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Case Number 68,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THERESA BAINES SMITH and DEPAUL SMITH, Plaintiffs Below, Appellants, v. GREGORY BUNKLEY, STATE OF DELAWARE, a governmental Entity, DELAWARE DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, an agency of the State of Delaware, DELAWARE DIVISION OF FAMILY SERVICES, an agency of the State of Delaware, JENNIFER RANJI, in her official capacity, and VICKY KELLY, in her official capacity, Defendants Below, Appellees.	)	No. 68,2017

APPELLEES' ANSWERING BRIEF

DEPARTMENT OF JUSTICE
STATE OF DELAWARE

/s/ Ryan P. Connell
Ryan P. Connell, ID 5423
Deputy Attorney General
Department of Justice
820 N. French St., 6th Fl.
Wilmington, DE 19801
(302) 577-8400
Attorney for Defendants Below, Appellees

Dated: May 5, 2017

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NATURE OF THE PROCEEDINGS

On November 17, 2015, Plaintiffs Theresa Baines Smith and DePaul Smith filed an action in Superior Court making a number of state tort law claims related to the criminal actions of former Department of Services for Children, Youth and Their Families ("DSCYF") employee Gregory Bunkley ("Bunkley"). In addition to Bunkley, Plaintiffs named DSCYF (and it's Division of Families Services ("DFS")), former DSCYF Secretary Jennifer Ranji (in her official capacity), and DFS Director Vicky Kelly (also in her official capacity)(collectively "State Defendants"). The claims against the State Defendants centered on the idea that they somehow wrongfully hired Bunkley and/or deficiently supervised him.

The State Defendants moved to dismiss the Complaint on January 12, 2016, as Plaintiffs' state law claims were all clearly barred by sovereign immunity. In response to that motion, Plaintiffs filed an Amended Complaint on February 16, 2016. Appendix at A-8. The Amended Complaint rehashed the same state law claims, but also raised federal constitutional claims, federal disability discrimination claims, and claim pursuant to the federal Child Abuse Prevention and Treatment Act ("CAPTA").

State Defendants again moved for dismissal on March 7, 2016. Appendix at A-29. State Defendants re-asserted sovereign immunity defense for the state law claims and also asserted Eleventh Amendment sovereign immunity for a number of

the federal claims. State Defendants also argued that Plaintiff did not state a claim for disability discrimination and that CAPTA does not provide for a private right of action.[1] Plaintiff filed a six-page opposition to the State Defendants' Motion to Dismiss the Amended Complaint nearly two months later on May 4, 2016. In Plaintiff's response, they devote one paragraph to the idea that solely does not really mean solely. Appendix at A-49. Plaintiffs' written papers cite no legal authority for this idea.

On May 13, 2016, the Motion to Dismiss was heard. At the hearing, Plaintiffs' counsel all but admitted that this was a fishing expedition aimed at looking for a cause of action that would stick. Appendix at A-107 (stating "I'm making no secret about this--this is a case where we're pushing as hard as we can to find a defendant other than the possibly penurious Gregory Bunkley.") After twisting about on the state law claims, Plaintiffs essentially conceded defeat, leaving primarily a Rehabilitation Act claim[2] and a CAPTA claim. With respect the Rehabilitation Act

[1] State Defendants' primary argument was that Plaintiff did not state a claim for disability discrimination under either the ADA or the Rehabilitation Act. However, State Defendants' did note that this was especially true under the plain language of the Rehabilitation Act which precludes exclusion from programs "solely by reason of his or her disability." A-33 FN 6.

[2] Plaintiffs' never pursued an argument that they might have an ADA claim that withstands the Eleventh Amendment. This is interesting given the fact that they now urge the Court to adopt a "but for" test used in Title VII and ADA employment cases.

claim, Plaintiffs' counsel again advanced the argument that solely does not mean what it says. Again he cited no authority for that idea. Appendix at A-103-104.

Following argument on the Rehabilitation Act, Plaintiffs' counsel moved on to discuss the CAPTA claim. Appendix at A-107. During argument on CAPTA, Plaintiffs' counsel indicated that additional briefing was necessary to fully develop that argument. *See* Appendix at A-109. Defendants opposed the request for additional briefing on the CAPTA issue. Appendix at A-113. Over the Defendants' objection, the Court granted Plaintiffs' requests "to supplement the record with regard to the CAPTA issue." Appendix at A-117. Plaintiffs' counsel requested an additional 15 pages to discuss the CAPTA issue and that request was granted by the Court. Appendix at A-118. On May 27, 2016, Plaintiffs filed a supplemental brief in support of their CAPTA claim.

On April 5, 2017, Plaintiffs' filed their opening appellate brief. Despite the additional level of briefing that was granted on the CAPTA issue below, Plaintiffs make no CAPTA argument on appeal. Despite citing no case law for this argument below, Plaintiffs' now devote a nineteen page brief to the argument that the term "solely" in the Rehabilitation Act need not be narrowly construed.

SUMMARY OF THE ARGUMENT

I. **Denied** that the Superior Court erred in granting the Defendants' Motion to Dismiss Plaintiffs' Rehabilitation Act Claim. The plain language of the statute requires a Plaintiff to plead and show that denial of services was predicated *solely* on the basis of disability. While this makes Rehabilitation Act claims harder to establish than other civil rights claims, it does not nullify the statute. Lastly, regardless of the causation standard applied, the dismissal of the Rehabilitation Act claim is appropriate because there is no pleading or suggestion that any agency employees were aware of Mr. Bunkley's misconduct and failed to take action.

STATEMENT OF FACTS

Plaintiff Theresa Baines Smith is an adult female with an unspecified mental impairment that purportedly substantially limits one or more of her major life activities. Appendix at A-8. Although it is not explicitly pleaded in the Amended Complaint, it is the Defendants' understanding that Co-Plaintiff DePaul Smith is her spouse. In November 2013, Plaintiffs moved to Dover. Around that time, DSCYF employee Gregory Bunkley was assigned to their family as a Family Crisis Therapist. Appendix at A-10.

According to Plaintiffs' characterization, "Bunkley has a history of multiple arrests and convictions for sexually motivated offenses dating back to at least 1993." In support of that statement, Plaintiffs cite to a criminal history report showing that Bunkley plead guilty to Unlawful Sexual Contact, Third Degree in 1993.[3] Appendix at A-54. They also provide documentation that he pleaded guilty to Offensive Touching, also a misdemeanor, in 2013. Appendix at A-69.

After being assigned to the Smith family, Bunkley engaged in an escalating pattern of sexual harassment direct toward Ms. Smith. Appendix at A-10-11. Eventually, Bunkley engaged in various sex acts with Ms. Smith. Appendix at A-11. This occurred approximately 1-15 times. Appendix at A-11. In connection with these activities, Bunkley was arrested, charged and ultimately convicted of Official

[3] This offense is codified at 11 Del. Code § 767 and is classified as a misdemeanor.

Misconduct. Appendix at A-69. There are no allegations that Plaintiffs reported this to anyone at DSCYF. Moreover, Plaintiffs do not plead that anyone at DSCYF had knowledge of these acts and failed to act on that knowledge.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DISMISSED PLAINTIFFS' REHABILITATION ACT CLAIM.

Question Presented

Whether the Superior Court was correct in ruling that Plaintiff's Rehabilitation Act claim failed to state a claim for relief?

Standard and Scope of Review

This Court reviews *de novo* the Superior Court's ruling on a motion to dismiss to "determine whether the trial judge erred as a matter of law in formulating or applying legal precepts." *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (quoting *Clinton v. Enterprise Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)). When deciding a motion to dismiss for failure to state a claim upon which relief may be granted, the Court must accept all well pleaded allegations as true. If a Plaintiff may recover under any conceivable set of circumstances susceptible of proof under the complaint, the motion must be denied. *Spence v. Funk,* 396 A.2d 967, 968 (Del. 1978). When considering the pleadings, the Court need not accept conclusory allegations unsupported by specific facts or draw unreasonable inferences. *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (quoting *Clinton v. Enterprise Rent–A–Car Co.,* 977 A.2d 892, 895 (Del.2009)). ("[T]he Court does not 'accept conclusory allegations unsupported by specific facts or to draw unreasonable inferences in favor of the non-moving party.'"); *see also*

Nemec v. Shrader, 991 A.2d 695, 704 (Del. 2010); *Gantler v. Stephens*, 965 A.2d 695, 704 (Del. 2009); *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008); *In re Gen. Motors (Hughes) S'holder Litig*., 897 A.2d 162, 168 (Del. 2006); *Solomon v. Pathe Commc'ns Corp*., 672 A.2d 35, 38 (Del. 1996); and *Winshall v. Viacom*, 55 A.3d 629, 635 n.23 (Del. Ch. 2011).

When it comes to statutory construction, Delaware's rules are not complex. First, "[a] court must first determine whether or not the statute is ambiguous." *Insurance Comm'r of State of Delaware v. Sun Life Assur. Co. of Canada (U.S.)*, 21 A. 3d 15, 20 (Del. 2011). If the statute is found to be unambiguous, "the plain meaning of the statutory language controls." *Id*. "The fact that the parties disagree about the meaning of the statute does not create ambiguity." *Id.* quoting *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1151 (Del. 2010).

Merits of Argument

A. Plaintiffs' Argument Was Not Fairly Presented or Developed Below

"Under Supreme Court Rule 8 and general appellate practice, this Court may not consider questions on appeal unless they were first fairly presented to the trial court for consideration." *Russell v. State*, 5 A.3d 622, 627 (Del. 2010) *citing* Del. Sup.Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.1986).

In this case, Plaintiffs presented no serious argument to the Superior Court from which the Court could have drawn a different conclusion about the meaning of

Rehabilitation Act. Plaintiffs' counsel did argue that "[t]here are very few things on Earth that literally have just one cause." However, he provided no legal authority as the basis for that argument. Despite requesting additional briefing to develop CAPTA arguments, Plaintiffs did not request additional briefing to develop a causation argument that cuts against the plain language of the statute. Now on appeal, Plaintiffs' for the first time seek to engage in an analysis of the statutory meaning of the Rehabilitation Act. Plaintiffs had an ample opportunity to develop and present these arguments below but instead chose to focus their attention on other arguments. They should not be allowed to make novel statutory construction arguments on appeal that were undeveloped, at best, in the Court below. Accordingly, Defendants respectfully request the decision of the Superior Court be affirmed.

B. The Superior Court Correctly Held That Plaintiff Failed to Conceivably Plead a Rehabilitation Act Claim Based on the Sole Cause Requirement[4]

The Rehabilitation Act states "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 (emphasis added). Despite not developing this argument below, Plaintiffs now ask this Court to construe the meaning of "solely" differently than it has ever been construed in the forty-five year history of this federal statute. Defendants remain unclear exactly what standard Plaintiff wishes the Court to apply, but it seems that they want the Court to examine whether disability was a "but for" cause as opposed to the sole motivation for a discriminatory act by an agency.[5]

[4] Analysis of causation in this matter is complicated by the fact that Plaintiffs do not allege that the Department itself actually discriminated against Plaintiffs or that the Department had any actual knowledge of Mr. Bunkley's behavior and failed to take corrective action. As Defendants argued in their supplemental CAPTA briefing, liability for statutes predicated on the spending clause, like CAPTA and the Rehabilitation Act, require a showing that the agency, at a minimum, acted with deliberate indifference. In this case, Plaintiffs have failed to conceivably plead deliberate indifference to the activities of Mr. Bunkley. For this alternative reason, dismissal of the Rehabilitation Act claim was appropriate.

[5] At oral argument, Plaintiff's counsel argued that the language of the Rehabilitation Act serves to distinguish it "from the motivating factor test that applies under some other federal civil rights statutes." Counsel did not suggest a test at the trial court

As no Rehabilitation Act cases support this argument, Plaintiffs engage in a discussion of other civil rights statutes.[6] *See* Op. Br. 10. This discussion is interesting as it mentions that Congress *amended* the ADA in 1991 to include unintentional, disparate impact-type claims. Op. Br. 11. Plaintiff's discussion of other civil rights statutes is somewhat perplexing in that none of the other statutes contain the words "solely." And that's precisely the point: the Rehabilitation Act is worded differently than other statutes, including the ADA.[7] If Congress wants to expand liability under the Rehabilitation Act, they have the ability to do so. But that is a question for Congress, not for the Delaware Supreme Court.

Plaintiffs' argument that the language of the statute is self-nullifying is off base in that it assumes that disability is never the sole reason for discrimination. This is a strange argument because traditionally the disabled have commonly been discriminated against solely on the basis of their disability. For instance, an employer may not hire a blind employee because they do not want to provide the

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level. Now, for the first time on appeal, Plaintiffs seem to suggest that "solely" should be construed to mean "but for."

[6] Plaintiffs engaged in a similar strategy in arguing in favor of their CAPTA claims in supplemental briefing below. Both of their arguments about CAPTA providing a private cause of action and their argument that the Rehabilitation Act claim can be predicated on some sort of mixed motive discrimination cut against the clear weight of legal authority. In both arguments, Plaintiffs attempt to distract from that by discussing other, unrelated statutory provisions.

[7] *See also* Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219, 220 (2002) (arguing that Congress meant for section 504 of the Rehabilitation Act to act as a "floor" in determining the meaning of the ADA.)

necessary software to accommodate that employee's needs. That is discrimination solely on the basis of disability and a Rehabilitation Act claim could be sustained. If a public transit entity refuses to serve people in wheelchairs because it does not want to put lifts or ramps on buses that is discrimination solely on the basis of disability and a Rehabilitation Act claim could be sustained. Of course, this loops back to the biggest problem with Plaintiff's Rehabilitation Act claim: the rogue acts of an employee that are unbeknownst to agency management, do not give rise to an actionable Rehabilitation Act claim.

The language of the Rehabilitation Act is clear: a person discriminated against "*solely by reason of her or his disability*" can bring suit. No case law in the forty five year history of this statute has found that language to equate to a "but for" causation standard. The language in clear. If it was truly ambiguous, one might expect that this issue would have been raised before. Not only is it unambiguous, but it does not lead to the absurd results that Plaintiffs contend. People with disabilities can be discriminated against solely on the basis of their disabilities and historically have been. Without a doubt, it is harder for a plaintiff to prove a Rehabilitation Act case using this standard than it is to prove a discrimination case with a more liberalized standard, but it is not impossible. Moreover, as Plaintiffs note, Congress has at times amended statutes, like the ADA, to permit mixed motive causes of action. But that is not the case with Rehabilitation Act. Thus, the Superior

Court correctly construed the statutory language and dismissed Plaintiffs' Amended Complaint. Accordingly, Defendants respectfully ask this Court to affirm the dismissal.

C. Regardless of Whether a "Sole Cause" or "But For" Standard Is Utilized, Plaintiffs Have Not Pleaded a Conceivable Rehabilitation Act Claim

As the Defendants argued in their supplemental briefing on CAPTA, in cases where liability can be imposed on entities through the spending clause, entities are not strictly liable for harms. *See also* A-100. The Supreme Court has held that liability can be imposed "only where the funding recipient acts with deliberate indifference to *known acts of harassment* in its programs or activities." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added). In this case, there is no allegation that anyone knew that Mr. Bunkley was behaving inappropriately. In fact, Plaintiff's counsel stated at argument that "[w]e have not alleged that there was actual knowledge." A-106. Having failed to plead that any official failed to act in the face of known acts of harassment, Plaintiffs have failed to state a conceivable, cognizable claim for relief. Absent actual knowledge on the part of agency management, Plaintiffs' cannot sustain their Rehabilitation Act claim. For this independent reason, Defendants ask this Court to sustain the Superior Court dismissal of Plaintiffs' Rehabilitation Act claim.

CONCLUSION

In this case, the Plaintiffs failed to properly present and develop the novel legal argument that a Rehabilitation Act claim can be based on some sort of mixed motive theory or something less than sole cause. Moreover, there is no authority that supports their argument that a more relaxed standard be applied. Lastly, regardless of the causation standard, a Rehabilitation Act claim must involve actual knowledge on the part of agency management, which Plaintiffs have not pleaded. For these reasons, the Defendants respectfully request that the dismissal of this case be affirmed.

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/s/ Ryan P. Connell
Ryan P. Connell (#5423)
Deputy Attorney General
Carvel State Office Building
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8400
Attorney for Defendants Below, Appellees

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