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ADA: Failure to Provide Medication to Epileptic Detainee was not "by Reason of" her Disability: ADA Does Not Apply

Tardif v. City of New York, no. 19-1360 (2d Cir. Mar. 18, 2021).

The Second Circuit affirms the lower court's determination that the failure of arresting authorities to provide an epileptic with anti-seizure medications while in detention does not constitute an action "by reason" of her disability under the ADA. The Circuit also finds that a jury instruction allowing for a review of the officer's "good faith" in using force to deter the plaintiff was an erroneous application of subjective intent, in conflict with New York law and *Graham*.

While involved in confrontations with authorities during Occupy Wall Street demonstrations at Union Square Park in the spring of 2012, Mary Tardif (Tardif) sustained a concussion, was knocked to the ground in a separate non-arrest incident, and was arrested, whereupon she notified authorities of her epileptic condition and need for medication contained in her backpack. She sued the City of New York (City), the New York City Police Department (NYPD), and various officers and officials. As relevant on appeal, Tardif alleged that (1) the City violated the ADA in failing to reasonably accommodate her epilepsy by timely administering medication during her pre-arraignment detention following her arrest, and that (2) two NYPD sergeants committed assault and battery under New York law when, during separate demonstrations, each officer used force against her.

The Southern District of New York granted summary judgment to the City on Tardif's ADA claim and, following a six-day trial, a jury returned a verdict in favor of the City and

the individual officers on all the remaining claims. The Second Circuit concluded that the district court properly granted summary judgment on the ADA claim because there was no evidence demonstrating the City delayed administering medication "by reason of" Tardif's disability, as required under the statute.

> This case thus presents the following legal question for this Court to resolve: whether the alleged failure by the police to provide custodial medical services to Tardif in a timely and adequate manner prior to her arraignment, by itself, constitutes a failure to make a reasonable accommodation "by reason of" an individual's disability under the ADA. We hold that it does not.
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> At its core, the issue here is not whether Tardif was denied medical services because she has a disability. Instead, **her claim relates solely to whether she received adequate medical treatment in police custody for her disability, and such a claim is not cognizable under the ADA. To hold otherwise would allow inmates to litigate in federal court virtually every medical malpractice claim arising in a custodial setting under the auspices of the ADA.** Such a result is entirely at odds with the statutory language of Title II and its purpose.
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> In sum, the record presents no facts from which a reasonable jury could infer that there was a disability-based reason for the delay in Tardif's medical services. Any shortcomings that existed in the provision of medical services for Tardif's epilepsy provide no basis to conclude that she was denied meaningful access to such services because of her disability, and thus the ADA claim fails as a matter of law. Accordingly, the district court properly granted summary judgment on the ADA claim.

With respect to the state law assault and battery claims, the Second Circuit held that the district court correctly determined, contrary to Tardif's contention, that a justification instruction to the jury was warranted, because New York law permits a police officer, even in a non-arrest situation, to use an objectively reasonable degree of force in the performance of a public duty, including crowd control:

> In describing the purported error in this case, Tardif takes the position that under state law, "any force used" in a non-arrest context "must give rise to a claim for assault and battery," and no justification is permitted. Appellant's Br. at 38-39. Contrary to Tardif's contention, New York courts have never articulated such a sweeping theory of assault-and-battery liability and we decline to do so here. Instead, as set forth below, **we hold that New York law—consistent with federal Section 1983 excessive force jurisprudence—permits a police**

officer to use an objectively reasonable degree of force in the performance of a public duty, including a non-arrest situation.

However, the Circuit also concluded that the district court, in providing that justification charge, erroneously instructed the jury that it could consider an officer's subjective intent, which is contrary to New York's objective reasonableness inquiry:

> In short, the jury should not have been told that, in assessing the reasonableness of the police officer's use of force, they could consider "whether the force was applied in good faith—in a good faith effort to maintain or restore discipline—or maliciously for the very purpose of causing harm." App'x at 1105 (supplemental jury instruction); see also id. at 1077-78 (initial jury instruction). **Once it is demonstrated that an individual police officer intended to use force of some kind, the subjective motivations of that officer simply have no bearing on whether the particular degree of force used is unreasonable and excessive under the Fourth Amendment or New York law.** Accordingly, because the district court's initial instruction and supplemental instruction on the assault and battery claims incorporated a subjective element, those instructions were erroneous.

Although that error was prejudicial as it related to the assault and battery claims involving one NYPD officer and warranted a new trial, the error was harmless as to the claims against the other sergeant, given that his subjective good faith was never raised, or even at issue, during the trial.

Affirmed in part, vacated in part, and remanded.

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Due Process: Unclaimed Mail is Insufficient Notice of Forfeiture

Tacoma Police Department v. Zhen, No. 54510-1-II (Ct. App. Wa. Mar. 2, 2021).

A police department's failure to make additional efforts at notification results in vacating a forfeiture.

In June 2018, the Tacoma Police Department (TPD) confiscated a vehicle, jewelry, and more than $51,000 in cash that belonged to Hong Mei Zhen (Zhen), who was charged with unlawful manufacture of a controlled substance. The next day, the superior court released Zhen from custody subject to certain conditions, including a prohibition against her living at an address on E. 48th Street in Tacoma. Ten days later, TPD sent Zhen a notice of seizure and intended forfeiture of her property, by way of regular and certified mail—to the E. 48th Street address—stating that she had the right to a civil hearing

regarding the forfeiture if she notified TPD within 45 days. Both mailings were returned to TPD as "not deliverable as addressed" and "unable to forward." Zhen failed to respond to TPD in writing within the 45-day period.

In September 2018, Zhen personally visited TPD, attempting to retrieve her vehicle, money and jewelry and providing TPD with her new address. TPD did not inform her at that visit that a forfeiture proceeding was pending and did not send notice of the forfeiture to the new address. Zhen returned to TPD in October 2018, again seeking her property; again, TPD did not inform her that a forfeiture proceeding was pending. A TPD officer then conducted a follow-up investigation, discovering additional addresses for Zhen and determining that she had updated her address with the state Department of Licensing for driver's license purposes in mid-July 2018. Nevertheless, TPD did not send a notice of forfeiture to any of those locations.

A hearing examiner subsequently entered a default order confirming forfeiture of the items seized. TPD then mailed a notice of the forfeiture order to Zhen at her new address. But that notice did not inform Zhen of her right to move to set aside the default order or to petition for judicial review. Months later, Zhen filed a motion to set aside the default order based on a violation of due process. The hearing examiner denied the motion. She then petitioned for judicial review in the superior court, but that court affirmed the examiner.

The Washington Court of Appeals vacated:`

Standards for Adequacy of Notice: The Court of Appeals cited Supreme Court standards for notice in a due process context: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

Jones v. Flowers, 547 U.S. 220 (2006), presented a case factually analogous to the Tacoma situation. In *Jones*, the petitioner was delinquent in payment of his property taxes, and the commissioner of state lands sent him a certified letter stating that the property would be sold if the taxes were not paid. The letter was returned as unclaimed. The commissioner then received an offer to purchase the property; another certified letter was sent, stating that the property would be sold if taxes went unpaid, and again the letter was returned as unclaimed. The commissioner sold the house, and the petitioner filed suit based on a due process violation. The Court specifically referenced the unclaimed letter scenario, holding that "**when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so**." Furthermore, " '**[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it**.' " (quoting *Mullane*).

The Court in *Jones* stated, "We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed."547 U.S. at 229. Elaborating further, "**the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice**." 547 U.S. at 230.

The Court of Appeals found that TPD's actions (or inactions) fell far short of these standards. "TPD made no further attempts to actually inform Zhen of the pending forfeiture even though it knew that notice had been ineffective. Under *Mullane* and *Jones*, TPD's inaction violated due process if it was practicable for TPD to take 'additional reasonable steps to attempt to provide notice' to Zhen before forfeiting her property. Here, TPD "easily could have taken additional reasonable steps to give notice to Zhen."

Balancing of Interests? TPD argued that under *Mullane*, its interest in deterring drug crimes through forfeiture of personal property used to facilitate drug activity must be balanced against Zhen's interest in her personal property, and the balance of interests did not compel TPD to take additional steps to provide notice in this case. The Court of Appeals was not convinced: while it is true that *Jones* quotes *Mullane* for the proposition that "assessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against 'the individual interest sought to be protected by the Fourteenth Amendment,' " neither *Mullane* nor *Jones* actually engaged in a balancing process. The *Mullane* test is simply whether notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and requires that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

In any event, the Court of Appeals found, TPD's argument that its interest prevailed over Zhen's interest was unpersuasive. "Zhen's interest in over $50,000 in cash and a vehicle is significant." While TPD's interest in suppressing drug activities was also significant, it could have, with minimal effort, provided actual notice to Zhen rather than doing nothing when its attempted notice failed. This required vacating the forfeiture:

> We agree with the Court in *Jones* that a person who actually desired to inform a property owner of an impending sale of that property would not "do nothing when a certified letter sent to the owner is returned unclaimed." 547 U.S. at 229. Therefore, we conclude that TPD violated Zhen's due process rights by providing insufficient notice of seizure and intended forfeiture and that the default order confirming forfeiture must be vacated.

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Editor's Note—compare the Tacoma case above with Crooked Creek, LLC v. Cass County Treasurer, no. 159856 (Mi. Mar. 16, 2021) a Michigan Supreme Court case finding sufficient notice where authorities place a foreclosure warning on the

door of the premises in addition to making repeated mailings; the adequacy of notice prevented the property owner's appeal to set aside the foreclosure and/or obtain damages. Microsoft Word - 2 Crooked Creek-SS.docx

Evidence: Failure to Apply Evidence of Protestor Interference at Women's Health Clinic Requires Remand

People of the State of New York v. Griepp, nos. 18-2454-cv, 18-2623-cv, 18-2627-cv, 18-2630-cv (2d Cir. Mar. 10, 2021).

Vacating the district court, the Second Circuit finds that credible evidence of unlawful protestor interference in patients' path to an abortion clinic was improperly excluded and that a federal law prohibiting such interference was impermissibly narrowed.

Every Saturday morning in Queens, New York, anti-abortion groups have protested outside Choices Medical Center, a reproductive health care facility. The protestors contend that their efforts walk up to, but do not cross, the legal boundary. They employ tactics like "do[ing] the slow walk in front of the clients so [other protestors] can talk to [those patients]," because it "gives [them] a little more time to plead for the baby's life," "tag teaming" patients so that, even after a patient has asked the protestor to leave her alone, another protestor will approach the patient; or using signs as a "barrier" by the clinic entrance on a city sidewalk. After a yearlong investigation into the protestor activity, the New York Office of the Attorney General (OAG) sought a preliminary injunction against certain protestors, (Defendants) relating to their protest activities in violation of the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. 4 § 248(a)(1), (c)(3)(A) and various New York laws requiring clinical access.
FACE provides for civil and criminal penalties for any individual who, in relevant part, "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1). Escorts are considered providers for purposes of the statute.

The district court denied the preliminary injunction, concluding that Defendants' conduct was too minor to constitute violations of FACE and its state and local analogs. It characterized the challenged protestor activity as merely "incidental contact," causing only "slight[]" deviations or delays, or otherwise being too negligible to interfere with patients' rights. It reached this conclusion in large part by declining to attribute any credibility to voluminous records offered by "client escort" workers at the clinic, who recorded daily interactions with the protestors.

The Second Circuit found otherwise. Its 104-page opinion includes an exhaustive evaluation of the clinic escort workers' evidence, and concludes that the lower court made improper evidentiary and credibility rulings, relied on clearly erroneous factual

findings in assessing the OAG's physical obstruction claims, and committed an abuse of discretion. It also found that the lower court had improperly discerned restrictions on the reach of FACE, "in contravention of its text and purpose, would effectively eviscerate the statute." It found the likelihood of irreparable harm, vacated and remanded.

It seems that few challenges to any measure that allegedly restricts expression can avoid mention of *Reed*. This case was no exception, requiring the Second Circuit to explain why *Reed* did not apply here:

> In *United States v. Weslin*, 156 F.3d 292, 296-98 (2d Cir. 1998), our Circuit held that FACE was facially neutral and constitutional. We first noted that FACE largely regulates obstructive conduct and only proscribes speech insofar as it prohibits true threats, which fall outside of the First Amendment's ambit. Id. at 297. We went on to explain that regardless, the statute is content-neutral because "FACE applies whenever access to reproductive health services is obstructed. It contains no requirement whatsoever that the offenders intend to communicate a particular message—or any message at all—by their obstructive actions."
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> Defendants attempt to overcome *Weslin* by arguing that the Supreme Court's subsequent decision in *Reed v. Town of Gilbert* calls *Weslin* into question. 576 U.S. 155, 159 (2015). We disagree. In *Reed*, the Supreme Court held that a municipal code's regulation of the display of outdoor signs was a content-based regulation because the restrictions "depend entirely on the communicative content of the sign." Id. at 164. **But in *Weslin*, we explicitly held that application of FACE does not rely on any particular message or communicative content. 156 F.3d at 297. Speech and conduct unrelated to reproductive rights can still give rise to a FACE violation. Id. Accordingly, *Reed* is inapposite.**

LINK

Injunctive Relief: Potential Future Inhibition of First Amendment Rights is Insufficient to Warrant Injunction

Sessler v. City of Davenport, no. 19-3290 (8th Cir. Mar. 19, 2021).

A protestor seeking injunctive relief could not succeed where his motion was based on an unspecific future plan to express his views in the city's public spaces.

Background Street Fest is an annual event in downtown Davenport (the City) coinciding with the annual Quad Cities "Bix 7" road race, and draws approximately 20,000 attendees each year. Outdoor events, such as Street Fest, are governed by the City's Special Events Policy (Policy). Before an outdoor event can take place, event

organizers must submit an online application; they are required to have security on site, and paid vendor permits are issued with the express qualification that their presentations are subject to review, and, if necessary, exclusion, if vendors interfere with the safety and convenience of festival attendees or otherwise disrupt the festival's objective of providing a wide variety of family activities. Vendors are prohibited from playing music at their booths and require pre-approval to distribute literature or extend their activities beyond the confines of their assigned booths.

On July 28, 2018, Cory Sessler (Sessler) and his colleagues attended Street Fest as members of the public; they did not have a vendor permit, nor had they applied for one. They carried signs on extendable poles with messages such as: "Hell is enlarged for adulterers . . . homosexuals . . . abortionists. . . ."; "Fake Christians . . . don't . . . smoke, vape, and get high . . . and think they're saved"; and "Warning: if you are involved in . . . sex out of marriage, homosexuality, drunkenness, night clubbing . . . you are destined for a burning hell." Sessler preached similar messages using a microphone and speaker.

Sessler's group initially congregated at a location assigned to a fee-paying juggling and magic vendor, who complained. They moved to another area near a Street Fest entrance, generating further complaints from attendees and vendors. Davenport officers told Sessler he had to leave the festival area and, if he did not, he would be subject to arrest. The group moved across the street, where they continued demonstrating for several hours. One month later, Sessler contacted the City Attorney to discuss the Street Fest episode. He was told that the officers' actions were lawful, because Street Fest was a permitted event approved under the Policy, giving Street Fest organizers the authority to request Sessler's removal.

Sessler sued, seeking injunctive and declaratory relief, damages, and attorney fees, naming the City and three police officers, challenging "the interpretation and enforcement" of the Policy, and alleging violation of First Amendment rights to free speech and free exercise. He stated his plan to engage in future constitutionally protected activities by peacefully expressing religious, political, and social speech within the City's public spaces. His complaint alleged "On upcoming days – including but not limited to days in November 2018 through December 2022 – [Sessler] has concrete plans to engage in his constitutionally-protected activities by peacefully expressing religious, political, and social speech within the City's Public Spaces." It also alleged that, because "of Defendants' prior enforcement of the Policy, [Sessler] is forfeiting his constitutionally-protected activities due to fear of arrest, incarceration, and fines."

The district court denied Sessler's request, finding that Street Fest was a traditional public forum and that, although Sessler engaged in protected speech at Street Fest, the police officers' decision to move Sessler to an adjacent location was likely a content-neutral limitation on the time, place, and manner of his speech and would likely satisfy intermediate scrutiny.

Both parties appealed; with Sessler challenging the district court's analysis in its entirety, and the City challenging the finding that Street Fest was a traditional public forum. On appeal, Sessler alleged the Policy allows for an event, such as Street Fest, to give priority to the speech of vendors who are willing to pay a permit fee. The Eighth Circuit found otherwise:

> In reviewing the Policy, we find it to be a content neutral permitting scheme. The Supreme Court has recognized permitting schemes as valid means for the government "to regulate competing uses of public forums." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (noting that "any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication"). And, other courts assessing claims similar to Sessler's have noted that "[t]he right of free speech does not encompass the right to cause disruption, and that is particularly true when those claiming protection of the First Amendment cause actual disruption of an event covered by a permit." *Startzell v. City of Philadelphia*, 533 F.3d 183, 198 (3d Cir. 2008) . . ."

Even if the Circuit assumed for purposes of the appeal, without deciding, that Sessler had shown a likelihood of success on the merits, "we find Sessler's inability to demonstrate a threat of irreparable harm heavily weighs against granting preliminary injunctive relief." Here, Sessler had not shown any desire or plans to attend an event in the City that was governed by the Policy; instead, he vaguely alleged that he planned to preach "within the City's Public Spaces" on "upcoming" days. Ultimately, Sessler bore the burden of establishing that an "extraordinary remedy" such as a preliminary injunction was appropriate in his case. He did not meet his burden because he did not show he would suffer irreparable harm without prospective relief. "Sessler has asked the district court to determine whether enforcement of the City's Policy violated his constitutional rights during Street Fest. Such a determination will eventually be made. However, Sessler has not demonstrated preliminary injunctive relief is warranted in his case."

LINK

This Just In: County Council Seeks to Avoid Ethical Prohibitions and Adopt Pro-Development Zoning

So many members of the Prince George's (Maryland) County Council have received contributions from developers that they are unable to form a quorum to pass a pro-growth zoning plan.

Prince George's Council Wants to Waive Ethics Law to Approve New Zoning Map (msn.com)

IMLA in the news-Amicus support for Seattle in Washington State Supreme Court vehicle towing case.

IMLA's highly-regarded amicus program--available at no cost to IMLA Municipal members--not only provides vital support at the United States Supreme Court and in the federal circuits and district courts, but also in significant cases within your state court system.

IMLA's amicus support for the City of Seattle was recently cited in the *East Oregonian* in a case now before the Washington Supreme Court. In City *of Seattle v. Long*, no. 98824-2 (Wa. 2019) the City impounded a vehicle after the owner failed to move it from the Century Link Field parking lot for more than a week after being warned by authorities that remaining there beyond 72 hours was illegal. The owner, who had been living in the vehicle, eventually recovered it after paying the towing and storage costs in installments.

His attorneys argue that the City violated Long's privacy rights and the state's homestead law, as well as imposing excessive fines. IMLA supports Seattle's position that, while homelessness is a major problem, the City must have the authority to apply its parking regulations. As IMLA states in our amicus brief, to allow the result sought by Mr. Long would result in "a means to avoid parking regulations that would essentially allow persons to live, indefinitely, on municipal property with no recourse for the public." Washington justices weigh towing of vehicles of homeless

IMLA would like to thank Matthew Segal of Pacifica Law Group in Seattle for drafting IMLA's amicus brief in this case. To read the brief, click here.

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