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Case Number 68,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THERESA BAINES SMITH, and DEPAUL SMITH	:	
	:	No. 68, 2017
Plaintiffs Below, Appellants,	:	
v.	:	Court Below – Superior Court of
STATE OF DELAWARE, DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, DELAWARE DIVISION OF FAMILY SERVICES, JENNIFER RANJI, VICKY KELLY	:	the State of Delaware in and for Kent County
	:	C.A. No. K15C-11-018 JJC
Defendants Below, Appellees.	:	

AMENDED OPENING BRIEF OF PLAINTIFFS-BELOW, APPELLANTS

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

NATURE OF THE PROCEEDINGS 1

SUMMARY OF ARGUMENT 4

STATEMENT OF FACTS 5

ARGUMENT 7

I. PLAINTIFFS-BELOW WERE ENTITLED TO PURSUE THEIR CLAIM AGAINST THE DEFENDANTS-BELOW BROUGHT UNDER THE REHABILITATION ACT OF 1973 AND THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS 7

A. Questions Presented 7

B. Scope of Review 7

C. Merits of the Argument 9

1. Background on Causation Standards under Federal Civil Rights Statutes ... 10

2. The Sole Cause Language of the Rehabilitation Act 15

3. The Statute Cannot be read to Nullify Itself 18

CONCLUSION 19

EXHIBIT A – Opinion August 3, 2016 (Clark, J.)
EXHIBIT B – Order January 18, 2017 (Clark, J.)

TABLE OF CITATIONS

Cases

Alexander v. Choate,
469 U.S. 286 (1985) 9,10,15

Alexander v. Louisiana,
405 U.S. 624 (1972) 15

Burrage v. United States,
134 S. Ct. 881 (2013) 14

Carvalho-Grevious v. Delaware State University,
2017 WL 1055567 (3d Cir. Mar, 21, 2017) 14

Conrail v. Derrone,
465 U.S. 624 (1984) 18

Desert Palace, Inc. v. Costa
539 U.S. 90 (2003) 12

Dunlap v. State Farm Fire & Cas. Co.,
878 A.2d 434 (Del. 2005) 7

Gadow v. Parker,
865 A.2d 515 (Del. 2005) 7

Gross v. FBL Financial Services, Inc.,
557 U.S. 167 (2009) 12,13

Harris v. Adams,
873 F. 2d 929 (6th Cir. 1989) 17

Harrison v. Ramunno,
730 A.2d 653 (Del. 1990) 9

In re Tri-Star Pictures, Inc., Litig.,
634 A.2d 319 (Del. 1993)..... 8

Kurth v. Gonzales,
472 Supp.2d 874 (E.D.Tex. 2007)..... 17

Leckelt v. Board of Commissioners of Hospital District No. 1,
909 F. 2d 820 (5th Cir. 1990)..... 17

Lewis v. Humboldt Acquisition Group,
681 F.3d 312 (6th Cir. 2012)..... 17

McDonnell Douglas Corp. v Green,
411 U.S. 792 (1973)..... 16

McMullan v. Beran,
765 A.2d 910 (Del. 2000)..... 8

Norcross v. Sneed,
755 F.2d 113, (8th Cir. 1985)..... 17

Paroline v. United States,
134 S. Ct. 1710 (2014)..... 18

Price Waterhouse v. Hopkins,
490 U.S. at 504 (1989)..... 10,15,18

Shellburne, Inc. v. Roberts,
238 A.2d 331 (Del. 1967)..... 8

Sherman v. State,
133 A.3d 971 (Del. 2016)..... 7

Soledad v. U.S. Department of the Treasury,
304 F.3d 500 (5th Cir. 2002)..... 16,17

University of Texas Southwestern Medical Center v. Nassar,
133 S. Ct. 2517 (2013)..... 13,14

VLIW Technology, LLC v. Hewlett-Packard Co.,
840 A.2d 606, 61, 840 (Del. 2003)..... 8

Statutes

Del. Const. art. IV, §11(1)(a)..... 8
10 *Del. C.* §144..... 8

29 U.S.C. §626 *et seq.*..... 12
29 U.S.C. §794(a)..... 4,9,19
29 U.S.C. §701, et seq..... 2,4,9
42 U.S.C. §2000e-2(m)..... 11

I. NATURE OF PROCEEDINGS

This is an appeal from a final judgment of the Superior Court of Kent County, dismissing all claims asserted by the Plaintiffs against the Defendants, State of Delaware, Delaware Department of Children, Youth and their Families, and the Delaware Department of Family Services (collectively "State Defendants"). The appeal is limited to the ruling dismissing claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 *et seq.*

The action brought by the Plaintiffs alleged harassment and assault on Theresa Baines Smith by an employee of the State Defendants, Gregory Bunkley, which was facilitated by his position as an agent exercising influence and authority over the integrity of her family relationships. On November 17, 2015, Theresa Baines Smith and DePaul Smith ("the Smiths") filed a complaint in the Superior Court of the State of Delaware in and for Kent County, initially invoking only claims under state law of assault and battery, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, and loss of consortium, naming Gregory Bunkley, the State of Delaware, its Department of Services for Children, Youth and their Families, a division of DFS, and several individual state actors, as defendants (collectively, "the State").[1] On January 12,

[1] Appendix at A-7.

2016, the State filed a motion to dismiss all the claims against it, and the Smiths filed an amended complaint.[2] In the amended complaint, filed on February 16, 2016, the Smiths asserted new federal claims including, as pertinent this appeal, a claim of disability discrimination in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 *et seq.*[3] On March 7, 2016, the State filed motion to dismiss Plaintiffs' amended complaint.[4] Plaintiff's opposed the motion to dismiss, and their response in opposition to said motion was filed on May 9, 2016.[5] Oral argument on the State Defendants' motion to dismiss was held on May 13, 2016.[6]

With regard to the Rehabilitation Act claim, the State argued that the Smiths failed to state a claim upon which relief could be granted because they did not adequately allege a disability, and because they could not meet the statute's requirements that the discrimination experienced by Theresa be "solely by reason of her disability."[7] On August 3, 2016, the Superior Court issued its Opinion granting the State Defendants' Motion to Dismiss.[8] The Superior Court rejected

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[2] Appendix at A-6.

[3] Appendix at,A-8.

[4] Appendix at A-28.

[5] Appendix at A-43.

[6] Appendix at A-92.

[7] Appendix at A-33 n. 6 (citing 29 U.S.C. § 794).

[8] Exhibit A.

the former argument for the reasons argued by the Smiths, but accepted the latter, and dismissed the Smith's claim under the Rehabilitation Act, along with all other claims against the State.[9]

Thereafter, Plaintiffs pursued the claims remaining against Defendant Bunkley individually. Plaintiffs obtained a default judgment against Defendant Bunkley on October 14, 2016, and an inquisition hearing was held on January 4, 2017 to determine damages assessed against Defendant Bunkley.[10] The Superior Court issued its final order on January 18, 2017 awarding damages to Plaintiff.[11] Theresa was awarded $600,000 in compensatory damages and $200,000 in punitive damages. DePaul Smith was awarded $50,000 in compensatory and $25,000 in punitive damages. This appeal was filed on February 14, 2017.[12]

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[9] *Id.*

[10] Appendix at A-2.

[11] Appendix at A-129.

[12] *Id.* at A-132.

II. SUMMARY OF ARGUMENT

The Rehabilitation Act requires that a plaintiff's injury be experienced "solely by reason of her or his disability."[13] This concept of legal cause does not require that discriminatory animus be the only contributing factor is an event; there are no events that have but one contributing factor behind them, so such an interpretation would render the statute ineffective. In the context of a discrimination case, the requirement can only mean that the fact finder must ultimately determine that the plaintiff was treated differently from otherwise similarly situated persons only because of the disability. At the pleadings stage, it was error to conclude that the Plaintiffs in this case could not possibly establish that causation.

[13] 29 U.S.C. § 794(a).

III. STATEMENT OF FACTS

The amended complaint alleges that the Plaintiffs, Theresa Baines Smith and DePaul Smith (collectively, "the Smiths") were married. Ms. Smith has mental impairments substantially limiting her in some of her major life activities.[14] The Smiths moved to Dover in 2013 with their three-year-old, while Ms. Smith was pregnant. One of the children has Down syndrome.[15] The State's Division of Family Services (DFS) became involved with the Smiths, and Gregory Bunkley was assigned as their family crisis therapist.[16] The purpose of the position of family crisis therapist is to further government social welfare programs implemented by DFS that are funded, at least in part, by the federal government.[17]

Bunkley was conscious of Ms. Smith's mental health issues and, taking advantage of them,[18] engaged in an escalating pattern if unwelcome sexual harassment, including sexually oriented comments and jokes, separating the Smiths from each other, groping Ms. Smith with his hands[19] and, eventually, coercing her

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[14] Appendix at A-8, ¶1.

[15] Appendix at A-10, ¶13.

[16] Appendix at A-10, ¶14.

[17] Appendix at A-10, ¶12.

[18] Appendix at A-11, ¶16.

[19] Appendix at A-10-11, ¶15.

into ten to fifteen occasions of sexual relations and actions of various sorts.[20] Much of this conduct took place during the course of Bunkley's work as a crisis therapist, and through the use of a facility or automobile owned and operated by DFS.[21]

Bunkley has a history of multiple arrests and convictions for sexually motivated offenses dating back to 1993.[22]

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[20] Appendix at A-11, ¶16-17.

[21] Appendix at A-11, ¶18.

[22] Appendix A-10, ¶10.

ARGUMENT

PLAINTIFFS-BELOW WERE ENTITLED TO PURSUE THEIR CLAIM AGAINST THE DEFENDANTS-BELOW BROUGHT UNDER THE REHABILITATION ACT OF 1973 AND THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS.

A. Question Presented

Whether the sole cause requirement of Section 504 of the Rehabilitation Act of 1973 must be interpreted to mean that there be but a single contributing factor to the event giving rise to the action, as opposed to being an identifiable cause of the discrimination based on disability without which there would have been no discriminatory conduct?[23]

B. Scope of Review

The Delaware Supreme Court reviews the Superior Court's grant of a motion to dismiss de novo.[24] In a de novo review, the Court "determines whether the trial judge erred as a matter of law in formulating or applying legal precepts."[25] The facts alleged in the plaintiffs' complaint must be taken as true and all

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[23] Appendix at A-49, ¶ 12, A-102-107.

[24] *Sherman v. State*, 133 A.3d 971 (Del. 2016) (citing *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 438 (Del. 2005)).

[25] *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 438 (Del. 2005) (citing *Gadow v. Parker*, 865 A.2d 515, 518 (Del. 2005)).

inferences therefrom must be viewed in a light most favorable to the plaintiffs.[26] The Court "must determine whether it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiffs would not be entitled to relief."[27] "A trial court must not dismiss any claim pursuant to Rule 12(b)(6) unless it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts which might be proven to support the allegations in the complaint.[28]

The Delaware Constitution vests this Court with mandatory original jurisdiction to hear appeals from final judgments entered by the Superior Court in civil proceedings.[29] "A failure to appeal from an interlocutory order, judgment or decree of the . . . Superior Court shall not bar a party from making any objection to such interlocutory order, judgment or decree on appeal from the final order, judgment or decree."[30] This rule permits the withholding of an appeal from an interlocutory order until final judgment has been entered.[31] "When a civil action

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[26] *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

[27] *McMull v. Beran*, 765 A.2d 910) (Del. 2000) (citing *In re Tri-Star Pictues, Inc., Litig.*, 634 A.2d 319, 326 (Del. 1993)).

[28] *VLIW Technology, LLC*, 840 A.2d at 615.

[29] Del. Const. art. IV, § 11(1)(a); *see also Harrison v. Ramunno*, 730 A.2d 653 (Del. 1999).

[30] 10 *Del. C.* § 144.

[31] *Shellburne, Inc. v. Roberts*, 238 A.2d 331, 335 (Del. 1967).

involves multiple claims and multiple parties, a judgment regarding any claim or any party does not become final until the entry of the last judgment that resolves all claims as to all parties . . . ." [32]

C. Merits of the Argument

The Rehabilitation Act of 1973 contains specific language requiring that "solely by reason of [the plaintiff's] . . . disability."[33] The State argues, and the lower court agreed at page 28 of its opinion,[34] that this requirement was not satisfied in this case because, where the plaintiff's injuries flowed from a sexual assault, it did not logically flow that they could be solely due to discrimination based on disability. This misconstrued the meaning of the sole cause language and, especially at the procedural stage of a motion to dismiss, was error.

The passage of the Rehabilitation Act was a result of Congress' belief that discrimination against the disabled was "most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect."[35] Its House sponsor described the treatment of the disabled as one of the country's "shameful oversights, and Senate proponents also explained its purpose as to end

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[32] *Harrison*, 730 A.2d at 653-54.

[33] 29 U.S.C. § 794(a).

[34] *See* Exhibit A.

[35] *Alexander v Choate*, 469 U.S. 287, 295 (1985).

tolerance of the invisibility of the disabled within society and as a response to "previous societal neglect."[36] The interpretation of language in the Rehabilitation Act with any degree of ambiguity must proceed in light of this background.

1. Background on Causation Standards under Federal Civil Rights Statutes

An informative place to begin discussion of controversies over defining causation under the assorted federal civil rights statutes is the United States Supreme Court's decision in *Price Waterhouse v Hopkins.*[37] There, a highly fragmented Court was grappling with the standards of proof to be applied under Title VII of the 1964 Civil Rights Act, in the context of a case of alleged gender discrimination. As it may be significant to this case, Justice Brennan's lead opinion, distinguished the "because of" language of Title VII from "solely because of," pointing out that Congress had specifically rejected the work "solely" in its drafting of the statute.[38] Going a bit further from that starting point, Justice O'Connor also equated the concept of sole cause with "but for" causation, as long known in the law of torts.[39] She formulated a framework in which, where the plaintiff presented her case through direct evidence of discrimination, the burden

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[36] *Alexander*, 469 U.S. at 286.

[37] 490 U.S. 228 (1988).

[38] *Price Waterhouse*, 490 U.S. at 241, n. 2 and accompanying text.

[39] *Id.* at 264.

of proof (which included the burden of persuasion, and not just that of producing evidence) fell on the defendant to show that it would have made the same adverse decision in the absence of the unlawful discriminatory motive, in which event it would escape liability entirely.

As indicated, there was no majority opinion in *Price Waterhouse*, but if the votes were counted there was a majority in favor of all of aspects of Justice O'Connor's approach, so her opinion came to be viewed as the Court's holding. Predictably, it created more questions than it resolved. First, Congress did not like the idea that an employer could be shown to have considered a criteria that was outlawed by Title VII and be completely without liability. Included in the 1991 amendments to the statute was "subsection m,"[40] which allowed that, even if an employer proved it would have taken the same adverse action against an employee for a wholly non-discriminatory motive, it could be held responsible for non-monetary equitable relief and attorneys' fees where a plaintiff had proved that unlawful discrimination had been a motivating factor – in other words a non-determining factor – in the action.

Many of the lower federal courts limited the impact of subsection m to the direct evidence scenario that had been the premise of Justice O'Connor's

[40] 42 U.S.C. §2000e-2(m)

formulation. The Court took up this question in *Desert Palace, Inc. v. Costa*[41] where Justice Thomas wrote for a unanimous Court. Looking to the plain language of the amendment, the Court held that there was no distinction to be drawn between so-called direct evidence cases and those based on circumstantial evidence, and that all Title VII discrimination cases were subject to the motivating factor test. In the course of concluding that there was no higher burden for circumstantial evidence cases, the Court noted that, when Congress intended to require and enhanced burden of proof, it had shown its desire explicitly, with citations to other sections of Title 42 of the United States Code, where Title VII resides.[42]

A few years later, the Court took up *Gross v. FBL Financial Services, Inc.*,[43] a case alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA).[44] The ADEA had not been subject to an amendment in 1991, and did not contain a provision similar to subsection m. Applying principles of statutory construction, the Court held that a plaintiff always had the burden of proving the case under the ADEA, and that included that discrimination was a

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[41] 539 U.S. 90 (2003)

[42] *Desert Palace*, 539 U.S. at 99.

[43] 557 U.S. 167 (2009)

[44] 29 U.S.C. § 626 *et seq.*

determining – not a motivating – factor in the adverse decision at issue. In the course of doing so, the Court referred to the required determinative reason as "the reason," in the singular, for the action as synonymous with a reason that, in combination with others, was determinative.[45] The causation test required under the ADEA was, therefore, "but for" causation.[46] In rejecting the notion that some heightened standard of proof, more onerous than the but for standard that is well known to the common law, the Court pointed out that Congress had demonstrated its ability to clearly require such things in other provisions of Title 29, citing 29 U.S.C. §722(a)(2)(A) which requires clear and convincing evidence. The Court did not, however, mention the Rehabilitation Act, also resident in Title 29.

A few years yet further on, the Supreme Court decided *University of Texas Southwestern Medical Center v. Nassar.*[47] The majority of the Court held that the retaliation provisions of Title VII were subject to the but for standard of causation because subsection m, by its language, did not amend the separate provision making retaliation unlawful. Significant to the current discussion, the linguistic

[45] *Gross*, 557 U.S. at 176.

[46] *Id.*

[47] 133 S. Ct. 2517 (2013).

equation of but for causation and sole cause appeared again in Justice Ginsburg's dissenting opinion.[48]

So, one thing that becomes apparent in the progress of discussion from the highest authority interpreting the federal statutes is that the language "sole cause" is often used interchangeably with "but for" cause. The federal courts continue to mix the language of singular causation with the equally interchangeable determining factor and but for cause articulations. [49]

Discrimination cases are not the only ones that generate discussion about causation. In 2013, for example, *Burrage v United States*,[50] addressed the prosecution's contention in a criminal matter that the statutory language "results from" contemplated a motivating factor degree of causation instead of "but for" causation. The Supreme Court, per Justice Scalia, rejected this contention, and confirmed that but for causation is "one of the traditional background principles 'against which Congress legislate[s]."[51]

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[48] Nassar, 133 S. Ct. at 2538 (Ginsburg, J., dissenting)

[49] *E.g, Carvalho-Grevious v. Delaware State University,* 2017 U.S. App. LEXIS 4992 *15-16 (3d Cir. March 21, 2017).

[50] 134 S. Ct. 881 (2013)

[51] *Burrage*, 134 S. Ct. at 889.

2. The Sole Cause Language of the Rehabilitation Act

Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. §794. There was not a lot of legislative debate about Section 504,[52] and none about the meaning of the word "solely." As previously mentioned, Congress deliberately declined to use that modifier when adopting Title VII in 1964. Why, then, did it not similarly decline in 1973, when the Rehabilitation Act was first enacted? Examination of some more United States Supreme Court cases is revealing. Just the previous year, in *Alexander v. Louisiana*,[53] the Court had adopted a framework of shifting burdens, identical to that later applied to some Title VII cases by *Price Waterhouse*, for equal protection challenges to the racial composition of grand juries.[54] Just four months before the enactment of the Rehabilitation Act, the Court created a different framework of shifting burdens of

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[52] *Alexander v. Choate*, 469 U.S. at 296 n. 13.

[53] 405 U.S. 625 (1972).

[54] In fact, this case was relied upon by Justice O'Connor in her adoption of the framework. *Price Waterhouse*, 490 U.S. at 267.

production for application in intentional discrimination cases under Title VII, which required employers to move forward with evidence before a plaintiff's case was closed.[55]

The law relating to discrimination cases was rapidly developing, in a number of different contexts, during the years immediately before the Rehabilitation Acts enactment. The nature of that development suggested that a holding, similar to *Alexander v Louisiana* (or the later *Price Waterhouse v Hopkins*), which allowed liability for something less than a determining cause of adverse action, might be contemplated for disability discrimination claims under the new statute as well. For policy reasons related to the different nature of disability discrimination – or perhaps merely because of legislative compromise – Congress made clear that there would be no liability for something that would have happened in the absence of an unlawful cause. This would serve to forestall *Price Waterhouse* and *Burrage* style arguments for a lesser standard such as motivating factor.

Authority relied upon by the court below to support dismissal do not, as it turns out, conflict with this argument. *Soledad v. U.S. Department of the Treasury*,[56] a Fifth Circuit case, discussed the sole cause language in the context of distinguishing it from a *Price Waterhouse* style "motivating factor" jury instruction

[55] *McDonnell Douglas Corp. v Green,* 411 U.S. 792 (1973).

[56] 304 F.3d 500 (5th Cir. 2002)

that had been erroneously given at trial.[57] *Kurth v. Gonzales*[58] followed *Soledad*, but also in rejecting a "mixed motives" approach to causation.[59]

In the last of the three cases cited by the lower court, *Lewis v. Humboldt Acquisition Group*, [60] the Sixth Circuit refused to add the word "solely" to jury instructions for a claim under the Americans with Disabilities Act, and discussed the Rehabilitation Act only in dealing with issues under that more recent federal statute.[61]

Other federal cases have noted the sole cause requirement of the Rehabilitation Act as distinct from the causation standard under Title VII or other anti-discrimination statutes. This has frequently been in the context of distinguishing and rejecting the motivating factor test.[62] A question remains, however, as to just what the significance of the additional word "solely" may be.

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[57] *Soledad*, 304 F.3d at 503-05.

[58] 472 F.Supp.2d 874 (E.D.Tex. 2007)

[59] *Kurth*, 472 F.Supp.2d at 879.

[60] 681 F.3d 312 (6th Cir. 2012)

[61] *Lewis*, 681 F.2d at 315.

[62] *Norcross v. Sneed,* 755 F.2d 113, 117 n.5 (8th Cir. 1985); *see also, Leckelt v. Board of Commissioners of Hospital District No.1,* 909 F.2d 820, 826-27 (5th Cir. 1990); *Harris v. Adams*, 873 F.2d 929, 932 (6th Cir. 1989)(all cited in *Soledad).*

3. The Statute Cannot be read to Nullify Itself

There is no question but that Congress intended Section 504 of the Rehabilitation Act to create a private cause of action. It was amended for the very purpose of describing procedures for enforcement.[63] The State believes that this remedy is available, however, only to a plaintiff who can prove that his or her disability was the one and only contributing factor in the injury that the claim is to correct.

No such plaintiff can exist. As the United States Supreme Court recently said, self-evidently, in *Paroline v. United States,* "[e]very event has many causes."[64] There has been no event since the beginning of this universe, except perhaps that beginning itself, that had but one thing contributing to its happening. The State's position fundamentally misunderstands the nature of discrimination.

"To discriminate is to make a distinction, to make a difference in treatment or favor."[65] The inquiry is not, therefore, as to what caused the event, but rather as to what caused the difference in treatment. As applied to this case, Bunkley's unlawful conduct may well have been partly motivated by something other than the plaintiff's disability, such as her gender, for example. The inquiry cannot end

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[63] *Conrail v. Derrone*, 465 U.S. 624, 632-33 (1984).

[64] 134 S. Ct. 1710, 1719 (2014).

[65] *Price Waterhouse v Hopkins*, 490 U.S. at 243 (Brennan, J).

there, however, for the question remains why he did not behave in the same way toward every other female who came within the reach of his authority as a caseworker. The complaint allows for the likelihood that she was singled out from among others because of her disability. It is very likely that her disability, and the vulnerability resulting therefrom, is the sole reason she was selected for Bunkley's unwanted attention. Taking the allegations of the amended complaint as true, it is certainly not possible to conclude that she was not. Dismissal at the pleadings stage was, accordingly, improper.

CONCLUSION

For the foregoing reasons, Appellants, Plaintiffs-Below, the Smiths respectfully request this Honorable Court reverse the lower court's decision granting the State's Motion to Dismiss upon the claim for violations under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 and remand this case for further proceedings.

Respectfully submitted,

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