



NYU | LAW

MOOT COURT BOARD

Marcia Flanders,
Petitioner,

-against-

Fishing Corp. USA,
Respondent.

Memorandum of Law

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QUESTIONS PRESENTED

- (1) Whether a plaintiff must show the defendant acted with deliberate indifference or animus to prove intentional discrimination under the Americans with Disabilities Act (“ADA”).
- (2) Whether Petitioner can demonstrate Respondent’s intentional discrimination.

STATEMENT OF FACTS

Marcia Flanders is a former cashier at Fishing Corp. USA (“Fishing Corp.”), a fishing gear retail store. Flanders held this position for seven years. In this role, she always completed her duties professionally and has been described as an outstanding employee.

On January 9, 2020, Flanders was in a serious car accident that injured her spine and left her paralyzed, requiring the use of a wheelchair. Following her injury, Flanders returned to work as soon as she was able. Before her return, Samuel Anderson, the manager of Fishing Corp., told Flanders to take as much time as she needed to recover. After she returned to work so quickly, Anderson was shocked at her enthusiasm and encouraged her to take time to recover to the extent she needed.

According to quarterly job performance reports, the accident did not affect Flanders’s job performance. Following her injury, Flanders even earned “employee of the month” awards on numerous occasions.

Fishing Corp.’s original location was wheelchair accessible. There was a ramp at the entrance of the building, the height of Flanders’s retail counter made it wheelchair accessible, and there was an accessible bathroom. On October 16, 2022, Fishing Corp. relocated to a smaller location due to financial constraints. The day after the move, Flanders arrived at work only to discover that the new location was not wheelchair accessible. Flanders was physically unable to enter.

Soon after, Flanders requested that Fishing Corp. implement accommodations, including installing a ramp and modifying the restroom. On multiple occasions, Flanders spoke with Anderson about her request for accommodations. Anderson was enthusiastic at those meetings and promised he would help find a solution. Fishing Corp. did not implement any of the accommodations Flanders sought for over a month, after which she filed a complaint.

As a result of Fishing Corp.’s failure to act, Flanders has been unemployed—though not formally. Fishing Corp. has not fired Flanders, and she has not quit. Because Flanders is an hourly worker, she does not receive wages unless she is in-

person, leaving her without income as she waits for Fishing Corp. to implement accommodations.

PROCEDURAL POSTURE

On December 20, 2022, Flanders filed an ADA complaint against Fishing Corp. with the Equal Employment Opportunity Commission (“EEOC”). On January 28, 2023, the EEOC issued Flanders a right to sue letter for Fishing Corp.’s failure to provide reasonable accommodations under the ADA. Soon after, Flanders sued.

The district court granted Fishing Corp.’s motion for summary judgment. The court ruled that Flanders failed to establish intentional discrimination under the ADA because the evidence did not suggest animus. The district court, quoting the First Circuit, found that “merely labeling the delay or denial in providing an accommodation as intentional discrimination, without some modicum of evidence demonstrating an actual discriminatory animus is itself not enough.” *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 18 (1st Cir. 2006). Flanders appealed, asserting that the correct standard for claims of intentional discrimination is whether the employer acted with deliberate indifference. The court of appeals reversed, holding that deliberate indifference is sufficient to establish intentional discrimination.

Fishing Corp. petitioned the Supreme Court of the United States for a writ of certiorari, which was granted.

SUMMARY

Every circuit agrees that discriminatory conduct must be intentional to secure damages under an ADA claim, but circuits disagree as to whether deliberate indifference rises to the level of intentional discrimination.

The majority of circuits addressing this issue agree that a plaintiff can prove intentional discrimination by demonstrating the defendant’s deliberate indifference. *See, e.g., Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 275 (2d Cir. 2009) (“The standard for intentional violations is ‘deliberate indifference to the strong likelihood [of] a violation.’” (quoting *Bartlett v. N.Y. State Bd. of L. Exam’rs*, 156 F.3d 321, 331 (2d Cir. 1998))); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013) (“A showing of deliberate indifference may satisfy a claim for compensatory damages under . . . § 202 of the ADA.”); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011) (stating that intentional discrimination does not require showing animus or ill-will if there is a strong likelihood that defendant’s actions will violate federally protected rights). Deliberate indifference is established when a plaintiff “prove[s] that the defendant knew that harm to a federally protected right was substantially likely and that the defendant failed to act on that likelihood.” *T. W. v. Sch. Bd.*, 610 F.3d 588, 604 (11th Cir. 2010).

Conversely, the First, Fifth, and Sixth Circuits rely on an animus standard for proving intentional discrimination under the ADA. *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 18 (1st Cir. 2006) (holding that evidence of intentional discrimination that shows animus beyond deliberate indifference must be established to recover under the ADA); *Smith v. Harris County*, 956 F.3d 311, 318 (5th Cir. 2020) (“Unlike other circuits, we have not held that deliberate indifference suffices.”); *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015) (requiring plaintiffs to provide “evidence that animus against the protected group was a significant factor in the position taken”). Discriminatory animus is discrimination motivated by ill-will, spite, or prejudice against a specific group rather than a legitimate non-discriminatory reason. See *Liese v. Indian Riv. Cnty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012).

Petitioner will argue that deliberate indifference is sufficient to establish intentional discrimination under the ADA. First, Petitioner will raise a legislative history argument indicating that deliberate indifference reflects Congress’ intent better than animus. Next, Petitioner will argue that Respondent’s conduct rose to the level of deliberate indifference.

Respondent Fishing Corp. will argue the view of the First, Fifth, and Sixth Circuits that a showing of animus is required to establish intentional discrimination under the ADA. First, Respondent will contend that the plain meaning of the text of the ADA supports adopting an animus standard in intentional discrimination cases. Second, Respondent will argue that its actions did not amount to animus.

DISCUSSION

One of the purposes of the ADA is to provide “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1)(2). Under the ADA, a prima facie case is met if a plaintiff establishes that “(1) she is a qualified individual with a disability; (2) the defendants are subject to one of the Acts; and (3) she was denied the opportunity to participate in or benefit from defendants’ services, programs, or activities, or was otherwise discriminated against by defendants, by reason of her disability.” *Harris v. Clay County*, 448 F. Supp. 3d 629, 637 (N.D. Miss. 2020).

Under the ADA, a plaintiff must demonstrate they were the victim of intentional discrimination to obtain an award of monetary damages. The majority of circuits have held that a showing of the defendant’s deliberate indifference is sufficient to establish intentional discrimination. On the other hand, three circuits have adopted a more stringent standard. These circuits require plaintiffs to establish that they were subject to discriminatory animus to succeed on an intentional discrimination claim.

I. Petitioner Will Argue the Deliberate Indifference Standard Is Sufficient to Establish Intentional Discrimination Under the ADA.

Petitioner will argue that the legislative history of the ADA and policy considerations support a holding that deliberate indifference is sufficient to establish intentional discrimination.

A. Petitioner Will Argue the Purpose of the ADA Favors a Deliberate Indifference Standard.

The deliberate indifference standard works as a catch-all to protect and consider the most vulnerable individuals when their pleas are ignored. In *S.H. v. Lower Merion Schl. Dist.*, a child was misdiagnosed as having a disability by the school district for several years. 729 F.3d 248, 263 (3d Cir. 2013). There, the court considered whether deliberate indifference or animus should be the standard applied to a claim of intentional discrimination and whether the plaintiffs had established either. The Third Circuit held that “a showing of deliberate indifference may satisfy a claim for compensatory damages under . . . the ADA.” *Id.* The Third Circuit reasoned that the Rehabilitation Act (“RA”) and the ADA are “targeted to address ‘more subtle forms of discrimination’ than merely ‘obviously exclusionary conduct.’” *Id.* at 264 (quoting *Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939, 945 (9th Cir. 2011)). Thus, Petitioner will argue that “a standard of deliberate indifference, rather than one that targets animus, will give effect to the RA’s and the ADA’s purpose to end systematic neglect.” *Lower Merion*, 729 F.3d at 264 (citing *Alexander v. Choate*, 469 U.S. 287, 296 (1985) (noting that Senator Humphrey, who introduced a companion measure to the RA, stated that “we can no longer tolerate the invisibility of the handicapped in America”)).

While the court in *Lower Merion* adopted the deliberate indifference standard, it ultimately concluded that the school district’s conduct did not amount to intentional discrimination because there was no evidence that the school district knew that the child was misdiagnosed and failed to act on that basis. 729 F.3d at 265–67. Nevertheless, had there been evidence of deliberate indifference about the child’s misdiagnosis, the case likely would have had a different result. Petitioner will therefore argue that *Lower Merion* illustrates the need for a deliberate indifference standard. Such a standard would allow people with disabilities to recover in situations where the conduct affecting them is not necessarily malicious, but nevertheless created significant harm.

B. Petitioner Will Argue That the ADA’s Legislative History Supports a Showing of Deliberate Indifference as Opposed to Animus.

Petitioner will argue that based on the legislative history of the ADA, the standard of deliberate indifference is better suited than animus to establish intentional discrimination.

In *Lacy v. Cook County*, five wheelchair-using detainees brought ADA claims against Cook County, Illinois, and the sheriff, alleging that the ramps and bathrooms at six county courthouses were inaccessible. 897 F.3d 847, 863 (7th Cir. 2018). The court focused on the legislative history of the ADA when holding that “a plaintiff can establish intentional discrimination in a Title II damage action by showing deliberate indifference.” *Id.* at 851. The court “adopt[ed] the two-part standard applied by most other courts, requiring both (1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act upon that likelihood.” *Id.* (quoting *Lower Merion*, 729 F.3d at 263) (internal quotations omitted).

In *Lacy*, as in the case at bar, if the court did not embrace the deliberate indifference standard, plaintiffs might be left with no legal remedy. “Even absent animus-based prejudice, people with disabilities may be deprived of opportunities’ which the ADA aims to protect.” *Lacy*, 897 F.3d at 863 (first quoting Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 Va. L. Rev. 397, 423 (2000); then citing 42 U.S.C. § 12101(a)(7) (“[T]he Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity [and] full participation . . .”).

Because the ADA was based on section 504 of the RA, the *Lacy* court interpreted them in tandem. It reasoned that the deliberate indifference standard “is sensible based on the clear purpose and evolution of the ADA” and that “Title II was modeled after section 504 [of the Rehabilitation Act], which was meant to combat discrimination that is ‘most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.’” *Id.* (quoting *Choate*, 469 U.S. at 295). Similarly, in *Liese v. Indian River County Hospital District*, the Eleventh Circuit held that “[t]he legislative history of the RA . . . shows that Congress intended for § 504 [of the RA] to combat intentional discrimination in general, not just discrimination resulting from invidious animus.” 701 F.3d 334, 348 (11th Cir. 2012) (internal quotations omitted).

Petitioner will argue that raising the standard to animus would undermine the ADA’s purpose, as it is more difficult to prove her employer acted with ill-will, thus severely compromising her opportunity for equal employment.

C. Petitioner Will Argue that Respondent's Actions Constituted Intentional Discrimination Under a Deliberate Indifference Standard.

"[I]ntentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999). Petitioner will argue that Respondent is liable under this standard because it ignored her requests for a reasonable accommodation, denying her an equal opportunity to employment.

Petitioner submitted formal accommodation requests and spoke to the manager about making the new store wheelchair accessible but received no assistance. Petitioner will distinguish her case from *Meagley v. City of Little Rock*, where the Eighth Circuit held that the plaintiff failed to show intentional discrimination because there was no evidence that the defendant actually knew that their structure violated the ADA. 639 F.3d 384, 389 (8th Cir. 2011). Petitioner will point to the record to establish that Respondent was aware of her requests for accommodations. In addition, making a space physically accessible to wheelchair users is a basic and reasonable accommodation. See 42 U.S.C. § 12111 (9)(A). Therefore, Petitioner will argue that providing these accommodations did not place an undue burden on Respondent.

II. Respondent Will Argue That a Showing of Animus is Required to Establish Intentional Discrimination Under the ADA.

Respondent will argue that the text of the ADA supports a holding that animus is required to establish intentional discrimination. Respondent will also argue that if an animus standard is adopted, it should not be held liable because its actions do not amount to animus.

A. Respondent Will Raise a Textual Argument in Favor of Showing Animus to Establish Intentional Discrimination.

Title I of the ADA prohibits discrimination against individuals with disabilities in seeking and maintaining employment. 42 U.S.C. § 12112(a). The ADA prohibits employers from "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

Respondent will argue that the exception in Title I for “undue burden[s]” on an employer is significant, as it demonstrates a limitation on recovering for intentional discrimination. As the court in *Vande Zande v. Wisconsin Dep’t of Admin.* expressed:

[I]f the nation’s employers have potentially unlimited financial obligations to 43 million disabled persons, the ADA will have imposed an indirect tax potentially greater than the national debt. We do not find an intention to bring about such a radical result in either the language of the Act or its history. The preamble actually ‘markets’ the Act as a cost saver, pointing to ‘billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.’ § 12101(a)(9). The savings will be illusory if employers are required to expend many more billions in accommodation than will be saved by enabling disabled people to work.

44 F.3d 538, 542–43 (7th Cir. 1995).

Therefore, Respondent will argue that the text’s carve out for undue burdens demonstrates that the ADA’s drafters were concerned about potentially boundless liability and intended a heightened standard of animus for intentional discrimination. Adopting a less demanding standard of deliberate indifference would penalize a wider scope of conduct, contrary to this reading of the text.

Petitioner will respond by stating that the entire text and the purpose of the ADA aim to provide equal employment opportunities for people with disabilities. *See supra* Part I.B. Therefore, the existence of the ADA and the text as a whole point to a deliberate indifference standard since requiring people to prove animus would be too burdensome. Additionally, the inclusion of undue burden language may just have been intended to safeguard against unnecessary accommodations. *See Lacy v. Cook Cnty., Illinois*, 897 F.3d 847, 853 (7th Cir. 2018) (finding that, under the deliberate indifference standard, “in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service.”) However, Respondent will contend that the ADA’s text and purpose must be interpreted in light of the undue burden exception and thus that an employer can have a permissible basis for not providing accommodations in certain circumstances.

B. Respondent Will Argue that Their Actions Did Not Meet the Animus Standard for Intentional Discrimination.

After contending that animus should be the standard, Respondent will argue that Petitioner failed to establish that it intentionally discriminated with animus. Respondent will refer to the First Circuit’s holding in *Carmona-Rivera v. Puerto Rico*.

464 F.3d 14 (1st Cir. 2006). In that case, the plaintiff, a schoolteacher, “made a request . . . for accommodations for her disability at the Vazquez school” where she worked. *Id.* at 16. The plaintiff “contend[ed] that the school’s director, Dr. Elsie Trinidad, was aware of Carmona’s disability but did nothing to assist her, and continued to treat her like everyone else.” *Id.* As in the present case, the accommodations the plaintiff requested were neither adequately nor efficiently provided.

The First Circuit found that the record lacked any evidence that the school’s failure to provide the requested accommodations was “anything more than the result of a slow-moving bureaucracy or that they were intentionally undertaken by the defendants to purposefully discriminate against Carmona because of her disability.” *Id.* at 18. The court held that “without some evidence of intentional discrimination, Carmona cannot recover under Title II for non-economic damages . . .” *Id.* The First Circuit reasoned that “merely labeling the delay as intentional discrimination, without some modicum of evidence demonstrating an actual discriminatory animus, is itself not enough.” *Id.* at 17–18 (quoting *Schultz v. YMCA of the United States*, 139 F.3d 286, 291 (1st Cir. 1998)).

Respondent will analogize Petitioner's claim to that in *Carmona-Rivera*, arguing that it did not treat Petitioner any differently than its other employees. Respondent will contend that failing to provide Petitioner with her requested accommodations, despite expressing the desire to do so, was a result of a slow-moving and expensive process. Respondent will argue that, as in *Carmona-Rivera*, this delay in providing accommodations in an effort to avoid undue burdens on business is not evidence of animus or ill-will, and therefore intentional discrimination cannot be established.

Respondents will also likely rely on *Campbell v. Lamar Inst. of Tech.*, where the Fifth Circuit held that in situations where the record contains no evidence of “malice, ill-will or efforts . . . to impede” a disabled individual, courts cannot presume intentional discrimination. *See* 842 F.3d 375, 380 (5th Cir. 2016) (internal quotations omitted).

CONCLUSION

Respondent Fishing Corp. and Petitioner Marcia Flanders will each raise multiple arguments addressing this employment discrimination issue. They will first argue about which standard should be adopted when analyzing intentional discrimination under the ADA. Then, they will argue why they should succeed in this case based on the standard they prefer—whether it be deliberate indifference or animus. While most circuits have adopted a deliberate indifference standard, Respondent can make a persuasive textual argument in favor of adopting a stricter animus standard.