

DOC throughout the 15 days that Miller was out on probation” (*Harper*, p 1079).

Regarding the notion that juries should essentially decide simple or gross negligence, the court clarified its ruling in *LaPlante v. State*, 531 P.2d 299 (Wash. 1975) regarding questions of negligence and proximate cause, stating that “courts are not precluded from rendering such judgments” and that the “issues of negligence and proximate cause must be accorded the same treatment as any other following a motion for summary judgment” (*Harper*, p 1079, quoting *LaPlante*, p 302).

Discussion

The Washington State Supreme Court found that the DOC exercised an acceptable level of care in monitoring Mr. Miller after release and in attempting to ensure no contact between Mr. Miller and Ms. Patricelli. The court also pointed out that the appeals court failed to take into account what the DOC did to assure no contact between the two parties and that the DOC actions did not rise to the level of gross negligence. Although the murder of Ms. Patricelli was tragic, the DOC was ultimately not held liable for failing to enforce a no contact order between two parties who voluntarily and covertly began living together. The case is instructive because it discussed the responsibility of the DOC after an inmate is released from prison and how the court analyzed the gross negligence standard.

Disclosures of financial or other potential conflicts of interest: None.

Accommodation for Patients with Mental Illness Under the Americans with Disabilities Act and the Rehabilitation Act

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Seclusion and Withholding Communication Devices Can Act as Intentional Discrimination or Failure of Reasonable Accommodation

DOI:10.29158/JAAPL.3900LI-19

In *Reed v. Columbia St. Mary’s Hospital*, 915 F.3d 473 (7th Cir. 2019), the Seventh Circuit Court of Appeals reversed and remanded the U.S. District Court for the Eastern District of Wisconsin’s grant of summary judgment dismissing Linda Reed’s claims of intentional discrimination and failure to accommodate under the Americans with Disabilities Act (ADA) and the Rehabilitation Act during her psychiatric hospitalization at Columbia St. Mary’s Hospital. The court of appeals held that the hospital forfeited its affirmative defense of religious exemption from the ADA due to failure to plead such a defense until after discovery. The appeals court also stated there were factual disputes regarding Ms. Reed’s Rehabilitation Act claims and therefore dismissal via summary judgment was not appropriate.

Facts of the Case

Ms. Reed was hospitalized voluntarily for suicidal ideation at Columbia St. Mary’s Hospital from March 8 to March 12, 2012. Her psychiatric history included bipolar disorder and posttraumatic stress disorder (PTSD). She also experienced tardive dyskinesia (TD) that interfered with her speech and required a prescription electronic device (called a Dynavox) to assist with communication.

Numerous offenses were alleged by Ms. Reed during her hospitalization. First, she reported her Dynavox was withheld. A nursing supervisor from the hospital testified that the Dynavox was secured outside of her room at night and that she had access to it during the day if she maintained “appropriate” behavior. Ms. Reed also alleged that she was denied access to a telephone, chaplain, and medical records; experienced a near-exposure to allergenic medications; and was escorted off hospital property at discharge by security.

On March 11, 2012, Ms. Reed’s Dynavox was withheld and she was placed in seclusion for approximately two hours. Ms. Reed and the hospital disputed the circumstances precipitating seclusion. Ms. Reed reported she asked for her Dynavox and hospital staff refused access. She noted that her TD and associated movements caused her to spill coffee and fall. She reported then being placed in the seclusion room by a patient-care assistant. Staff from Colum-

bia St. Mary's testified that Ms. Reed was lying on the hallway floor and crying. She was instructed to move out of the hallway and was escorted back to her room. During this walk, she reportedly began to scream, and staff made the decision to place her in the seclusion room.

Ms. Reed filed action against the hospital *pro se* in February 2014. The U.S. District Court for the Eastern District of Wisconsin dismissed the claims without prejudice. She refiled *pro se* with claims "that the hospital failed to accommodate her disabilities by deliberately withholding from her a device she used to speak and discriminated against her by putting her in a 'seclusion' room to punish her" (*Reed*, p 475). These claims were interpreted as violations of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12182 (2012) and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2012). The district court again dismissed, citing failure to state a claim, and held that their previous ruling precluded a second judgment. Ms. Reed appealed, and the Seventh Circuit Court of Appeals vacated and remanded in *Reed v. Columbia St. Mary's Hospital*, 782 F.3d 331 (7th Cir. 2015), ruling that she made viable claims and her initial action was dismissed without prejudice, allowing a second judgment.

With counsel on the remand, Ms. Reed stated specific claims involving intentional discrimination based on her disabilities and denial of reasonable accommodation or modification under the ADA and Rehabilitation Act. She also made patients' rights claims under the Wisconsin Mental Health Act (Wis. Stat. § 51.61 (2011)). The hospital filed answers to these complaints but did not plead a religious exemption defense. Under Title III of the ADA, disability discrimination is prohibited in "public accommodations" that would generally include hospitals as defined in 42 U.S.C. § 12181 (2012). Religious organizations and "entities controlled by religious organizations, including places of worship," however, are exempt under 42 U.S.C. § 12187 (2012).

Discovery was completed in August 2016, and in October 2016 the court granted the hospital's motion for summary judgment, dismissing the claims with prejudice. The district court held that the hospital met the ADA exemption for entities controlled by a religious organization. It also ruled that the alleged mistreatment of Ms. Reed during seclusion was not premised solely on her disability and thus did not violate the Rehabilitation Act. The district court de-

clined to exercise jurisdiction over the state-law claims. Ms. Reed again appealed the decision.

Ruling and Reasoning

The Seventh Circuit reversed and remanded the district court's grant of summary judgment dismissing Ms. Reed's claims. It held that dismissal via summary judgment was inappropriate for Ms. Reed's claim of intentional discrimination and failure-to-accommodate claims under the Rehabilitation Act because there were factual questions in dispute. The court ruled that the district court abused its discretion in considering the hospital's religious exemption defense because it was raised after discovery.

The court stated that a reasonable jury could find that secluding Ms. Reed constituted intentional discrimination solely due to Ms. Reed's disability if Ms. Reed was accurate in her contention that she was not screaming, and thus was not disruptive to the point of requiring seclusion. Under the Fed. R. Civ. P. 56(a) (2010), a court shall grant summary judgment only if there is no genuine dispute on material fact. Because there was dispute on the material fact of screaming, summary judgment was deemed inappropriate.

Intentional discrimination under the ADA differs from the Rehabilitation Act in that the discrimination does not have to be solely due to the individual's disability, and instead can be a mixed-motive claim as per *Whitaker v. Wisconsin Dep't of Health Servs.*, 849 F.3d 681 (7th Cir. 2017). For this reason, dismissal of Ms. Reed's ADA claim depended instead on Columbia St. Mary's affirmative defense of exemption for organizations controlled by a religious entity under 42 U.S.C. § 12187 (2012). Columbia St. Mary's did not raise this defense until after discovery. The Seventh Circuit said that the delayed plea was in violation of Federal Rules of Civil Procedure 8(c) (2010) regarding requirement of pleading an affirmative defense and that Ms. Reed was prejudiced by the delay. While the court did not rule on the matter of religious exemption, it said that the defense had been forfeited by failure to plead.

Finally, the court of appeals reversed the dismissal of the reasonable accommodation claim regarding withholding the Dynavox. Relying on the reasoning in *McGugan v. Aldana-Bernier*, 752 F.3d 224 (2d Cir. 2014), health care providers can make discriminating judgments regarding types of treatment to provide based on their expertise. Columbia St. Mary's,

however, did not offer any argument that it withheld the Dynavox based on medical judgment. Thus, it could be argued that withholding the device was a violation of reasonable accommodation, thereby precluding summary dismissal of claim.

Discussion

Reversal of the district court’s decision in *Reed* was largely due to procedural factors; however, there are important implications for the practice of inpatient psychiatry. Ms. Reed argued that being placed in seclusion during her hospitalization was due to intentional discrimination. By reversing the district court’s decision, the court of appeals concluded that a reasonable jury could have credited Ms. Reed’s account of the seclusion event and found that the hospital discriminated against her on the basis of her disability.

Psychiatric providers must proceed with caution to ensure that seclusion is necessary to avoid a risk of harm to self or others, is not done punitively, and that the clinical judgment for deciding to use seclusion is fully documented. As always, compliance with established procedures and appropriate monitoring are important to ensure appropriate use and legal protection if using seclusion. Ms. Reed’s hospitalization resulted in discord between her and staff regarding access to and use of her Dynavox. In these scenarios seclusion could potentially qualify as discrimination solely due to a disability. The importance of documentation manifested most significantly in the material fact disputes between Ms. Reed’s and the hospital staff’s testimony regarding the precipitating events for seclusion. It is important to note that the appeals court reversed primarily on procedural factors and did not opine that the hospital had necessarily committed the above offenses.

The importance of documentation also predominated in Ms. Reed’s reasonable accommodation claims. Both patient and hospital testified that the Dynavox was withheld, but the hospital’s testimony did not identify a corresponding medical justification or rationale. Decisions related to patient safety and actions to reduce possible harm are crucial to providing appropriate inpatient psychiatric care; however, these decisions should not override reasonable accommodations without appropriate clinical justification and documentation.

Disclosures of financial or other potential conflicts of interest: None.

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A Lack of Adequate Background Investigation and Presentation of Mitigating Factors During the Penalty Phase of a Capital Case Could Constitute Ineffective Counsel

DOI:10.29158/JAAPL.3900L2-19

In *Abdul-Salaam v. Secretary of Pennsylvania Department of Corrections*, 895 F.3d 254 (3d Cir. 2018), the Third Circuit Court of Appeals reversed the denial of *habeas* relief for Seifullah Abdul-Salaam, who had been convicted in state court of murder, robbery, and conspiracy. He argued ineffective assistance of counsel, stating that his attorney did not have a reason for failing to acquire a mental health evaluation, among other things. The Third Circuit ruled that there was a reasonable probability that such evidence, had it been presented, would have caused at least one juror to vote differently in his sentencing.

Facts of the Case

On August 19, 1994 in New Cumberland, Pennsylvania, Mr. Abdul-Salaam and Scott Anderson attempted to rob a store. When Officer Willis Cole arrived on scene, Mr. Abdul-Salaam was able to escape, but Mr. Anderson was captured. As Officer Cole was placing Mr. Anderson in handcuffs, Mr. Abdul-Salaam returned to the scene and fired his gun at Officer Cole, who ultimately died as a result of his injuries. Following a six-day jury trial in March 1995, Mr. Abdul-Salaam was found guilty of murder, robbery, and conspiracy. During the one-day penalty phase of the trial, jurors were instructed to consider four statutory aggravating factors that had to be proven beyond a reasonable doubt by the Commonwealth of Pennsylvania to sentence someone to death. Mr. Abdul-Salaam’s trial counsel presented three witnesses (his mother and two of his sisters) to provide evidence of mitigating factors. His mother