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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.	:	

REPLY BRIEF OF PLAINTIFFS-BELOW, APPELLANTS

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INTRODUCTION

In their answering brief, the Defendants-Below, Appellees (hereinafter referred to collectively as "State Defendants") make three arguments: (1) that Plaintiffs failed to preserve the Rehabilitation Act issue for appeal by inadequately alerting the trial court to its nature;[1] (2) that Plaintiffs were wrong in their position on the substantive meaning of the Rehabilitation Act's causation language;[2] and (3) that, even if Plaintiffs were right about the latter, their case would founder because they must show that Gregory Bunkley's supervisors were deliberately indifferent to the likelihood that their subordinate would act as he did.[3] The State Defendants' arguments must be rejected in all three respects.

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[1] Defendants-Below, Appellees' Answering Brief ("Ans. Br.") at p. 8 – 10.

[2] Ans. Br. at p. 10 – 13.

[3] Ans. Br. at p. 13 – 14.

ARGUMENT

A. The Issue was Preserved for Appeal.

Delaware Supreme Court Rule 8, a rule of appellate procedure entitled "Questions which may be raised on appeal," requires one who seeks to challenge the rulings of a trial court on appeal to have first submitted the issue to the trial court for ruling.[4] It does not, however, require that the issue be submitted to the trial court with the same degree of thoroughness as it may be later developed. All that is required is that the trial court be alerted to the issue, including that it is a matter of dispute, and have the opportunity for consideration before ruling. Numerous decisions from this Honorable Court have confirmed this interpretation of the rule.

In *Parisi v. State*,[5] the Court held an appellate issue to be preserved because "[a]lthough Parisi did not specifically articulate his state of mind argument to the Superior Court, he did argue that the State failed to present evidence of each element of the crime." Similarly, the case of *North River Ins. Co. v. Mine Safety Appliances Co.*[6] held against a waiver where, although North River had primarily

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[4] Del. Sup. Ct. R. 8.

[5] 128 A. 3d 634, *2 (Del. 2015).

[6] 105 A.3d 369 (Del. 2014).

focused in the lower court on an injunction issue, it did "point out" the issue that was the subject of the appeal.[7]

Moreover, the State Defendants' suggestion that Plaintiffs did little more than mention the issue is misperceived. In fact, they developed each of the components of their analysis in oral argument, pointing out that those courts that have discussed the Rehabilitation Act's troublesome language have tended to be doing so when distinguishing a "motivating factor" standard under other civil rights laws;[8] that sole cause could be read to make some sense "in the context of a discrimination case" only if their analysis were accepted;[9] and that vicarious liability would attach to the State Defendants according to a "much more relaxed test" than deliberate indifference, even if that standard needed to be met as to the

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[7] *North River*, 105 A.3d at 382-83 ("Although North River primarily focused in the proceedings below on seeking to enjoin the West Virginia Actions, it did point out that MSA had settled 'hundreds' of cases without assigning its rights, and that the first assignment occurred after the Delaware Superior Court kept the stay in effect as to North River in March 2012. We are satisfied that the broader issue of the utility of future assignments was sufficiently raised . . . ."); *see also, Sears Roebuck & Co. v. Medcap*, 893 A.2d 542, 547 n. 4 (Del. 2006).

[8] Appendix at A-103.

[9] Appendix at A-103-04.

person most directly engaging in discriminatory actions.[10] Applying Rule 8 as it has been interpreted in *Parisi* and *North River* leads ineluctably to consideration of the issue on the merits.

B. Discrimination Solely because of Disability does not mean Other Factors have not Contributed to the Plaintiffs Being in a Position to be the Subject of the Discrimination.

The State Defendants' version of the Rehabilitation Act, requiring that there be only one motivating event for the result in question, would effectively render the statute a chimera. One of the State Defendants' defenses for this interpretation is the assertion that Plaintiffs' counsel's claim that "there are very few things on Earth that literally have just one cause,"[11] is merely his *ipse dixit.* It is not. The Supreme Court of the United States made the point, with even more force, in *Paroline v. United States,* writing: "**Every** event has many causes . . . ."[12]

Yet another illustration of the intended meaning of the sole cause language in the federal system came not long ago, in *Quigg v. Thomas County School District,*[13] where the Eleventh Circuit Court of Appeals spoke of "single motive," cases, in the context of distinguishing them from the "mixed motive" or

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[10] Appendix at A-105.

[11] Appendix at A-103; Ans. Br. at p. 9.

[12] 134 S.Ct. 1710, 1719 (2014)(emphasis added).

[13] 814 F.3d 1227 (11th Cir. 2016).

"motivating factor" case allowed under Title VII. The court wrote "single-motive claims – which are also known as 'pretext' claims – require a showing that bias was the true reason for the adverse action."[14] One who experiences adverse action due to disability discrimination which is the "single motive" therefore must surely satisfy the Rehabilitation Act's requirement that that injury be "solely by reason of" disability. The Eleventh Circuit's application of that concept to a "pretext" case demonstrates that it may not have the expansive and unrealistic meaning the State Defendants desire here.

As the Eleventh Circuit noted,[15] the "pretext" claim derives from the U.S. Supreme Court's decision in *McDonnell Douglas Corp. v. Green.*[16] Under *McDonnell Douglas's* framework of burden shifting, a plaintiff first presents evidence of a *prima facie* case of discrimination, triggering a burden on the employer (in an employment case) to articulate a legitimate, non-discriminatory

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[14] *Quigg*, 814 F.3d at 1235 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 251-53, 101 S.Ct. 1089, 1092-93 (1981)).

[15] *Quigg*, 814 F.3d at 1232.

[16] 411 U.S. 792 (1973).

explanation for its actions, which in turn offers the plaintiff to show that the explanation thus advanced is a pretext.[17]

Significantly to the current issue, this pretext – or single motive – model does not require that there be only one cause for the result. In fact, the plaintiff in *McDonnell Douglas* offers a perfect illustration. He had engaged in a form of collective action, along with other employees, against his employer.[18] This particular action even resulted in a plea of guilty to a crime by the plaintiff,[19] so the employer was the victim of his crime. These unlawful actions were clearly a part of the reason for the adverse action against him. He was nevertheless entitled to proceed with his case in an effort to prove that his race made a difference in the decision to discipline him, or in the decision as to the severity of his discipline. In short, the "single motive" framework looks to determine if prohibited discrimination explains the difference in treatment between one person or group from among others, although there may be other factors distinguishing them all from the greater mass of humanity.

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[17] *McDonnell Douglas*, 411 U.S. at 802-805; *Quigg,* 814 F.3d at 1232 n.1.

[18] *McDonnell Douglas*, 411 U.S. at 794-95

[19] *Id.* at 795

The *McDonnell Douglas* framework of analysis is well established as applicable to cases under Section 504 of the Rehabilitation Act.[20] The case of *Soledad v. United States*[21] is perhaps the most commonly cited authority for arguments such as that made by the State Defendants in this case, but provides an excellent example for how the argument does not really go as far as the State Defendants want. In *Soledad*, the plaintiff did not allege only violations of the Rehabilitation Act; rather, he alleged claims of retaliation for protected conduct in opposition to sexual harassment and national origin discrimination under Title VII, as well.[22] A jury had returned a verdict in his favor, but the trial court had granted a post-trial motion for judgment as a matter of law. The Court of Appeals reversed, not because of the obviously mixed motives nature for any hostility by management toward the plaintiff, but because the trial court had given a "motivating factor" instruction to the jury.[23] The decision whether the evidence

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[20] *Jones v. Potter*, 488 F.3d 397, 403-04 (6th Cir. 2007); *Dyrek v. Garvey*, 334 F.3d 590, 598 (7th Cir. 2003); *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987).

[21] 304 F.3d 500 (5th Cir. 2002).

[22] *Soledad*, 304 F.3d at 502.

[23] *Id.* at 503-504.

allowed a finding under the proper standard of liability was left to the jury, with new instructions, on remand.[24]

There were many events that contributed to the Plaintiffs' eventual arrival at a position to assert this claim. As to Plaintiff Theresa Baines-Smith, being born female may have been one such fact. Gregory Bunkley's prurient interest has, as far as the evidence reveals, been restricted to adult females. Having children in need of services from the State was another contributing event. These underlying facts placed the Smiths within a group of people, smaller than the mass of humanity that became acquainted with Mr. Bunkley. Plaintiffs seek to prove that Mrs. Smith was singled out from among this group because her mental disabilities rendered her vulnerable to his abuse. There is nothing in her complaint to suggest that she cannot prove it, and it was inappropriate to dismiss her claim.

C. The State Defendants may be Held Liable for the Acts of their Agent.

As the State Defendants observe, the standard of liability for a violation of Section 504 of the Rehabilitation Act may be deliberate indifference to the rights of the victim.[25] Plaintiffs, however, do not anticipate a lot of difficulty in proving

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[24] *Id.* at 505-506.

[25] *See, Ans. Br.* at 13; *see also S.H. v. Lower Merion School Dist.*, 729 F.3d 248 (3d Cir. 2013).

that Mr. Bunkley's actions met that standard and, since he is already criminally convicted for them, they could hardly have their case dismissed on the pleadings for an anticipated inability to meet this standard of proof. Plaintiffs cannot, however, pursue a claim against Mr. Bunkley, who is not the recipient of federal funds under the statute.[26] His deliberate indifference satisfies the degree of fault element of the claim; liability attaches to his principal under a different standard.

When an agent of the State acts with deliberate indifference under the Rehabilitation Act, his principal is responsible under traditional agency principals, including *respondeat superior*.[27] The record supports the allegation that Mr. Bunkley had, as of the time of his interactions with Mrs. Smith, been previously arrested for sexually oriented offenses on multiple occasions.[28] This record began even before he was hired by the State. Accordingly, at the motion to dismiss stage, it is inappropriate to dismiss her claim.

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[26] *Grzan v. Charter Hosp. of Nw. Indiana*, 104 F.3d 116 (7th Cir. 1997); *Penney v. Town of Middleton*, 888 F.Supp. 332 (D.N.J. 1994).

[27] *Delano-Pyle v. Victoria County*, 302 F.3d 567, 574-75 (5th Cir. 2002); *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001); *Rosen v. Montgomery County*, 121 F.3d 154, 157 n. 3 (4th Cir. 1997).

[28] Appendix at A-54, 63-64.

CONCLUSION

WHEREFORE for the reasons set forth in this Reply Brief and Appellants' Opening Brief, Plaintiffs-Below, Appellants, the Smiths respectfully request this Honorable Court reverse the lower court's decision granting the State Defendants' 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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