

The court viewed penile plethysmography as an intrusive procedure, both physically and psychologically, likening the procedure to a device from a George Orwell novel. The court utilized a standard of review involving tests that are “nonroutine manipulative intrusions on bodily integrity” and that such tests “will be scrutinized” (*Harrington v. Almy*, 977 F.2d 37, 44 (1st Cir. 1992)) to determine whether there are less intrusive options. Also, the court maintained that the government has the burden of proof to show “that a particular condition of supervised release involves no greater a deprivation of liberty than is reasonably necessary to serve the goals of supervised release” (*U.S. v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991)).

While the court concluded that the level of accuracy of penile plethysmography reported in the scientific literature is low and that the test’s true validity is academically controversial, this test could be a required condition for supervised release if there was evidence supporting the efficacy of this test over less intrusive procedures, such as the Abel and polygraph tests.

However, the court ruled in this case that the government did not meet the required burden of proof to show that plethysmography was necessary over other testing options. The U.S. Court of Appeals vacated Mr. Weber’s supervised release condition and remanded the case.

Discussion

The case of *U.S. v. Weber* revolves around the convicted child sex offender’s right to individual dignity. The Ninth Circuit Court of Appeals concludes that penile plethysmography is a highly intrusive procedure contrary to the basic human rights that prisoners do not relinquish once incarcerated. As Judge Noonan noted, “by committing a crime and being convicted of it, a person does not cease to be a person. A prisoner is not a mere tool of the state to be manipulated by it to achieve the purposes the law has determined appropriate in punishment” (*Weber*, p 571).

In reviewing the merits of penile plethysmography, applying a “reasonable and necessary” standard coupled with the requirement that the government shoulder the burden of proof to show that such testing is merited, the court is expressing its disquiet over a common psychological test format used on released sex offenders. Mandatory penile plethysmography to

gain supervised release places the convicted sex offender in the paradox of abrogating his right to personal dignity to secure his release from prison.

U.S. v. Weber brings to the forefront the debate over plethysmography’s psychiatric merits. Given the number of human rights concerns surrounding penile plethysmography, the limited efficacy of the test, and the ready availability of other testing alternatives, *U.S. v. Weber* calls into question the wisdom of utilizing penile plethysmography as a sex offender testing device.

Although the court established broad guidelines for the use of plethysmography, it did not specify what level of evidence the government must show to display a requirement for plethysmography over other sexual response tests. This ambiguity leaves the matter of use of plethysmography during supervised release unresolved and subject to further judicial review.

Americans With Disabilities Act, Wrongful Death, Equal Protection, Immunity

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The First Circuit Affirms the District Court’s Summary Judgment Regarding Wrongful Death and Failure to Accommodate Mental Illness

In *Buchanan v. Maine*, 469 F.3d 158 (1st Cir. 2006), Daniel Buchanan, brother of Michael Buchanan (deceased) and representative of his estate, appealed to the U.S. District Court for the District of Maine’s summary judgment in favor of the defendant (County, State of Maine, two deputy sheriffs, and a case manager) in a suit for wrongful death under 42 U.S.C.S. § 1983 (1996) and for failure to accommodate Mr. Buchanan’s mental illness under

Title II of the Americans with Disabilities Act (ADA), 42 U.S.C.S. §§ 12131-12165 (1990).

Facts of the Case

Michael Buchanan, a resident of Maine, had shown signs of mental illness since young adulthood and had been admitted to Augusta Mental Health Institute (AMHI) in 1988 and in 1999. His diagnosis was “bipolar disorder with psychosis, schizoaffective disorder, and schizophrenia with paranoia.” In compliance with guidelines established after a class action lawsuit resolved in 1990 in favor of “present and former patients of AMHI,” which required the state to provide an individualized support plan (ISP) at discharge and monitoring by a community support worker, Michael Buchanan’s case was assigned to Joel Gilbert.

On December 2, 1999, Mr. Gilbert completed an “outreach plan” for Mr. Buchanan that included “weekly visits to Mr. Buchanan to check on his living conditions, offer[ing] rides to town for errands, take[ing] him to doctor’s appointments, and encourag[ing] him to take his medications” (*Buchanan*, p 163). By early 2001, Mr. Buchanan announced that he would no longer take his medications and began to demonstrate signs of decompensation. On December 28, 2001, Mr. Buchanan became angry with Mr. Gilbert during a visit. Claiming to have five gun permits, Mr. Buchanan told the case manager that he did not trust him and did not want him to return. Mr. Gilbert decided that it would be prudent to have a coworker accompany him on future visits. He last visited Mr. Buchanan on December 31, 2001, and was unable to find a coworker to accompany him on visits in January 2002. On February 5, 2002, Mr. Gilbert informed Mr. Buchanan’s brother Daniel (the plaintiff in the case) that he had been having difficulty making visits, but was keeping watch over Mr. Buchanan through Mr. Buchanan’s neighbor and friend, Terry Johnston.

On February 25, 2002, Ms. Johnston called Mr. Gilbert and stated that Mr. Buchanan had “growled and glared at her that morning, and that around 4:30 p.m. the same day, she had learned that someone resembling Buchanan had been spotted lighting a fire in her woodpile” (*Buchanan*, p 164). Because the fire was a criminal matter, Mr. Gilbert told Ms. Johnston to call the police. Deputies Kenneth Hatch and Robert Emerson responded at 5:59 p.m. and saw Mr. Buchanan standing next to a window “screaming

something.” Mr. Buchanan then pushed the window open and began to scream that he worked for the Massachusetts Sheriff’s Department, that they were not throwing him in “a Nazi Jewish oven,” that he was with the New York State Police and the federal government, and that he had the right to sell guns. He then threatened to kill the officers, and a few moments later threw a liquid at them that smelled like liquor.

At around 6:20 p.m., Deputy Hatch radioed dispatch to ask for contact with Mr. Buchanan’s mental health counselor for advice. When the line was found to be busy, Mr. Hatch asked the dispatch officer to break in. There was then a loud smashing sound that sounded like either a gunshot or a window breaking. Deputy Hatch asked the officer on the line to contact the on-call police supervisor. Mr. Buchanan appeared at the door with blood on his hand and opened the door, screaming at Deputy Emerson, and spitting at him. Mr. Buchanan then walked back inside and Deputy Emerson followed him and was spat on a second time. Deputy Emerson intended to put Mr. Buchanan into protective custody due to “an unstable mental state . . . [his] agitated condition, his nonsensical screaming, and his apparently self-inflicted injuries” (*Buchanan*, p 164). Deputy Emerson, seeing a “substantial” amount of blood, attempted to grab both of Mr. Buchanan’s hands, but Mr. Buchanan pulled back and spat on Deputy Emerson for the third time.

Going up the stairs, Mr. Buchanan went into a room and returned with a knife. Deputy Emerson screamed “knife” as Mr. Buchanan stabbed him repeatedly. Deputy Hatch drew his gun and shot Mr. Buchanan four times, resulting in Mr. Buchanan’s death.

Daniel Buchanan filed suit, alleging that the death was preventable, that entry into the home violated the Fourth Amendment, that the State defendants failed to provide needed mental health services as required by Title II of the Americans with Disabilities Act (ADA), and that Mr. Buchanan’s case manager had violated Mr. Buchanan’s “class of one” equal protection rights. The State of Maine asserted Eleventh Amendment immunity to the plaintiff’s ADA Title II claim, and summary judgment for defendants was entered by the trial court.

Ruling

The U.S. Court of Appeals for the First Circuit affirmed the entry of summary judgment in favor of the defendants (the County, two deputy sheriffs, and the case manager) with regard to the claims of wrongful death and failure to accommodate the decedent's mental illness. The court also held that judgment for the State should have been entered without reaching the Eleventh Amendment issue, because no Title II claim was established.

Reasoning

The court began its opinion with a review of the standard for summary judgment, citing Fed. R. Civ. P. 56(c), stating that it is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as [a] matter of law." On this basis, the court examined the record "in the light most favorable to the nonmovant."

The first issue discussed by the court was plaintiff's 42 U.S.C.S. § 1983 (1996) claim against the two deputies. Both parties agreed on the facts of the case and that constitutional theory under the Fourth Amendment's protection against unlawful search and seizure required that entry into the home be justified. The court used a three-part test to evaluate whether the two deputies were entitled to qualified immunity: first, whether plaintiff asserted a violation of constitutional rights; second, whether those rights were established; and third, whether a reasonable officer could have concluded that his actions did not violate constitutional rights.

With regard to the first step of the analysis, the court found that Daniel Buchanan had asserted a constitutional right and the absence of extenuating circumstances justifying entry. The court believed that the reasonableness of entry into Mr. Buchanan's home is "highly idiosyncratic and heavily dependent on the facts," and that the salient "threshold question is whether all the uncontested facts and any contested facts looked at in plaintiff's favor show a constitutional violation" such as precluding submission to a jury (*Buchanan*, p 168). Due to the "complexity of the matter" and because the court considered it to be clear that the officers were entitled to immunity, it then examined the second and third prongs of the test. With regard to the second prong, the court

found that it could not say that the deputies had "fair warning under the law" that entering the house would violate Mr. Buchanan's Fourth Amendment rights, as case law tended to support intervention in such circumstances. With regard to the third prong, the court found that even though officers may sometimes be mistaken, they are entitled to immunity on the basis of reasonable actions alone, regardless of the results of the first and second prongs of the test. The court then examined the facts, noting that although mental illness alone does not permit warrantless entry, the threat of imminent and substantial harm to self or others need not be life threatening to justify entry. Listing Mr. Buchanan's threats and aggressive behavior at the time, the court concluded, "A reasonable officer could have believed that waiting [for a response from case manager Gilbert] was not a good idea" (*Buchanan*, p 168).

The second point addressed by the court was the ADA Title II claims against Maine and Lincoln County. Whereas "the district court held that 'Title II of the ADA, as applied to access to public mental health services, does not validly abrogate the State's sovereign immunity and cannot be enforced against the State of Maine in a lawsuit for monetary damages'" (Eleventh Amendment defense, *Buchanan v. Maine*, 377 F. Supp.2d, 276, 283 (D. Me. 2005), cited in *Buchanan*, 469 F.3d, 171), the appellate court found that there was no Title II claim against the State and therefore the district court was in error in reaching the Eleventh Amendment issue.

The court held that Daniel Buchanan did not establish a claim under Title II because he did not show: (1) that Mr. Buchanan was a qualified individual; (2) that Mr. Buchanan was excluded from participation in or denied benefits provided by Maine or that he was otherwise discriminated against; and (3) that Maine's failure to provide such services was due to disability. Although Mr. Buchanan was clearly disabled, the ADA does not mandate the provision of services. The ADA does not establish a "standard of care" for the services rendered; it prohibits discrimination only in the provision of the services rendered. Citing *Kimman v. N.H. Dep't of Corr.*, 451 F.3d 274 (1st Cir. 2006), the court emphasized the distinction between "ADA claims based on negligent medical care and those based on discriminatory care." Daniel Buchanan's claims concerned the adequacy of treatment provided, not a discriminatory denial of services. Furthermore, the court found that Maine did

“attempt to meet Buchanan’s increasing needs, and did provide assistance and crisis intervention,” and that the failure to provide an ISP was attributable to Mr. Buchanan’s refusal. There was no evidence in the record that treatment decisions were so unreasonable as to raise “an implication of pretext for some discriminatory motive” or that they were “based on stereotypes of the disabled” (*Buchanan*, p 176). On this basis, the court held that Title II claim had been established.

On appeal, Daniel Buchanan also asserted Title II claims against Lincoln County, stating that the law requires sufficient training of police officers to accommodate the needs of mentally ill individuals and requires policies to assure that the training is provided. The court chose to “bypass” the question of whether Title II of the ADA imposes the requirement of a policy and training procedures for officers, stating that in fact the County had such policies and training. While Daniel Buchanan contended that the policies and training were deficient, the court found that the argument of insufficiency does not indicate a denial of benefits of the services of a public entity by reason of disability and that the claim therefore did not fall under Title II of the ADA.

Third and last, Daniel Buchanan claimed an equal protection “class of one” denial of critical intensive case management. Although the issue was treated under the Title II analysis, the court also proceeded to apply an equal protection analysis to the case. The court found that, whereas a plaintiff who does not rely on “typical” categories of discrimination (such as race or religion) must show that there was no rational basis for the difference in treatment and that the plaintiff was intentionally treated differently than others similarly situated, there was no evidence in the record that Mr. Buchanan had been treated differently from others similarly situated.

Discussion

This is a complex case that provides clarification of a hierarchy of legal tests and delineates a proper sequence for applying the tests to cases involving government liability for services to mentally ill persons. The case also examines the manner in which exceptions are embedded in texts of law that otherwise state plainly the rights and responsibilities of government.

First, we observe that this case could have been tried under tort law. Daniel Buchanan’s choice of

making a claim on constitutional grounds and federal statutes induces the court to comment on the pertinence of tests at these levels.

The analysis begins with a Fourth Amendment § 1983 claim that the officers’ warrantless entry into Mr. Buchanan’s home precipitated the series of events resulting in Mr. Buchanan’s death. The text of the Fourth Amendment specifies exceptions:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The court readily noted that the facts of Mr. Buchanan’s case indicated a reasonable basis and probable cause, affirming the officers’ qualified immunity.

In contrast, the Eleventh Amendment describes government immunity in unequivocal terms, stating no derogations:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The court pointed out that Congress may abrogate state immunity by legislation, but only by invoking application of another text of law at the constitutional level, in this case that of the Fourteenth Amendment. Federal code in the ADA is thus able to take precedence over the authority of the Eleventh Amendment by supporting its aims through a constitutional text of equal weight.

The analysis then turns to the ADA-based claim that the State and County failed to provide reasonable accommodations for Mr. Buchanan’s mental illness, setting in motion the events that culminated in his death. On the basis of interpretation of Title II of the ADA, the court was able to conclude that Daniel Buchanan did not state a Title II claim. However, the court carried through an analysis of the same issue by way of an equal protection claim under the Fourteenth Amendment, even though this did not appear to be necessary in this case. The suggestion, not explicitly stated by the court, is that, were there to be a demonstrable Title II claim, the issue would reach the Eleventh Amendment, but for the need to invoke an equal protection analysis. The court therefore also followed the facts of the case through the constitutional claim under the Fourteenth Amendment, to

show that the Eleventh Amendment issue cannot be reached.

In its analysis of Title II, the court clarified the nature of protections offered by the ADA. While the ADA protects against discrimination on the basis of disability in the provision of services, it does not mandate the services provided, nor specify a standard of care. A plaintiff claiming inadequate, rather than discriminatory, care, thus fails to state a Title II violation. This finding further stratifies the legal tests that are to apply in cases such as *Buchanan v. Maine*, where the grievance more properly arises from tort liability related to outcome than from procedure that is found to be discriminatory on the basis of class.

Amnesia and Competence to Stand Trial

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Amnesia for the Time of the Alleged Crime Is Not a Bar to Competence to Stand Trial and Does Not Require a Separate Finding of Fact of Competence at the Termination of the Trial

In *U.S. v. Andrews*, 469 F.3d 1113 (7th Cir. 2006), Rodney Andrews appealed his conviction to the Seventh Circuit Court of Appeals based on his claim that his amnesia for the time surrounding the crime rendered him incompetent to stand trial based on his inability to assist his attorney in preparing his defense. Mr. Andrews also claimed that the court erred in denying his request for a second competency assessment and a hearing to determine the impact of his amnesia on his fitness to stand trial.

Facts of the Case

On May 11, 2001, the Anchor Bank in Madison, Wisconsin, was robbed by a man claiming to have a gun. Before the alleged robbery, a witness saw an individual fitting the description of the bank robber smoking outside the bank. Three years later, cigarette butts found at the scene of the crime were sent for

DNA analysis. The profile matched that of convicted bank robber and long-time drug addict, Rodney Andrews. Mr. Andrews was indicted by grand jury on one count of robbing the Anchor Bank and was informed that he was suspected in four other bank robberies that occurred in 2001. His counsel understood that the government intended to charge Mr. Andrews on all five counts of bank robbery, which would result in his classification as a career offender, if he did not plead guilty to the original charge and stipulate to culpability in the other four incidents.

Because of his heavy use of heroin and alcohol at the time of the alleged robberies, Mr. Andrews claimed to have no memory of “where he was, or what he was doing, during the early to middle part of 2001.” As a result, a motion was filed by Mr. Andrews’ counsel for a psychiatric and psychological examination of his “present competency and his sanity at the time of the alleged bank robbery.” The examination was ordered without opposition by the government.

A psychologist opined that Mr. Andrews was competent to stand trial based on his “rational and factual understanding of the proceedings against him” and that “he is capable of assisting counsel in his defense.” The psychologist went on to opine that he “did not have a mental illness impairing his ability to appreciate the wrongfulness of his conduct” at the time of his alleged offenses.

Mr. Andrews then filed a second motion requesting an additional psychological evaluation based on his belief that the psychologist did not specifically address the effect of his alleged lack of memory on his ability to assist counsel. The government cited Seventh Circuit precedent in their opposition to his request. On September 28, 2005, Magistrate Judge Crocker denied the motion stating, “Given the law of this circuit, it does not appear anything useful would be obtained by attempting to pinpoint more precisely any organic basis for Mr. Andrews’ amnesia” (*Andrews*, p 1116).

Mr. Andrews was found guilty of robbing the Anchor Bank in a bench trial. He appealed based on his claim that his amnesia for the relevant period of the robbery rendered him unable to assist in his own defense at trial and that as such he should have been declared incompetent. He further claimed that the district court “erred in denying his request for a second competency examination and hearing to evalu-