UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MICHELE HADDAD,

Plaintiff

v. Case No: 3:10-cv-414-J-99MMH-TEM

THOMAS W. ARNOLD, in his official Capacity as Secretary, Florida Agency for Health Care Administration, and

DR. ANA VIAMONTE ROS, in her official capacity as Surgeon General, Florida Department of Health,

Defendants

_____/

DEFENDANTS' MEMORANDUM OF LAW ON THE STANDARD FOR INJUNCTIVE RELIEF

The Defendants, THOMAS W. ARNOLD, in his official capacity as the Secretary of the Florida Agency for Health Care Administration, and DR. ANA VIAMONTE ROS, in her official capacity as Surgeon General, Florida Department of Health, by and through undersigned counsel, pursuant to this Court's order, submit this memorandum of law on the mandatory nature of the injunctive relief requested in the above styled matter.

Injunctions are either prohibitory (status quo) or mandatory (affirmative) in nature. Prohibitory injunctions seek only to maintain the status quo pending a trial on the merits. Tom Doherty Associates, Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34 (2d Cir. 1995). Mandatory injunctions *alter* the status quo "by commanding some ***positive act***." Id (emphasis added). When the relief requested constitutes a mandatory injunction, "the

burden placed on the moving party is increased." Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC, 605 F. Supp. 2d 1189, 1196 (N.D. Ala. 2009). A mandatory preliminary injunction "should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party." Miami Beach Fed. Sav. & Loan Ass'n v. Callander, 256 F.2d 410, 415 (5th Cir. 1958). See also Staver v. Am. Bar Ass'n, 169 F. Supp. 2d 1372, 1376 (M.D. Fla. 2001) ("A mandatory preliminary injunction requiring defendant to take affirmative action is proper only in rare instances." (internal quotations omitted)). The United States Supreme Court has distinguished between mandatory and prohibitory injunctions by describing a mandatory injunction as one that orders a party to "take action", whereas a prohibitory injunction would "restrain" a party from unlawful action. Meghrig v. KFC W., Inc., 516 U.S. 479, 484, 116 S. Ct. 1251, 1254, 134 L. Ed. 2d 121 (1996)

At the hearing on Plaintiff's Motion for Preliminary Injunction in this matter, Plaintiff's counsel argued that the requested injunction is prohibitory because Plaintiff wants the Court to "restrain" Defendants from continuing to (allegedly) violate Title II of the Americans with Disabilities Act ("ADA"). But the alleged discrimination lies precisely in the Defendants' *inaction* (i.e., the "failure" of the Defendants to provide in-home personal care assistance services to the Plaintiff), and such "discrimination" could only be "restrained" by this Court ordering the Defendants to **take positive action** (i.e., to provide in-home personal care assistance services to the Plaintiff). Plaintiff's counsel's argument is circuitous and tortured to the extreme.

Plaintiff's counsel would make actions out of inactions and restraints out of affirmative orders to act. The Court should not be fooled by this assault on logic. It is

abundantly obvious that the requested injunctive relief is for a mandatory preliminary injunction. The Plaintiff wants the Court to order the Defendants to undertake an *affirmative act* (i.e., to provide in-home personal care assistance services to the Plaintiff), which Defendants are not currently doing. The *status quo* is that the Plaintiff is *not* receiving any services from the Florida Medicaid Program. The Plaintiff wants to *change* the status quo by an order of this Court requiring Defendants to undertake a **positive act**. As held in Schrier v. University of Colorado, 427 F.3d 1253, 1261 (C.A. 10 (Colo.) 2005):

> We characterize an injunction as mandatory if the requested relief "affirmatively require[s] the nonmovant to act in a particular way, and as a result ... place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *Id.* at 979 (quoting SCFC ILC, Inc., 936 F.2d at 1099). While merely seeking restoration of the status quo, Dr. Schrier's requested relief nonetheless "affirmatively require[s] the [University] to act in a particular way," *id.,* that is, to reinstall him as Chair of the Department of Medicine. Moreover, we agree with defendants that "reinstatement would place the court in position where it may have to provide supervision." Aple. Br. at 48. Thus, the relief sought here is properly characterized as mandatory and, as a result, constitutes a specifically disfavored injunction.

If the Defendants were enforcing a specific *policy* that was operating to prevent Plaintiff from being placed on the Traumatic Brain Injury / Spinal Cord Injury Waiver ("TBI/SCI Waiver"), the Court could arguably issue a prohibitory injunction restraining Defendants from continued enforcement of the policy, without applying the higher standard for mandatory injunctions. But no such policy exists. The Plaintiff will be placed on the TBI/SCI Waiver if and when she is at the top of the waiting list and a slot opens up. The Defendants do not have a policy requiring the Plaintiff to spend 60 days in a nursing facility before she can be placed on the TBI/SCI Waiver. Jacqueline Jones, for example, was placed on the TBI/SCI Waiver without having to spend 60 days in a nursing facility because she

was at the top of the waiting list and a slot opened up. The Defendants have called the Court's attention to the nursing home transition program only to show that 60 days in a nursing facility is the *worst case scenario* that the Plaintiff faces. Because the Defendants have no policy that can be restrained, this is not a prohibitory injunction.

Plaintiff's counsel's characterization of the requested relief (an order from the Court instructing Defendants to "stop discriminating") would constitute an "obey the law" injunction. The 11th Circuit has repeatedly held that such injunctions are unenforceable. Fla. Ass'n of Rehabilitation Facilities, Inc. v. Fla. Dept. of health and Rehabilitative Svcs., 225 F.3d 1208, 1222-3 (11th Cir. 2000) (citing Burton v. City of Belle Glade, 178 F.3d 1175. 1200 (11th Cir. 1999). In doing so, the 11th Circuit has reasoned that the specificity requirement of Rule 65(d), Fed. R. Civ. P., "is no mere technicality," and that injunctions must let those enjoined "know exactly what conduct the court has prohibited and what steps they must take to conform their conduct to the law." Fla. Ass'n of Rehabilitation Facilities, Inc., 225 F.3d at 1223. The specificity requirement could only be met by a mandatory injunction.

Because the Plaintiff is requesting a mandatory injunction, the higher standard applicable to such orders must be applied. The requested injunction "***should not be granted*** [unless] the facts and law are ***clearly*** in favor of the moving party." Miami Beach Fed. Sav., at 415 (emphasis added). Moreover, such instances are "rare." Id.

At the June 15, 2010, hearing, Plaintiff's counsel indicated that Plaintiff's Motion for Preliminary Injunction should be granted *unless* Defendants demonstrate that such relief would constitute a fundamental alteration. If courts were to adopt this standard, then no

Defendant would *ever* be able to defeat a motion for preliminary injunction brought under Title II of the ADA as no Defendant would be able to organize and produce sufficient evidence to prove a fundamental alteration given the limited time period applicable to such proceedings.

However, the burden is not on the Defendants here. The Plaintiff bears the onus to demonstrate that the facts and law are **clearly** in her favor. Defendants have presented sufficient evidence and legal arguments to show that neither the facts nor the law are as clear as the Plaintiff would have the Court believe. As such, the requested mandatory injunction should not be issued.

If this Court has any doubts as to the mandatory nature of the requested injunction, it should be noted that mandatory injunctions are not the only category of injunctions that are historically disfavored by courts. Also disfavored are "preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006). That is precisely the type of injunction before the Court in this matter. The Plaintiff is requesting the Court to order Defendants to place her on the TBI/SCI Waiver, which is *all the relief she seeks in this case*. Regardless of the mandatory or prohibitory nature of this injunction, it is still disfavored for this reason and should therefore be subject to heightened scrutiny. See Id.

Respectfully submitted this 21st day of June, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of the filing to all parties on this 21st day of June, 2010.

/s/ Andrew T. Sheeran
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