

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-00807-REB-CBS

JULIANNA BARBER, by and through her next friend, MARCIA BARBER,
MADELINE BARBER, by and through her next friend, MARCIA BARBER,
MARCIA BARBER,
COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit corporation, and
AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC.,
a Colorado non-profit corporation,

Plaintiffs,

v.

STATE OF COLORADO, DEPARTMENT OF REVENUE,
STATE OF COLORADO, DEPARTMENT OF REVENUE, DIVISION OF MOTOR
VEHICLES,
M. MICHAEL COOKE, in his official capacity as Executive Director of the
Colorado Department of Revenue, and
JOAN VECCHI, in her official capacity as Senior Director of the
Colorado Division of Motor Vehicles,

Defendants.

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs Julianna Barber, Madeline Barber, Marcia Barber, the Colorado Cross-Disability Coalition, and the American Council of the Blind of Colorado, by and through their attorneys, Fox & Robertson, P.C. and Kevin W. Williams, hereby bring this Complaint against the Department of Revenue and the Division of Motor Vehicles of the State of Colorado, M. Michael Cooke, in his official capacity as Executive Director of the Colorado Department of Revenue, and Joan Vecchi, in her official capacity as Senior Director of the Colorado Division of Motor Vehicles.

Introduction

1. Colorado law permits individuals to begin driving at the age of 15 when accompanied by a parent or guardian who is also a licensed driver. Marcia Barber is visually impaired and, as a result, does not have a driver's license. She requested the reasonable modification that her then 15-year-old daughter, Julianna, be permitted to drive accompanied by another close relative who is a licensed driver. Defendants refused to make this reasonable modification, in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Jurisdiction and Venue

2. This Court has jurisdiction over the federal claim in this action pursuant to 28 U.S.C. §§ 1331 and 1343.

3. Venue is proper within this District pursuant to 28 U.S.C. § 1391.

Parties

4. Julianna Barber is a resident of Colorado Springs, Colorado. She is 16 years old and participates in this lawsuit by and through her next friend, her mother Marcia Barber.

5. Madeline Barber is a resident of Colorado Springs, Colorado. She is 14 years old and participates in this lawsuit by and through her next friend, her mother Marcia Barber. Madeline Barber will turn 15 on January 14, 2007.

6. Marcia Barber is a resident of Colorado Springs, Colorado. She has retinitis pigmentosa and as a result is substantially limited in major life activities, including but not limited to the major life activity of seeing.

7. Plaintiff Colorado Cross-Disability Coalition (“CCDC”) is a Colorado non-profit corporation whose members are persons with disabilities and their nondisabled allies.

8. Plaintiff American Council of the Blind of Colorado (“ACBC”) is a Colorado non-profit corporation whose members are blind and sighted Coloradans.

9. Defendant Department of Revenue (“Department”) is a department of the government of the State of Colorado. Through its Division of Motor Vehicles, Department is responsible for administering the licensing of drivers in Colorado.

10. Defendant Division of Motor Vehicles (“Division”) is a division of the Department of Revenue of the State of Colorado. It is responsible for administering the licensing of drivers in Colorado.

11. Defendant M. Michael Cooke is the Executive Director of the Colorado Department of Revenue.

12. Defendant Joan Vecchi is the Senior Director of the Colorado Division of Motor Vehicles.

13. Defendants Department and/or Division receive federal financial assistance as that term is defined in 29 U.S.C. § 794.

14. Defendants Department and/or Division received a federal grant to fund the improvement of motor vehicle accident processing.

15. Defendants Department and/or Division also received a federal grant to discourage drinking and driving.

16. Defendants Department and/or Division also received a federal grant for a pilot project to implement automated testing for commercial driver licenses.

17. From approximately July 1, 2003 to June 30, 2004, Defendants Department and/or Division received at least \$2,718,793 in federal funds.

18. From approximately July 1, 2002 to June 30, 2003, Defendants Department and/or Division received at least \$3,620,104 in federal funds.

Facts

19. In 1999, the General Assembly declared that, “[g]raduated drivers licensing systems are designed to teach beginning drivers how to drive making certain that they accumulate sufficient behind-the-wheel experience in low-risk settings before they receive an unrestricted driver’s license,” and that “A graduated drivers licensing system is needed in Colorado to progressively develop and improve the skills of its teenage drivers in the safest possible environment to reduce the incidence of collisions and fatalities among teenage drivers.” Colo. Laws 1999 ch. 334, sec. 1(c) & (d) (emphasis added).

20. The Colorado General Assembly declared further that “[t]eenage drivers, in order to become safe and responsible drivers, need behind-the-wheel driving experience before they can begin to drive without restrictions,” and that “[p]roviding additional behind-the-wheel training with a parent, guardian, or other responsible adult

before obtaining a minor driver's license is the beginning of the young driver's accumulation of experience." C.R.S. § 42-2-105.5.

21. Colorado residents are eligible to apply for a "minor's driver's license" at the age of 16. Id. § 4-2-104(1)(c).

22. To encourage teen-age drivers to get additional "behind-the-wheel" experience, the legislature provided that individuals 15 to 16 years old may obtain a "minor's instruction permit." Id. § 42-2-106(b).

23. Plaintiff Julianna Barber was born on September 8, 1989. She turned 15 on September 8, 2004.

24. At that time, Colorado law provided that, after completion of a driver education course, the holder of the minor's instruction permit could drive under the supervision of a parent, stepparent, or guardian if such individual held a valid driver's license. C.R.S. § 42-2-106(b) (2004).

25. On or about October 13, 2004, Julianna Barber obtained a minor's instruction permit. On October 23, 2004, she completed a driver education course.

26. Following completion of her driver education course and until she turned 16 on September 8, 2005, Julianna Barber was only permitted to drive with a licensed parent, stepparent or guardian.

27. Marcia Barber has full custody of her daughters, Julianna and Madeline Barber.

28. Julianna and Madeline Barber's father does not have custody of either girl, does not have a driver's license and resides in the state of California.

29. Because of her visual disability, Marcia Barber does not have a driver's license.

30. As such, Julianna Barber did not have a parent, stepparent or guardian with a license and thus was not able to practice driving using her "minor's instruction permit."

31. In or about September or October of 2004, Marcia Barber inquired of her local Division of Motor Vehicles office concerning whether she could obtain the reasonable modification of permitting Julianna to drive with her grandfather, who is a licensed driver, before she turned 16. Ms. Barber thus placed Defendants on notice that she required such a modification.

32. Marcia Barber was ultimately referred to Steve Tool, then Director of the Division of Motor Vehicles of the Department of Revenue. By letter dated November 22, 2004, Mr. Tool ultimately conveyed the view of the Attorney General's office that the grandfather would not qualify unless legally appointed as a guardian. Defendants thus intentionally, and with deliberate indifference to Ms. Barber's federally protected rights, rejected Ms. Barber's request for a reasonable modification.

33. By letter dated December 2, 2004 to Mr. Tool, Marcia Barber requested that he ask the Attorney General's office to reconsider this response, and clarified that she was asking for a modification of the requirement. Ms. Barber explicitly referenced the ADA. Ms. Barber thus placed Defendants on notice a second time that she required a reasonable modification, and made clear that her federally-protected rights were at stake.

34. After several more, unfruitful conversations with Mr. Tool, Ms. Barber called John Suthers, the Attorney General of Colorado. She described her situation and requested a modification, again specifically referencing the ADA. Ms. Barber again placed Defendants on notice that she required a reasonable modification.

35. Mr. Suthers stated that he did not see the question as an ADA issue, and suggested that Ms. Barber assign guardianship of her daughter to someone else who could drive with her. Defendants again intentionally, and with deliberate indifference to Ms. Barber's federally protected rights, rejected Ms. Barber's request for a reasonable modification.

36. This was very painful for Ms. Barber, who has worked hard to ensure that her daughters can participate fully in all activities despite the fact that their mother is blind.

37. Marcia Barber wrote to Mr. Suthers on January 21, 2005 and January 25, 2005, explaining the requirement in the ADA of reasonable modifications, requesting that he grant her request, and explaining how painful his suggestion had been. Through these letters, Ms. Barber again placed Defendants on notice that she required a reasonable modification, and again made clear that her federally-protected rights were at stake.

38. By letter dated February 3, 2005, Chris Méndez, an attorney with the Legal Center for People with Disabilities and Older People, wrote to the Attorney General's office on Ms. Barber's behalf, explaining in detail why the Barbers were entitled to the relief they had requested. Mr. Méndez provided a detailed legal analysis

supporting Ms. Barber's request for reasonable modifications, under both the ADA and the Rehabilitation Act. Ms. Barber, through her attorney Mr. Méndez, again placed Defendants on notice that she required a reasonable modification, and again made clear that her federally-protected rights were at stake.

39. By letter dated February 23, 2005, the Office of the Attorney General replied, refusing such relief. This letter makes clear that Defendants -- acting through their attorneys -- specifically considered and rejected Ms. Barber's request under both federal statutes. Defendants again intentionally, and with deliberate indifference to Ms. Barber's federally protected rights, rejected Ms. Barber's request for a reasonable modification.

40. Effective May 27, 2005, section 42-2-106(b) was amended to provide that that, after completion of a driver education course, the holder of the minor's instruction permit could drive under the supervision of a parent, stepparent, grandparent with power of attorney, or guardian if such individual held a valid driver's license. C.R.S. § 42-2-106(b) (2005).

41. This statute would still have required Marcia Barber to convey legal rights to her father (Julianna's grandfather) in order to permit him to supervise Julianna's driving. Ms. Barber was unwilling to convey such legal rights.

42. Without an adult to supervise her driving, Julianna Barber lost the advantages -- declared important by the Colorado General Assembly -- of a year of supervised "behind-the-wheel" experience before she received her license.

43. Julianna Barber turned 16 on September 8, 2005.

44. Individuals who are 16 years of age are eligible to apply for a minor's driver's license provided they have logged 50 hours of driving experience. C.R.S. §§ 42-2-104(1)(c) & 106(1)(a). Most teenagers are able to log those 50 hours -- and more -- with their minor instruction permit during the year between their 15th and 16th birthdays. Because of Defendants' discrimination, Julianna had been able to log only a few hours, for example, with her paid driver instruction program.

45. As of her 16th birthday, Julianna was permitted to drive with her minor's instruction permit accompanied by any licensed driver over the age of 21. C.R.S. § 42-2-106(1)(a).

46. Julianna logged the remainder of the required 50 hours in the two months after her 16th birthday, compressing into that period the experience most young drivers gain over an entire year. Among other things, this did not give her driving experience in a full range of road conditions.

47. Julianna obtained her driver's license on November 14, 2005.

48. When she turns 15 less than one year from now, Madeline Barber will not have a parent, stepparent or guardian with a license and thus will not be able to drive using her "minor's instruction permit" until she turns 16. Marcia Barber will not convey legal rights to her father to permit him to supervise Madeline's driving.

49. Unless Madeline Barber is permitted to drive with another licensed adult -- without affecting her or her mother's legal rights -- she, too, will lose the advantages of a year of supervised "behind-the-wheel" experience before she receives her license.

50. Thus, unless Defendants change their policy to permit reasonable modifications, Marcia and Madeline Barber will face discrimination in one year when Madeline turns 15.

51. Marcia Barber has been and will continue to be injured by Defendants' conduct, including but not limited to:

- a. being excluded from the minor driving instruction program and the supervision of her daughters' driving instruction between the ages of 15 and 16;
- b. encountering greater difficulty obtaining a benefit -- participation in the minor driving instruction program -- than for individuals without disabilities due to a barrier imposed by the government;
- c. being prevented by a discriminatory policy -- the refusal to make reasonable modifications -- from participating in the program; and/or
- d. being stigmatized as a mother who is unable to supervise her daughters' driving instruction, as a direct result of having personally been discriminated against by Defendants.

52. Juliana Barber was injured and Madeline Barber will be injured by Defendants' discrimination against their mother, including but not limited to:

- a. being denied the opportunity to practice driving in a variety of weather conditions and over the course of a full year between their 15th and 16th birthdays;

- b. facing delays in obtaining their drivers' licenses after their 16th birthday; and/or
- c. otherwise being denied the benefits of the minor driving instruction program, for example, those referred to in Paragraphs 19 and 20 above.

53. Plaintiffs' injuries were and/or will be caused by Defendants' conduct, in that Defendant denied Marcia Barber's request for a reasonable modification that, if granted, would have permitted all Plaintiffs to avoid injury.

54. The relief requested will redress Plaintiffs' injuries:

- a. Marcia and Julianna Barber request compensatory damages to redress the injuries they suffered when Defendants denied Marcia Barber's request for reasonable modifications when Julianna was eligible for a minor's instruction permit; and
- b. Marcia and Madeline Barber request injunctive relief to prevent the injuries they will suffer less than a year from now, when Marcia -- in the absence of such relief -- will be unable to participate in and supervise Madeline's driving practice.

55. Marcia, Julianna and Madeline Barber are members of CCDC.

56. CCDC's purpose is to work for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities in the entire community. As part of that purpose, CCDC seeks to ensure that persons with

disabilities and those related to or associated with such persons do not encounter discrimination in government services such as licensing.

57. One of CCDC's programs is the Center for the Rights of Parents with Disabilities ("CRPD"). The mission of the CRPD is to combat discrimination that impacts parenting for parents with disabilities, through direct services, education, research and training.

58. CCDC's members include parents with disabilities and their children who are likely to encounter the same discrimination encountered by the Barbers.

59. CCDC's members, including but not limited to the Barbers, have been injured and will continue to be injured by Defendants' discrimination described above.

60. The elimination of discrimination, such as that of Defendants and the integration of persons with disabilities into the community are at the core of CCDC's organizational purpose.

61. The participation of individual CCDC members in the lawsuit is not required either to resolve the claims at issue or to formulate relief.

62. The Barbers are family members of ACBC.

63. ACBC's purpose is to promote the independence, equality and opportunities for blind and visually impaired individuals in the state of Colorado.

64. ACBC's members include parents who are blind and their children, who are likely to encounter the same discrimination encountered by the Barbers.

65. ACBC's members, including but not limited to the Barbers, have been injured and will continue to be injured by Defendants' discrimination described above.

66. The elimination of discrimination, such as that of Defendants and the integration of blind persons into the community are at the core of ACBC's organizational purpose.

67. The participation of individual ACBC members in the lawsuit is not required either to resolve the claims at issue or to formulate relief.

Claim I: Violation of Title II of the Americans with Disabilities Act

68. Plaintiffs reallege and incorporate by reference the allegations set forth in this Complaint as if fully set forth herein.

69. Defendants are public entities as that term is used in 42 U.S.C. § 12132 and the individuals responsible for administering those entities.

70. Defendants have discriminated against Plaintiffs on the basis of disability, in violation of 42 U.S.C. § 12132 and its implementing regulations, as more fully described above.

71. Such discrimination includes but is not limited to discrimination against Plaintiffs Marcia Barber, CCDC and ACBC in that Defendants refuse to make reasonable modifications in their policies, practices and procedures to avoid discrimination on the basis of disability.

72. Plaintiffs have been injured and aggrieved by, and will continue to be injured and aggrieved by, Defendants' discrimination.

73. Such injuries include but are not limited to:

- a. Injuries suffered and to be suffered by Plaintiff Marcia Barber caused by Defendants' discrimination against her;

- b. Injuries suffered and to be suffered by Plaintiffs Julianna and Madeline Barber caused by Defendants' discrimination against Plaintiff Marcia Barber; and
- c. Injuries suffered and to be suffered by Plaintiffs CCDC and ACBC based on injuries to their members, including but not limited to Plaintiffs Marcia, Julianna and Madeline Barber, caused by Defendants' discrimination against individuals with disabilities.

Claim II: Violation of Section 504 of the Rehabilitation Act

74. Plaintiffs reallege and incorporate by reference the allegations set forth in this Complaint as if fully set forth herein.

75. Defendants Department and Division receive federal financial assistance as that term is used in 29 U.S.C. § 794. Defendants Cooke and Vecchi are the individuals responsible for administering the relevant programs.

76. Defendants have discriminated against Plaintiffs on the basis of disability, in violation of 29 U.S.C. § 794 and its implementing regulations, as more fully described above.

77. Such discrimination includes but is not limited to discrimination against Plaintiffs Marcia Barber, CCDC and ACBC in that Defendants refuse to make reasonable modifications in their policies, practices and procedures to avoid discrimination on the basis of disability.

78. Defendants' discrimination is intentional or, at the very least, represents deliberate indifference to the strong likelihood that pursuit of the policies at issue here

would likely result in a violation of federally protected rights. Such intent and/or deliberate indifference includes, but is not limited to, Defendants' repeated denials of Plaintiff Marcia Barber's specific requests for reasonable modifications based on her federally protected rights to such modifications.

79. Plaintiffs have been injured and aggrieved by, and will continue to be injured and aggrieved by, Defendants' discrimination.

80. Such injuries include but are not limited to:

- a. Injuries suffered and to be suffered by Plaintiff Marcia Barber caused by Defendants' discrimination against her;
- b. Injuries suffered and to be suffered by Plaintiffs Julianna and Madeline Barber caused by Defendants' discrimination against Plaintiff Marcia Barber; and
- c. Injuries suffered and to be suffered by Plaintiffs CCDC and ACBC based on injuries to their members, including but not limited to Plaintiffs Marcia, Julianna and Madeline Barber, caused by Defendants' discrimination against individuals with disabilities.

Relief Requested

WHEREFORE, Plaintiffs respectfully request:

1. That this Court assume jurisdiction;
2. That this Court declare the actions of Defendants described in this Complaint to be in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act;

3. That this Court enter an injunction in favor of Plaintiffs Marcia and Madeline Barber, the Colorado Cross-Disability Coalition, and the American Council of the Blind of Colorado ordering Defendants to cease discrimination on the basis of disability in the administration of the driver's license program;

4. That this Court award Plaintiffs Marcia and Julianna Barber compensatory damages under the Rehabilitation Act against Defendants Department and Division;

5. That this Court award Plaintiffs their reasonable attorneys' fees and costs;
and

6. That this Court award such additional or alternative relief as may be just, proper and equitable.

JURY DEMAND: Plaintiffs demand a jury for all claims properly tried to a jury.

Respectfully submitted,

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Dated: January 20, 2006

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