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May 05 2023

SC Court of Appeals

THE STATE of SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHAPTER COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
Brian M. Gibbons, Circuit Court Judge
J. Mark Hayes, II, Circuit Court Judge

Case No. 2018—CP—12---00117
2018---AP—12—00074

Appellate Case Nos. 2022-001312 and 2022-001390

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is Appellant,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Insurance
Company, Interinsurance Exchange of the Automobile Club, John
Ammendola, Trustgard Insurance Company, Blackwell, SC Department of
Public Safety, Chevrolet, GMC, Unknown John Does,

Respondents.

TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA) REASONABLE
ACCOMMODATION REQUEST to ACCEPT APPELLANT'S STATUS UPDATE OF
TRANSCRIPT and MOTION FOR EXTENSION OF TIME TO FILE BRIEF and
AMENDED RULE 221 SCACR AND RULE 260 SCACR PETITION FOR REHEARING
AND REINSTATEMENT and REPLY to
NATIONWIDE INSURANCE COMPANY AND JOSEPH TIRBOVICH'S RETURN TO
APPELLANT'S PETITION FOR REINSTATEMENT
as TIMELY FILED

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The Appellant Heidi Gersten (hereinafter “GERSTEN”) in the above-captioned case, hereby requests this Court, pursuant of/to Title II of the Americans with Disabilities Act Reasonable Accommodation Request, and seeks a grant accepting her status update of transcript as timely filed, as requested of her by letter of this Court, first on March 30, 2023, (Appendix A) and again by Order on April 18, 2023 (Appendix B), and for an order accepting her request to file her brief, amended Rule 221 SCACR and Rule 260 SCACR petition for rehearing and reinstatement and reply to Nationwide Insurance Company and Joseph Tirbovich’s return to Appellant’s petition for reinstatement, as timely filed.

INTRODUCTION

GERSTEN, a paralyzed disabled woman as the result of the collision in this matter, suffers numerous secondary complications further discussed in detail in the Law and Argument section of this request.

During the week leading up to her deadline of February 17, 2023, to perfect her petition for rehearing and reinstatement, she was feeling quite ill for a variety of reasons. She received the Title II of the Americans with Disabilities Act Reasonable Accommodation Request to permit her to serve the Respondents via email by this Court on February 15, 2023, after serving and filing a second request on February 13, 2023. (Appendix K) Her first request to this Court was on December 1, 2022. (Appendix F)

The night of February 17, 2023, GERSTEN was suffering from “hot flashes” severely that caused her nausea and light-headedness. As she was working on finishing her documents to be submitted, she experienced a series of diarrhea “explosions”. Though she was wearing a diaper, the amount of diarrhea exceeded her brief. Determined to make her deadline to this Court, she worked until the time showed close to midnight without attempting to clean up. She sat in her own urine and feces for hours, until she was unable to and was then excluded from participating further due to her

disability of being paralyzed and in a good faith effort to comply with the said court deadline, she sent documents without being able to verify that they were the right versions.

Immediately after emailing the numerous attorneys for each party, and filing with this Court, she spent the next few hours emptying her bowels and doing what she could to relieve herself of the pain she was suffering from. She spent the next week very sick. This was the beginning of months of severe illness.

GERSTEN was unable to participate in and was excluded from following up with where she left off on February 17, 2023, because of being paralyzed disabled and all the secondary complications that come with it. She has no caregiver, aid, assistant, or any help do get through her daily life. She lives alone.

GERSTEN finally felt well enough on May 3, 2023, to begin to sort through this case file and emails to find the letters and orders of this Court then. Being that there was information requested and instructions made, GERSTEN is making a good faith effort to comply and rectify.

SUMMARY OF PROCEEDINGS

On September 19, 2022, GERSTEN served and filed an appeal with this Court; Appellate Case No. 2022-001312. (Appendix C)

On October 3, 2022, GERSTEN served and filed an appeal with this Court; Appellate Case No. 2022-001390. (Appendix D)

On November 9, 2023, this Court issued a letter indicating that the two appeals previously stated were to be consolidated. (Appendix E)

On December 1, 2023, GERSTEN served and filed a Title II of the Americans with Disabilities Reasonable Accommodation Request. (Appendix F)

Multiple motions were filed by various attorneys representing their clients for substitution of counsel and motions to dismiss, causing an abeyance, which holds all filing deadlines, that ended with this Court's Order filed on January 11, 2023, and in this Order, GERSTEN'S motion for extension of time to file a return to Respondents Nationwide Insurance Company and Joseph Tirbovich's motion to dismiss was granted and to be served and filed by January 19, 2023. (Appendix G)

On January 18, 2023, this Court dismissed both said appeals. (Appendix H)
On February 2, 2023, GERSTEN served and filed an extension of time to file a Rule 221, SCACR and Rule 260, SCACR petition for rehearing and reinstatement, along with a Title II of the Americans with Disabilities Act Reasonable Accommodation Request. (Appendix I)

On February 6, 2023, this Court granted GERSTEN's extension to file her petition for rehearing and reinstatement until February 17, 2023. (Appendix J)

On February 13, 2023, GERSTEN served and filed an emergency second request Title II of the Americans with Disabilities Act Reasonable Accommodation Request to Permit her to serve the Respondents via email. (Appendix K)

On February 15, 2023, this Court granted GERSTEN's request to serve future filings upon Respondents via email. The Order also stated, "Appellant shall serve all future filings on each Respondent's counsel via the email address listed for them in the Attorney Search database, which can be found at <https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm>." (Appendix L)

On February 17, 2023, GERSTEN served and filed her Rule 221, SCACR and Rule 260, SCACR petition for rehearing and reinstatement. (Appendix M)

On March 2, 2023, Respondents Nationwide Insurance Company and Joseph

Tirbovich filed their return to GERSTEN's petition for reinstatement. (Appendix N)

On March 30, 2023, this Court issued an Order granting GERSTEN's petition for rehearing as to the August 22, 2022, order on appeal, for which Kevin Carter is the respondent. The Order also stated that, "All future filings must include the above caption." (Appendix O)

On March 30, 2023, this Court issued a letter stating, "Enclosed is the Court's decision on the motion to reinstate. Appellant is to notify the Court of the status of the transcript within 10 days from the date of this letter or this appeal will be dismissed." (Appendix P)

On April 18, 2023, this Court issued a letter stating, "The Court sent a letter on March 30, 2023, requesting a status update on the transcript within 10 days from the date of that letter. To date, no status update has been received. An update is to be served and filed within 10 days from the date of this letter or this appeal will be dismissed." (Appendix O)

LAW and ARGUMENT

The basis or grounds for this request is that the Appellant is paralyzed disabled as a result of the collision in controversy in this matter which causes her to be substantially limited on one or more of her major life activities. She suffers from numerous secondary complications from being paralyzed that include, but are not limited to, a pressure wound located on her left buttocks that prevents her from sitting down for very long without further injury to it. GERSTEN also suffered multiple third degree burns on her legs as a result of frostbite from historical subzero weather temperatures; one, the size of two quarters on her right calf. Recently, she woke up to a giant blister on her left ankle that prevents her from wearing a shoe on that foot without further injury to it. She must

wear shoes to protect her feet from injury while using her wheelchair. Her wheelchair needs numerous repairs. Last week one of the tires fell off the wheelchair while she was riding in it. In addition, she has no control over her bowel movements and frequently experiences diarrhea “attacks” or “explosions”, as well as frequent urination, which she uses a catheter to do. She has spent up to five hours consecutively completing the process of emptying her bowels, wound care, and clean up after. Lately she has been experiencing numbness in her fingers and has been having difficulties using them. Using the digital stimulation method frequently has caused them to be pruned. She’s also having frequent “hot flashes” and must lay down at times to feel better, as she’s of the age of menopause. (Pictures available upon request.)

Under South Carolina law, GERSTEN is a “vulnerable adult”; defined, in part, as a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. She has no caregiver or aid or assistant or any physical help to perform basic functions of daily life. She lives under extreme hardship.

For the previous reasons, and more, she’s a qualified individual of and protected under the Americans with Disabilities Act (ADA). A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” *United States v. Georgia*, [*546 U.S. at 153–54*](#), [*126 S.Ct. 877*](#) (quoting [*42 U.S.C. § 12131\(2\)*](#)).

GERSTEN simply is unable to perform at the level of able bodies. It takes her

approximately fifty-two (52) times longer to complete basic daily functions or tasks than an able body. She spends most of her days performing bowel movements, and other self-care, like wound care, for example, that includes, but is not limited to, cleaning up after each perpetual function.

This is a complex matter and there are numerous respondents. It takes her a tremendous amount of time to research information and type up documents, print and/or scan them, and read documents presented to her by this Court and the multiple respondents.

It's challenging to point out what isn't damaging to her body as the deadly illness of pressure wounds is a serious secondary complication of being paralyzed. Christopher Reeves, the actor known for his acting role in movies as the character of "Superman" died of complications stemmed from a pressure wound. Prolonged sitting required to complete these tasks causes further injury. The only way the wound on her left buttocks will heal, is by staying off it. GERSTEN is mostly bedridden because of this. While in bed, she must be mindful to turn frequently as to not acquire new pressure wounds or prevent the current ones from healing. It's already quite difficult for her to simply type documents and being paralyzed alone makes everything, including but not limited to, daily life and complying with court deadlines, much more difficult than for an able body.

GERSTEN's health has dramatically declined due to secondary complications stemmed from her disability of being paralyzed.

GERSTEN's disability of being paralyzed renders her incapable of asserting her claims or defenses in a timely manner.

"The ADA was passed by large majorities in both Houses of Congress [in 1990] after

decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities.” *Lane*, [541 U.S. at 516](#), [124 S.Ct. 1978](#). “Congress found that ‘individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices....’ ” *Crowder v. Kitagawa*, [81 F.3d 1480, 1483](#) (9th Cir.1996) (alteration in original) (quoting [42 U.S.C. § 12101\(a\)\(5\)](#)). The ADA aims “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” [42 U.S.C. § 12101\(b\)\(1\)](#). “It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.” *Lane*, [541 U.S. at 516–17](#), [124 S.Ct. 1978](#).

“Title II of the ADA [, ‘Public Services,’] provides that ‘no 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.’ ” *United States v. Georgia*, [546 U.S. at 153](#), [126 S.Ct. 877](#) (quoting [42 U.S.C. § 12132](#)). The statute “require[s] that covered entities make reasonable accommodations in order to provide qualified individuals with an equal opportunity to receive benefits from or to participate in programs run by such entities.” *Tsombanidis v. West Haven Fire Dep't*, [352 F.3d 565, 573](#) (2d Cir.2003) (internal quotation marks omitted).

The ADA “defines ‘public entity’ to include ‘any State or local government’

and ‘any department, agency, ... or other instrumentality of a State.’ ” *United States v. Georgia*, [546 U.S. at 154](#), [126 S.Ct. 877](#) (quoting [42 U.S.C. § 12131\(1\)](#)) (some internal quotation marks omitted). *United States v. Georgia*, [546 U.S. at 153–54](#), [126 S.Ct. 877](#) (quoting [42 U.S.C. § 12131\(2\)](#)). “A public entity shall 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 modifications would fundamentally alter the nature of the service, program, or activity.” [28 C.F.R. § 35.130\(b\)\(7\)](#).

“In the ADA, Congress provided [a] broad mandate” to “effectuate its sweeping purpose[to] ... forbid[] discrimination against disabled individuals in major areas of public life, [including] ... public services....” *Id.* at 675, [121 S.Ct. 1879](#) “As a remedial statute, the ADA must be broadly construed to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” *Noel v. New York City Taxi and Limousine Comm’n*, [687 F.3d 63, 68](#) (2d Cir.2012) (internal quotation marks omitted).

As noted above, “[i]n the ADA, Congress provided [a] broad mandate” to “effectuate its sweeping purpose[to] ... forbid[] discrimination against disabled individuals in major areas of public life, [including] ... public services....” *Martin*, [532 U.S. at 675](#), [121 S.Ct. 1879](#). “Congress found that ‘individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices....’ ” *Crowder*, [81 F.3d at 1483](#) (alteration in original) (quoting [42 U.S.C. § 12101\(a\)\(5\)](#)). The ADA aims “to provide a clear and

comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” [42 U.S.C. § 12101\(b\)\(1\)](#). Title II of the ADA represents Congress's attempt to apply this “clear and comprehensive national mandate” to the “services, programs, or activities,” [42 U.S.C. § 12132](#), of “ ‘any State or local government’ and ‘any department, agency, ... or other instrumentality of a State,’ ” *United States v. Georgia*, [546 U.S. at 154](#), [126 S.Ct. 877](#) (omission in original) (quoting [42 U.S.C. § 12131\(1\)](#)).

Congress clearly meant Title II to sweep broadly. If all state laws were insulated from Title II's reasonable modification requirement solely because they were state laws, “state law [would serve as] an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in enacting Title II. *Marsh*, [499 F.3d at 177](#). Far from “provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” [42 U.S.C. § 12101\(b\)\(1\)](#), the ADA would be powerless to work any reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and no matter how minimal the costs of doing so. We conclude that the ADA's reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision. And this statement must be considered in context. Title II provides that “no 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](#).

Granting her said requests does not fundamentally alter this appeal nor would it cost this Court any added expense or money. There is no legitimate reason to deny these

requests.

ADA's reasonable modification requirement contemplated modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision.

Civil Rights

Discrimination by Reason of Handicap, Disability, or Illness

ADA's reference to "essential eligibility requirements," when defining a "qualified individual with a disability," did not necessarily refer to each and every formal legal eligibility requirement imposed for participation in public program or benefit; some relatively minor eligibility requirements, even if set by statute, will not be deemed essential because they will not be necessary to prevent the fundamental alteration of the program's nature. Americans with Disabilities Act of 1990, §§ 201(2), 202, 502, 42 U.S.C.A. §§ 12131(2), 12132, 12202; 28 C.F.R. § 35.130(b) (7).

Under the ADA, covered entities must make reasonable accommodations in order to provide qualified individuals with an equal opportunity to receive benefits from or to participate in programs run by such entities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

Congress clearly did not intend to give public entities more latitude under the ADA than private parties to discriminate against the disabled. Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

Title II of the ADA should not be construed to require automatic deference to a program's formal legal eligibility requirements, however minor they may be. Americans with Disabilities Act of 1990, § 201 et seq., 42 U.S.C.A. § 12131 et seq.

The ADA requires a court to analyze the importance of an eligibility requirement for

a public program or benefit, when determining whether a requested modification would fundamentally alter the nature of the service, rather than defer automatically to whatever “formal legal eligibility requirements” may exist, no matter how unimportant for the program in question they may be. Americans with Disabilities Act of 1990, §§ 201(2), 202, 502, 42 U.S.C.A. §§ 12131(2), 12132, 12202; 28 C.F.R. § 35.130(b)(7).

In the ADA, Congress provided a broad mandate to effectuate its sweeping purpose to forbid discrimination against disabled individuals in major areas of public life, including public services. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

As a remedial statute, the ADA must be broadly construed to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

ADA's reasonable modification requirement contemplated modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision. Americans with Disabilities Act of 1990, § 2(b)(1), 42 U.S.C.A. § 12101(b)(1).

Under the doctrine of federal preemption, state laws that conflict with federal law are without effect. U.S.C.A. Const. Art. 6, cl. 2.

Congress may manifest its intent to preempt state or local law explicitly, through the express language of a federal statute, or implicitly, through the scope, structure, and purpose of the federal law; thus, preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. U.S.C.A. Const. Art. 6, cl. 2.

An actual conflict between state and federal law exists, which results in federal preemption, when compliance with both federal and state regulations is a physical impossibility, or when state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; an actual conflict also exists where federal law is in irreconcilable conflict with state law. U.S.C.A. Const. Art. 6, cl. 2.

When the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed; if the purpose of the act cannot otherwise be accomplished, if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect, the state law must yield to the regulation of Congress within the sphere of its delegated power. U.S.C.A. Const. Art. 6, cl. 2.

In a preemption analysis, what is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. U.S.C.A. Const. Art. 6, cl. 2.

Since preemption claims turn on Congress's intent, a court begins as it does in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs. U.S.C.A. Const. Art. 6, cl. 2.

The ADA preempts inconsistent state law when appropriate and necessary to effectuate a reasonable accommodation under Title II. Americans with Disabilities Act of 1990, §§ 2(b)(1), 201(2), 42 U.S.C.A. §§ 12101(b)(1), 12131(2).

A plaintiff may sue a state official acting in his official capacity, notwithstanding the Eleventh Amendment, for prospective, injunctive relief from violations of federal law. U.S.C.A. Const. Amend. 11.

A court is required to disfavor interpretations of statutes that render language superfluous.

Accommodations in General

Typically, the determination under the ADA of whether a particular modification is “reasonable” involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it. Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7).

CONCLUSION

THEREFORE, having shown more than good cause; extraordinary circumstances, and for the previous reasons, the Appellant GERSTEN respectfully requests this Court, under controlling federal law, pursuant to Title II of the Americans with Disabilities Act for a reasonable accommodation request for an order granting acceptance of her status update of appeal, motion for extension of time to file her brief, amended Rule 221 SCACR and Rule 260 SCACR petition for rehearing and reinstatement and reply to Nationwide Insurance Company and Joseph Tirbovich’s return to Appellant’s petition for reinstatement, as timely filed.

This does not prejudice any of the Respondents.

This is not made to cause delay, rather, in the furtherance of justice and to avoid its miscarriage.

Respectfully submitted this 5th day of May 2023,

_____/S/_____
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May 05 2023

SC Court of Appeals

PROOF OR CERTIFICATE OF SERVICE

I hereby certify that service of the Appellant's TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA) REASONABLE ACCOMMODATION REQUEST to ACCEPT APPELLANT'S STATUS UPDATE OF TRANSCRIPT and MOTION FOR EXTENSION OF TIME TO FILE BRIEF and AMENDED RULE 221 SCACR AND RULE 260 SCACR PETITION FOR REHEARING AND REINSTATEMENT and REPLY to NATIONWIDE INSURANCE COMPANY AND JOSEPH TIRBOVICH'S RETURN TO APPELLANT'S PETITION FOR REINSTATEMENT as TIMELY FILED in the above-captioned cases was made upon all parties and counsel of record by email on May 5, 2023, to:

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May 5, 2023

/S/

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SC Court of Appeals

May 5, 2023
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The Honorable Jenny Abbott Kitchings
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Re: TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA) REASONABLE ACCOMMODATION REQUEST to ACCEPT APPELLANT'S STATUS UPDATE OF TRANSCRIPT and MOTION FOR EXTENSION OF TIME TO FILE BRIEF and AMENDED RULE 221 SCACR AND RULE 260 SCACR PETITION FOR REHEARING AND REINSTATEMENT and REPLY to NATIONWIDE INSURANCE COMPANY AND JOSEPH TIRBOVICH'S RETURN TO APPELLANT'S PETITION FOR REINSTATEMENT as TIMELY FILED with Appendix to follow shortly

Dear Ms. Kitchings and to ALL CONCERNED:

Good day to you!

Enclosed for filing, please find a copy of the above stated Title II of the ADA Reasonable Accommodation Request and its appendix, that will follow shortly.

Please call the above number or email me if you have any questions.

Thank you for your time and assistance regarding this matter.

Respectfully submitted,

_____/S/_____

Heidi Gersten

Appellant/Petitioner

HG/Enclosures/ Title II ADA Request and Appendix to follow shortly

Total pages: Nineteen (19) including this cover sheet