. RE 134 PageID # 1441. It is undisputed that Marble's aunt and uncle took all steps necessary to be approved for an interstate transfer of the minor child from Tennessee to Michigan where the Father was also living. RE 134 PageID # 1442-43. Plaintiff argued that once the child is placed in

the custody and control of the state agency they are given full statutory authority to determine the placement of the child. Tenn. Code Ann. § 37-1-129(e)(1) provides: Any order of the court that places custody of a child with [DCS] shall empower [DCS] to select any specific residential or treatment placements or programs for the child according to the determination made by the department, its employees, agents or contractors[8]. RE 134 PageID # 1443. The statute further provides that the court may hold a hearing to review residential placement decisions, but, by statute, the court is only allowed to make recommendations. Tenn. Code Ann. § 37-1-129(e)(2). RE 134 PageID # 1443. The Court found Marble failed to show that placing the child with his relatives after it was denied by the Court "remained a reasonable accommodation," and further opined that the question of Tennessee law whether the Court can order or only recommend placement of a child in state's custody was not material to the ADA analysis. RE 134 PageID # 1444. The Court held that any claim that Marble would have that the state denied his request for a reasonable accommodation of placing his child with his relatives was dismissed. RE 134 PageID # 1444.

Finally, the Court dismissed Marble's claims that the state agency failed to conduct an individualized inquiry into the effect of Marble's disabilities on his

[8] Also see *In re Neveah W.*, No. W2014-01531-COA-R10-CV, (Tenn. Ct. App. April 2, 2015)

compliance with the permanency plan. The Defendant claimed that the permanency plan was directly tailored to his abilities and the child's needs and was created by sitting down with the parent and assessing that particular parent-child relationship and what is needed for the child to safely and securely reunite with the parent. RE 134 PageID # 1445. The Plaintiff contended that there was nothing in Kenyon's testimony accounting for the known disabilities of Marble and how they would affect his ability to meet the requirements. RE 134 PageID # 1445.

The Court placed the burden on the Plaintiff stating that Plaintiff was unable to come forward with specific facts that he had requested a reasonable accommodation, therein he failed to demonstrate that there is a genuine issue for trial. RE 134 PageID # 1445. The court stated that any dispute about whether the stage agency made an individualized inquiry into the relationship of Marble's disabilities and the terms of the permanency plan were immaterial because nothing in the record indicated that Marble ever requested a reasonable accommodation. RE 134 PageID # 1445

Plaintiff's claims were dismissed in their entirety.

IX. SUMMARY OF THE ARGUMENT

The District Court erred in dismissing this matter on summary judgment. The Plaintiff concedes that the record is insufficient to raise a material disputed fact on a claim of intentional discrimination. *Washington v. Ind. High Sch. Athletic Ass'n, Inc.* 181 F. 3d 840, 847 (7th Cir. 1999) Although Marble recalled that the state workers treated him with some repulse of his ignorance, he cannot show that he was denied services because of his disability; that the animus toward him motivated the state worker's behavior; or that the state worker intentionally imposed requirements on him beyond his capabilities[9]. *Anderson*, 798 F.3d at 357; *Gohl*, 836 F.3d at 682. RE 134, PageID # 1427, 1435.

However, the Plaintiff would show this Court that the District Court has erred in dismissing his claim for violations of Title II of the ADA in that the State had sufficient knowledge of his disabilities from the onset of their involvement with Plaintiff to prompt their responsibility to engage in the ADA process. If the Court does not find that this knowledge immediately triggered the State's requirement to conduct the individualized assessment and investigate reasonable accommodations which would allow Marble to safely parent his child, the Court must find that within a short time thereafter, Marble's request that his aunt and

[9] As a matter of reason, if the state agency did not properly assess the Plaintiff's impairments and their effect on the requirements imposed on him, proving that they intentionally imposed requirements that "set him up to fail" would be impossible.

uncle be allowed to take custody of his child so that he could maintain his parental relationship, certainly initiated the State's duty to engage in an interactive process with Marble.

The Plaintiff argues that this is enough to survive summary judgment and create a genuine issue of fact allowing the jury to decide whether the State violated Plaintiff's ADA rights in his fundamentally protected right to parent his child. The events that occurred after[10] the State was on notice that he suffered from disabilities are the resulting damages from these violations and cannot be construed to mitigate the State's obligation at the commencement of their involvement with Marble.

The Plaintiff includes sufficient argument for this Court to find that sovereign immunity is abrogated in this case where the fundamental right to parent is at stake.

Plaintiff asks this Court to reverse the district Court's dismissal of the ADA violations in the State's failure to conduct an individualized assessment and reasonable accommodations finding that a there exists a genuine issue of material fact.

---

[10] Defendant asserts that that the juvenile court judge's denial of the relative placement; and the Court order terminating his parental rights mitigate their obligations to conduct the individualized assessment at the commencement of this process. RE 134 PageID# 1434, 1441, 1442.

X. ARGUMENT

The standard of review of a district court's grant of summary judgment is de novo. A judgement is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. In considering a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. The essential question is whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. The reviewing court may not weigh the evidence or make credibility determinations. *Torche v. Crabtree*, 814 F. 3d 795, 798 (6th Cir. 2016) (internal cites omitted).

AMERICANS WITH DISABILITIES ACT

Congress enacted the ADA 25 years ago "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1). Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, [and] independent living" and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to … pursue those opportunities for which our free society is justifiably famous. 42 U.S.C. § 12101(a)(7),(8). Title II

provides: [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. Title II covers essentially everything state and local governments and their agencies do. *Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 209-12 (1998). Pursuant to Congressional directive, e.g., 42 U.S.C. § 12134; 28 C.F.R. § 41.4, the Department of Justice and Health and Human Services have promulgated regulations implementing Title II. Covered entities may not "utilize criteria or methods of administration "[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [or t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with response to individual with disabilities. 28 C.F.R. § 35.130(b)(3)(ii), (iii). Covered entities must take certain steps to avoid discrimination on the basis of disability. They are required to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity being offered. 28 C.F.R. § 35-130(b)(7).

I. The District court erred in dismissing Plaintiff's claim for violations of the Americans with Disabilities Act.

The Plaintiff would show that the District Court made an improper analysis of the Plaintiff's claim for failure to conduct an individualized assessment and make reasonable accommodations. While the Court admitted that Marble had disclosed his disabilities upon his first encounter with DCS in September 2013 and he had articulated a need for an accommodation by October 2013 (by presenting his relatives as a reasonable alternative for custody), the District Court dismissed Plaintiff's claim concluding that the Plaintiff had failed to request an accommodation. Therefore, the lack of an individualized assessment did not rise to a stand-alone claim for an ADA violation. The Court stated that Marble "does not establish that he ever requested accommodation for his disabilities." RE 134 PageID # 1438. In support of its decision, the Court pointed to specific questions made of Marble in his deposition such as whether or not he notified DCS there was anything he could not do because of his seizures and memory issues, and he responded, "Not that I recall." RE 134 PageID # 1438.

The District Court failed to acknowledge Marble's request for accommodations (generally) as the threshold that initiated the duty of the state agency to make the individualized inquiry and engage in an interactive process with Marble to determine what accommodations where necessary to help him

either meet their requirements or otherwise satisfy that he could safely parent his child.

The Court referenced *Rorrer v. City of Stow*, 743 F.3d 1025, 1041 (6th Cir. 2014), in its conclusion that Marble's complaint that DCS did not make an individualized inquiry was immaterial because "nothing in the record" indicated that he had made a request for reasonable accommodations. This is an error. Marble's request for relative placement was sufficient to shift the burden to DCS for further inquiry into the effect his disability would have in allowing him to parent his child. RE 134 PageID # 1445.

The statement made in *Rorrer* is, "Although mandatory, failure to engage in the interactive process is only an independent violation of ADA if the plaintiff establishes a prima facie showing that he proposed a reasonable accommodation." Quoting, *Breitfelder v. Leis*, 151 Fed. Appx. 379, 384 (6th Cir. 2005). In fact, in *Rorrer*, the court found that Rorrer had requested an accommodation. In *Breitfelder*, the Court found that the plaintiff did not otherwise qualify for the specifically requested accommodation, i.e., a transfer to a different position.

Plaintiff would show that this Court should look at the analyses provided under *Genco*, *Taylor*, *Sutton*, and *Millage*.

In *Genco*[11], the Court stated that it is clear that the individualized assessment is a vital part of the protections afforded under ADA. The employee is responsible for informing his employer of his disability and that a request for accommodation is needed. Notice of the disability triggers the employer's duty to engage in an interactive process with the employee to assess whether the disability can be reasonably accommodated. Standing alone, the failure to engage in an interactive process is insufficient to establish an ADA claim. However, the failure to engage in the interactive process is relevant if it results in a failure to provide a reasonable accommodation. The employer has a duty to accommodate an employee's disability "if the employer knew or reasonably should have known that the employee is disabled." What matters under ADA are not formalisms about the manner of the request, but whether the employee provides the employer with enough information that, under the circumstances, the employer can fairly be said to know of both the disability and desire for an accommodation.

In *Taylor*[12], the Court also addressed shifting the burden to the employer upon notice of the disability and a request for a reasonable accommodation. The Court stated that requests do not need to be in writing. To request accommodation, an individual may use "plain English" and need not mention Americans with

[11] *Genco v. Starpoint Cent. Sch. Dist. Bd. Of Educ.,* 17-CV-01168-IJV-MJR, 2018 LEXIS 94591, Pg. 24-25. (W.D.N.Y. June 14, 2018)
[12] *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 313-16, (3rd Cir. 1999)

Disabilities Act or use the phrase "reasonable accommodation." A family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. What information the employee's initial notice must include depends on what the employer knows of both the disability and desire for an accommodation. Once the employer knows of the disability and the desire for an accommodation, it makes sense to place the burden on the employer to request additional information that the employer believes is needed. An employer, having received adequate notice of an employee's disability and desire for accommodations, cannot fail to engage the employee in the interactive process to find accommodations; then increase the disabled persons job responsibilities simply to document the employees' failures.

The opinion in *Sutton*[13], requires the employer to conduct an individualized assessment of the impairment under ADA once the employer is on notice of the disability. This prevents employers from creating "blanket exclusions" against disabled persons. The purpose of the individualized assessments is that ADA depends not on the name or diagnosis of the impairment, but rather on the effect of that impairment on the life of the individual. Relying on *Millage*, the Court stated, an agency's guidelines that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA.

[13] *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 483-484. (1999)

That approach requires courts and employers to speculate about a person's condition and would force a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on an actual condition.

In *Millage*[14], the court also stated, failure to conduct an individualized assessment on how the impairment effects their ability to perform is relevant to a discrimination claim under ADA. If a plaintiff raises a prima facie case, the defendant must then articulate a legitimate, nondiscriminatory reason for its actions. If the defendant does so, the burden shifts back to the plaintiff to demonstrate that the employer's proffered legitimate reason is merely a pretext for unlawful discrimination.

In the case at bar, DCS admits that Marble is a disabled person that qualifies under ADA and they do not deny that they did not conduct an individualized assessment. The sole defense is that (1) the accommodation of placement with the relatives was impossible due to the Court's ruling; and (2) Marble never requested any other accommodation.

This cannot be the law. As stated in the above Title I cases. To judge Marble in his uncorrected or unmitigated state runs directly counter to the individualized inquiry. This is exactly what happened to Marble. Although the

[14] *Millage v. City of Sioux City,* 258 F. Supp. 2d 976, 990-92. (W.D. Ia. April 25, 2003)

application of permanency plan requirements may not rise to intentional discrimination motivated by animus, they surely have the pretextual appearance of being established to document his failures. This has been addressed in employment cases and has been rejected by the Court as inexcusable.

There is no dispute that DCS knew of his disability, failed to assess Marble as required under 28 C.F.R. § 35.108(d). The state is required to make a "predictable assessment" to determine whether the individual is substantially limited in major life activity compared to most people in the general population, including the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; the duration of time it takes the individual to perform the major life activity, or if the individual can perform the major life activity. Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort of time required to perform a major life activity; the length of time a major life activity can be performed; or the way the impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measure, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity. 28 C.F.R. § 35.108(d)(3). The assessment is not to be based on what

outcomes an individual can achieve, but on the impairments that produce an impediment to receiving the benefits of the agency. It is assumed under these regulations that the agency will realize that some impairments inherently impose a substantial limitation on a major life activity. Upon a complete assessment, the next step identified in the C.F.R. is the identification of mitigating measures that the individual has available to them. Only after this process, can the agency consider what modifications are reasonable and necessary to receive the benefits of the agency.

In this case DCS knew of the physical limitations of Marble that could interfere with his ability to maintain employment such that he could pay child support, pay utilities, and maintain housing. The net result of his unmitigated circumstances was that his parental rights were terminated because he was unable to work consistently[15]. DCS attempts to dismiss this notion by claiming that Marble had a "plethora of jobs" and that he was employed at the time of his deposition in 2016. RE 134 PageID # 1432. Plaintiff Marble argues that this does not bar his claims against the State for failure to provide his individualized assessment and accommodations when they became engaged in his life in September 2013.

[15] The limitations of Marble included physical, mental, and medical conditions that were never fully assessed in relationship to his ability to parent his child.

The State will say the district Court based its conclusions on its factual findings that Marble did not tell DCS, i.e. Ms. Kenyon, that there was any requirement placed on him that he could not do because of his seizures, memory issues, knee problems, depression, or left eye blindness. RE 134 PageID # 1438-39. This simply does not relieve DCS of their primary obligation which was to complete the individual assessment step required by law at the commencement of their involvement the Marble. Tennessee DCS is vested with the responsibility of child safety and family reunification. The Tennessee Court have been clear that the public policy of Tennessee is to reunite the family[16].

[16] The Tennessee General Assembly has established the policy that children should not be removed from their parents' custody unless the separation is necessary for the child's welfare or in the interest of public safety, Tenn. Code Ann. § 37-1-101(a)(3) (2005), and that once children are removed, the first priority should be to reunite the family if at all possible. Because of the prominent role that the Department of Children's Services plays in the lives of so many dependent and neglected children, the Tennessee General Assembly has explicitly imposed on the Department the responsibility to make reasonable efforts to reunify children and their parents after removing the children from their parents' home. Tenn. Code Ann. § 37-1-166. The Department must memorialize its efforts in an individualized permanency plan prepared for every dependent and neglected child placed in its custody. The requirements in each permanency plan must be directed toward remedying the conditions that led to the child's removal from his or her parent's custody. Reflecting the Tennessee General Assembly's understanding that the ability of parents to rehabilitate themselves depends on the Department's assistance and support, permanency plans place obligations on the Department to help parents become better able to provide their children with a safe and stable home and with consistent and appropriate care. *In re Randall B., Jr.* 2006 Tenn. App. LEXIS 630, (Tenn. Ct. App. 2006)

In 2012, the National Council on Disability (NCD) also published guidelines on the rights of disabled parents titled ROCKING THE CRADLE. The NCD is an independent federal agency established to advise the President, Congress, and other federal agencies. NCD was statutorily created in 1978 through amendment to the Rehabilitation Act of 1973 (29 U.S.C. 780 et seq.). This publication also relies on *Olmstead*[17] as authority that the state's obligation to support parents with disabilities is "legally mandated[18]."

In 2015, the Department of Justice and the Department of Health and Human Services investigated the ADA abuses in the Department of Children and Families (DCF) in the State of Massachusetts[19]. RE 99-6. The report stated that "DCF failed to conduct an appropriate individualized analysis of Ms. Gordon and what family support services it needed to provide and accommodations it needed to make at the outset of its involvement, and for more than two years. … Among the

[17] *Olmstead v. L.C.,* 527 U.S. 581 (1999)

[18] https://www.ncd.gov/publications/2012/Sep272012 - Chapter 13.

[19] DOJ found that DCF violated Title II at "each stage of its process" by (1) denying Mother equal opportunities to participate in and benefit from its services, programs, and activities; (2) utilizing criteria and methods of administration having the effect of discriminating against the Mother on the basis of disability an defeating or substantially impairing accomplishment of the objective of its reunification program with respect to the Mother; and (3) failing to reasonably modify its policies, practices, and procedures where necessary to avoid discrimination against the Mother on the basis of her disability. As a result, for more than two years, DCF denied the Mother and the child the opportunity to be a family. 28 C.F.R. § 35.130(a), (b)(1)(i)-(ii); 28 C.F.R. § 35.130(b)(3); 28 C.F.R. § 35.130(b)(7). RE 99-6 PageID # 1076

ADA's most 'basic requirement' is that covered entities evaluate persons with disabilities on an 'individualized basis'. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001). The guidance to the Title II regulation explained in 1991 that "[s]uch an inquiry is essential if the law is to achieve its goal of protecting disable individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks." RE 99-6 PageID # 1076

The Gordon opinion also states that under Massachusetts state law, just as in Tennessee, the state agency was obligated to make reasonable efforts to maintain the family unit and to prevent the unnecessary removal of a child from his or her home. *Citing*, M.G.L.c.119§29C. There was no "pass" given to the Massachusetts agency because the Mother did not articulate how her disability impaired her right to receive the benefits of the agency. Nor should this Court allow Tennessee DCS to use this to excuse them from their affirmative obligations.

It simply cannot be the law that parents must recognize and design their own accommodations when they have become engaged with a state agency. If this District Court decision goes unaltered, it will embolden the state workers to ignore

the disabilities[20] of parents and continue to engage in a practice that amputates children from their parents.

Even through the Father cannot show that his treatment from DCS rose to such animus that he could maintain an action for intentional discrimination under *Anderson v. City of Blue Ash*, 798 F. 3d 338, 357 (6th Cir. 2015), there are material disputed facts as to the State's failure to commence its obligations under ADA when they had knowledge of his disabilities.

Plaintiff asks this Court to reverse the finding of the District Court regarding the state's failure to conduct an individualized assessment and make reasonable accommodations for Plaintiff to be able to successfully maintain a parent-child relationship.

II. Sovereign immunity is abrogated in this case, in that the parent and the child have Fourteenth Amendment procedural and substantive rights to maintain family integrity.

The District Court looked to *Babcock v. Michigan*, 812 F.3d 531, 534 (6th Cir. 2016) which acknowledged that Congress expressed an unequivocal desire to abrogate the Eleventh Amendment for violations of the ADA via its Fourteenth Amendment authority, that whether sovereign immunity is abrogated in a particular action is determined by looking to 'the nature of the ADA claim'

[20] Tenn. Code Ann. § 36-1-113(g)(9) provides that parental rights may be terminated on the grounds of the mental incompetence of a parent without a showing of willfulness.

alleged. If the plaintiff alleges conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity. *United States v. Georgia,* 546 U.S. 151, 159 (2006). The court must determine which aspects of the State's conduct violated Title II and to what extent the misconduct also violated the Fourteenth Amendment. RE 134 PageID # 1425.

The District Court found that it could not identify "violating conduct" by the state actors and therefore, could not extend itself to examine the issue of sovereign immunity.

There is no dispute that the Plaintiff's minor child was held in state's custody during the duration of the Plaintiff's involvement with the state agency. There is no dispute that the conditions of the permanency plan imposed upon the Plaintiff were prerequisites for gaining custody of his child (whom he had never harmed or neglected). The State's imposition of these conditions and terms, and Marble's inability to complete them, are the direct cause of his permanent loss of his parental rights. Therefore, should this Court find that the State agency failed to engage in an individual assessment and interactive process with Marble upon notice of disabilities, this Court must also find that Marble's Fourteenth Amendment right of privacy to parent his child are the direct result of the violating conduct, therein abrogating sovereign immunity.

It is clearly established that the constitution recognizes both a protectable procedural due process interest in parenting a child and a substantive fundamental right to raise one's child. *Michael H. v. Gerald D.*, 491 U.S. 110, 119-123 (1989) Likewise, children have a parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association. *Kia P. v. McIntyre,* 235 F. 3d 749, 759 (2nd Cir. 2000)

XI. CONCLUSION

In this case, the Plaintiff prays of this Court to find that the District Court erred in dismissing the Plaintiff's claims against the State of Tennessee Department of Children's Services for violations of his rights under the Americans with Disabilities Act. The results of this case have far reaching effects on the rights of parents who become engaged with the state agency that is vested by statute to protect children and promote the public policy of family reunification.

In Tennessee, parental rights may be terminated forever on the grounds of mental incompetence without any showing of willfulness on the part of the parent. Tenn. Code Ann. § 37-1-113(g)(8). Although this case does not rise to such a claim against the Plaintiff, the results of this case will no doubt affect how the state agency interacts with disabled parents and whether they begin to engage in more attentive individual assessments as required under 28 C.F.R. 35.101-108. For parents with disabilities, like Mr. Marble, the agency cannot fail to assess the parent for their limitations on their ability to work, or travel, or any other activity that would be necessary to complete the requirements of the permanency plan and then use the parent's inadequacies to end their parental relationship with their child.

Plaintiff asks this Court for reversal of the District Court's opinion that dismissed his ADA claims for failure to conduct an individualized assessment and

make reasonable accommodations and remand this case to the District Court for trial.

XII. CERTIFICATE OF COMPLIANCE

This brief complies with the limitations of Fed. R. App. P. 32. The brief contains less than 14,000 words having a total word count of 8,823 See Fed. R. App. P. 32 and 6th Cir. R. 32.

The brief complies with the typeface, type style, and spacing requirements of Fed. R. App. R. 32. The typeface is Times New Roman, proportionally spaced, and 14-point. The margins are one inch, pages are serially paginated, double-spaced, and footnotes appearing in the same size text.

This is the 2 day of OCTOBER 2018.

Respectfully submitted,

/s/Connie Reguli
Connie Reguli
LawCare- Family Law Center, P.C.
1646 Westgate Circle, Ste 101
Brentwood, TN 37027
615-661-0122
615-661-0197 FAX
Sup. Ct. 16867
Attorney for Plaintiff/Appellant

XIII. CERTIFICATE OF SERVICE

I, Connie Reguli, do hereby certify that a true and exact copy of the foregoing document has served on counsel through CM/ECF of which all attorneys have provided service emails on this the 2 day of OCTOBER 2018 to:

Brian A. Pierce
Assistant Attorney General
General Civil Division
PO Box 20207
Nashville, TN 37202
615 741 1481
Brian.pierce@ag.tn.gov

/s/Connie Reguli
Connie Reguli

XIV. ADDENDUM - DESIGNATION OF THE RECORD

Doc.	**Date**	**Description**	**PageID**
1	05/04/2015	Complaint	1-34
88	09/05/2016	Amended Complaint	740-796
89	09/26/2016	Answer	797-820
97	05/26/2017	D Motion for Summary Judgment	834-835
98	05/26/2017	D Memorandum in Support of SJ	836-846
98-1	05/26/2017	D Statement of undisputed material facts	847-852
	05/27/2017	D attachments – excerpts of depositions of:	
98-2		Matthew Marble	853-943
98-3		Lindsey Kenyon	944-1003
99	06/15/2017	P Response in Opposition to SJ	1004-1020
99-1	06/15/2017	P's Response to D's Statement of undisputed facts	1021-1032
99-2	06/17/2017	P's Statement of additional undisputed facts	1033-1039
99-3	06/17/2017	Affidavit of Dr. Berryman	1040-1059
99-4		Affidavit of Bobbi DuBoise	1060-1062
99-5		Affidavit of Attorney Reguli	1063-1064
99-6		Dept of Justice opinion in S. Gordon	1065-1090
99-7		Relative Placement laws	1091-1038
100	06/29/2017	D Reply to Response to Motion for SJ	1138-1143

100-1	06/29/2017	D Response to P Statement of undisputed facts	1144-1148
101	06/29/2017	D Addition Attachment to support SJ	1149-1170
127	01/11/2018	Order on consent of the parties to jurisdiction by US Magistrate Newbern	1382
128	03/20/2018	Order for parties to submit supplemental briefs	1383-1384
129	04/04/2018	P Supplemental Response in opposition	1385-1389
130	04/04/2018	D Supplemental brief in support of SJ	1390-1398
130-1	04/04/2018	D attachment	1399-1401
134	06/07/2018	Memorandum Opinion	1417-1446
135	06/07/2018	Order granting summary judgment	1447