No. 18-1179

IN THE

Supreme Court of the United States

JOHN MBAWE,

Petitioner,

v.

FERRIS STATE UNIVERSITY, ET. AL

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. HAD THIS OCCURRED IN ANOTHER CIRCUIT, THE ANALYSIS WOULD HAVE BEEN DIFFERENT

In an effort to avoid consideration of the deep circuit split identified in Petitioner's Writ, Respondents now attempt to abandon their prior arguments, and instead assert an argument contrary to the one relied upon by the lower courts in this case.

On pages 35 to 36 of their brief, Respondents argue that they 1) engaged in the good faith interactive process with Mbawe, 2) offered him the "only reasonable accommodation available" (in March of 2014, five months after Mbawe was expelled), and 3) that "Mbawe's ADA and §504 claims failed not because he neglected to propose a reasonable accommodation. His claims failed because he refused to accept the reasonable accommodation that was identified and offered."[1]

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[1]On page 37, Respondents refer to the March 2014 meeting with Mbawe and state, "[w]hether or not Mbawe recognizes that the interactive process occurred in this case, he does not (and cannot) dispute that FSU offered him a reasonable accommodation." They also argue, "[b]ecause Mbawe failed to make a prima facie showing that he was qualified to continue in the pharmacy program with or without an accommodation, it was not necessary to even consider issues regarding the interactive process." First, Mbawe absolutely does dispute that FSU offered him a reasonable accommodation. An appropriate accommodation is one that is "effective" in "*enabling*" the individual *to participate* in the program. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1137 (9th Cir.2001). Here, Mbawe was never given an accommodation of any sort. He was simply dismissed, and then later allegedly told he could possibly reapply. Even if this Court were to find that Mbawe was offered an accommodation (which he was not), "[t]he

Respondents also argue that the Sixth Circuit "was absolutely correct to reject Mbawe's untrue claim that FSU's officials did not engage in an 'interactive process'…" Again, this is contrary to Respondents' position throughout litigation, and inconsistent with the findings of the lower courts in this case.

For example, in the lower courts Respondents' position was, "[g]iven that Plaintiff refused to even acknowledge his own disability, and failed to understand that he was not qualified, participating in the interactive process with him was virtually impossible." (L.R.77, PgID#2582). Respondents argued they "had no obligation to engage in the interactive process before withdrawing Plaintiff", because "[a]s a general rule, the obligation to engage in the interactive process arises only after the plaintiff has proposed an accommodation." (L.R.23, PgID#77) (citing *Rorrer v. City of Snow,* 743 F.3d

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reasonableness of an accommodation is ordinarily a question of fact." *Lujan v. Pac. Mar. Ass'n*, 165 F.3d 738, 743 (9th Cir.1999). Second, Respondents' argument that Mbawe failed to make a prima facie showing that he was "otherwise qualified" is inconsistent with their own position. A student is "otherwise qualified" if he can meet the essential functions of the program *with or without a reasonable accommodation.* Respondents admit that Mbawe would be have been "readmitted" had he agreed to monitoring and continued treatment. (p. 26). Durst admitted that Mbawe would have been permitted to remain enrolled had he agreed to take medicine upon discharge from the hospital. (LR.59-8, PgID#1563). Mbawe testified that he would have certainly agreed to such terms to remain enrolled. (LR. 59-12, PgID#1653). In other words, Respondents have already admitted that Mbawe was "otherwise qualified" with a reasonable accommodation, yet they now assert a contradictory position.

1025, 1041 (6th Cir. 2014) and *Arndt v. Ford Motor Co.,* 247 F.Supp.3d 832, 850 (E.D. Mich. 2017)). Respondents even relied on *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010) to argue that Mbawe's failure to propose an accommodation prior to his dismissal is dispositive of his claims. (L.R.62, PgID#1870).

The district court agreed. As stated by the court, "Plaintiff contends that Defendants needed to engage in an interactive process with Plaintiff before it could be determined if Plaintiff was otherwise qualified. Plaintiff's argument is contrary to the 'general rule [that] the [plaintiff] must request a reasonable accommodation to trigger the [defendant's] duty to engage in the interactive process.'" (L.R.82, PgID#2748) (citing *Arredondo v. Howard Miller Clock Co.*, 2009 WL 2871171, at *9 (W.D. Mich. Sept. 2, 2009) and *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996)). The court held, "a plain reading of the relevant regulation makes clear that whether a plaintiff is a qualified individual *is distinct* from a defendant's obligation to engage in the interactive process." (L.R.82, PgID#2749). The court found that "Plaintiff never proposed any additional accommodations to the pharmacy program. Because of this, Plaintiff has failed to satisfy his burden." (*Id.* at PgID#2748) (citing *Jakubowski,* 627 F.3d at 202).

The Sixth Circuit affirmed, and stated, in relevant part, "we have held in the employment context that, to trigger the duty to participate in the interactive process, '[a]n employee has the burden of proposing an initial accommodation.' *Jakubowski*, 627 F.3d at 202. Mbawe fails to explain why this rule should be any different in the educational context. As noted above, Mbawe failed to propose any accommodation that would have allowed him to

remain qualified to be a pharmacy student, so *FSU's duty to engage in the interactive process was never triggered*." (R.34-2, PgID #13) (emphasis added). The court held that "Mbawe never proposed any accommodation" and "[t]his alone proves fatal to Mbawe's statutory claims." (*Id.* at 12).

The Sixth Circuit's stance that the "interactive process" is "distinct" from determining whether one is "otherwise qualified", is contrary to the Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits' stance that the "interactive process" is "an essential component of the process" in determining whether one is "otherwise qualified" with or without a reasonable accommodation.

Had these facts been presented to a court within a circuit other than the Fifth, Sixth, or Eleventh Circuits, then Respondents failure to engage in the "interactive process" with Mbawe prior to concluding he was not "otherwise qualified" would have been *prima facie* evidence that Respondents were acting in bad faith, and summary judgment would have been precluded. Requiring the Sixth Circuit to adopt the position that the mandatory interactive process is triggered when an entity knows or should know of an individual with a disability, and of that individual's desire to remain in the program despite that disability, would certainly require the lower courts in this case to conduct a different analysis when determining whether dismissal of Mbawe's ADA and §504 claims was proper.

II. ONE CANNOT BE MOTIVATED BY KNOWLEDGE HE DID NOT HAVE

A large portion of Respondents' brief relies on information first learned of during discovery – more than three years *after* Mbawe was dismissed and is simply irrelevant as to ADA's requirement to engage

in the interactive process when dealing with persons with *known* mental disabilities. For example, on pages 4-6, 13-14, and 28-30 Respondents refer to various irrelevant and inadmissible police reports and medical records pertaining to Mbawe. It is undisputed that Respondents were not aware of any of these alleged incidents or health records until ligation commenced, where Respondents then served dozens of subpoenas to various police departments and health agencies.

Regardless, as explained to the lower courts, "one could not have been motivated by knowledge he did not have." *McKennon v. Nahsville Banner Publishing Co.*, 513 U.S. 352, 360 (1995). The alleged police reports and medical records relied upon by Respondents were not even known by Respondents until three years after they expelled Mbawe from school because of his disability.

Further, on page 14, Respondents also attempt to create an issue regarding whether or not Mbawe took medication while hospitalized. In doing so, Respondents rely on testimony from Mbawe in 2017 to create the impression that during Mbawe's hospitalization his condition did not improve. On the contrary however, during Mbawe's probate hearing on October 10, 2013, the psychiatrist, Dr. Bell, testified (in the presence of Vander Myde) that Mbawe was "*cooperating and taking medication. Antipsychotics seems to take the edge off of this pattern.*" (L.R.59-18, PgID#1757). Dr. Bell also testified that Mbawe has admitted to probably having "*some paranoia but that's better now, and he is willing to take medication.*" (*Id.* at PgID#1765). Therefore, Dr. Bell stated (in the presence of Vander Myde), "*we don't think he needs much more hospitalization. He is taking the medication.*" (*Id.*). Dr. Bell was also asked whether Mbawe would be

released soon, to which he replied "*probably in the next day or two.*" (*Id.*).

Regardless of whether Mbawe testified in 2017 that he was not taking medication, Respondents had no reason to disbelieve Dr. Bell's testimony in court that 1) Mbawe was taking medication, 2) that he was willing to continue taking medication, and 3) that medication appeared to help his condition. Accordingly, Mbawe's testimony in 2017 cannot now be used to justify the actions taking in 2013, as one cannot be motivated by knowledge he did not have. *McKennon,* supra.[2]

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[2] Also, the fact that Vander Myde was at the Probate Hearing is significant, as that is when she learned of Mbawe's impending discharge. Three days later, Mbawe called Respondents twice to notify them he was being discharged and seeking an accommodation for his return. Respondents refused to respond to Mbawe's phone calls. (Dkt.59-16, PgID#1717). Instead, on the day following Mbawe's phone calls and voicemails, and with knowledge of Mbawe's impending return and efforts to seek an accommodation, Respondents dismissed him from the University. (Dkt.59-19, PgID#1780). On page 18 of their brief, Respondents state, "[u]nfortunately, effectuating the withdrawal was complicated by Mbawe's inaccessibility due to his hospitalization. Accordingly, on October 15, 2013, it was decided that FSU would initiate the medical withdrawal on Mbawe's behalf." As can be seen above, Respondents' justification is rather disingenuous. Respondents were not *unable* to speak to Mbawe prior to dismissing him, respondents *chose* to ignore his phone calls and process a dismissal without speaking to him. *Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1136 (7th Cir. 1996) (emphasis added) ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation *or response*, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.")

Furthermore, Respondents also allege that they met with Mbawe on October 17, 2013 and "*explained that Mbawe had been withdrawn because he was not in compliance with the Technical Standards due to the licensing issue.*" This is contrary to Mbawe's testimony that they only told him he was being dismissed for "medical reasons" and the decision was "final." (R.18, PgID#33). This is also contrary to the meeting notes that were taken by Bates, which only refer to Mbawe having a mental disorder, and only being told that he was medically withdrawn due to "*concern regarding subsequent academic dismissal…*" (Dkt.59-19, PgID#1782). The licensing excuse was not created until several weeks later when, according to Respondents, Bates contacted his "friend" at HPRP to "ma[k]e an informal inquiry…regarding Mbawe's ability to maintain his license…" (p. 23). A review of the pleadings in this case will reveal Respondents' struggles to refine and reword this licensing excuse throughout litigation.

Petitioner respectfully requests this Court disregard Respondents' arguments that rely on police reports, health records, "other acts", or alleged licensing issues, as those excuses were only discovered and invented during litigation, and one cannot be motivated by knowledge he did not have. *McKennon,* supra. In any event, even if Respondents knew what they know now, they were still required to engage in the mandatory, good faith interactive process with Mbawe before rendering him unqualified to remain in the program and dismissing him on October 15, 2013. Had this occurred in another circuit, summary judgment would not have been granted.

III. RESPONDENTS' CITATIONS TO THE RECORD ARE MISLEADING

Respondents' citations to the record are misleading.[3]

For example, on page 9, Respondents allege that after Bates found Mbawe's notes on September 16th, "Bates recommended that Mbawe take a medical *leave* from the pharmacy program to address his mental health issues, but Mbawe declined." Respondents cite to "L.R.58-28, PgID#1251" which is a sheet reflecting the "meeting notes" between faculty on or around September 23rd and refers to the following notes, "Ken asked if a medical *withdrawal* would be appropriate for this student. Jeff showed that he spoke with John and has offered to see him through the medical *withdrawal* process but he was not interested." A medical *withdrawal* is a *student initiated* process. Respondents now attempt to characterize this alleged discussion of a medical "*withdrawal*" as a medical *leave*. It is presumed that such a play on words is in response to the various possible accommodations identified in Mbawe's petition to this Court (including the option to take a medical *leave*). Respondents cannot evade their burden of demonstrating that a medical *leave* would have caused an "undue burden", by now

[3]It should be noted that any reference in Respondents' brief to "L.R. 58-23" should be viewed with skepticism. "L.R.58-23" is a 32-page affidavit that was submitted at the close of discovery by Bates (after his deposition) and which contains allegations that either 1) contradicted his own prior testimony, or 2) is inconsistent with the actual evidence in this case. Bates' affidavit is a highly suspect, self-serving affidavit that was created five years after Mbawe's expulsion and is now being used as a tool by Respondents to evade liability.

characterizing the involuntary medical *withdrawal* as merely a medical *leave*.[4]

Another example is seen on page 26 where Respondents attempt to distance themselves from their decision to report Mbawe to LARA by citing to "Doc 58-44, HPRP Letter 3/24/2014, PgID#1351". However, in actually, "Doc 58-44, HPRP Letter 3/24/2014, PgID#1351" is a letter from HPRP *to Mbawe*, sent by Bates' "friend" at the HPRP informing Mbawe that they would be closing Mbawe's file on March 12, 2014 (the same day Bates admittedly reported Mbawe to LARA). On page 27, Respondents even state, "*Mbawe makes the untrue assertion that FSU reported him to the 'Michigan Board of Pharmacy' when he refused to sign HPRP's monitoring agreement.*" Below is an excerpt of the deposition testimony of Bates' himself:

> **Counsel**: Okay. Now you say, I agree about notifying BOP, that's the Board of Pharmacy?
>
> **Bates**: Yes, sir.
>
> **Counsel**: And did you do that?

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[4]This play on words is demonstrable of Respondents' conduct throughout litigation. For example, Respondents claim that students are required to have a "valid" intern-pharmacy license to remain in the program. Yet, Mbawe maintained a valid license with the State until it was suspended in May of 2014. Respondents then crafted the defense that Mbawe's hospitalization "compromised" his license, therefore Mbawe's hospitalization "immediately" invalidated his educational license—even before any administrative hearing, or investigation by any agency. Respondents' position lacks merit, and was only created during litigation.

Bates: I believe so.

Counsel: Okay. So how did you do it? By e-mail, by fax, by phone call, what did you do?

Bates: The details escape me. I don't recall how I did that.

Counsel: Okay. So did you do it right after the e-mail? Did you do it in 2013? Do you remember when?

Bates: *I did notify the board*, but again, I cannot remember the details surrounding that.

Counsel: And what did you tell them?

Bates: That he was no longer enrolled in our program.

Counsel: Okay. So as we sit here, as far as 2013, *you, Dr. Jeffery Bates, had notified HPRP regarding John, his impairment, and notified the Board of Pharmacy, correct*?

Bates: *Yes*, I believe so.

Counsel: Now when he says, I think we should notify the board of John's dismissal, did you notify the board that he was medically withdrawn or did you notify the board that he was dismissed?

Bates: *I notified the board* that he was no longer reenrolled in our program.

(Dkt.68-7,PgID#2277-2278). Simply, this Court should be skeptical of the assertions made

throughout Respondents' brief as it is full of inaccuracies and misrepresentations.[5]

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[5] Respondents also allege that Mbawe refused to get treatment, or to be evaluated. That is false, as Mbawe complied with every request made by Respondents to report to a health professional for treatment. Respondents also designate an entire section of their brief in an attempt to discredit the "mental health examination" conducted by their own psychologist (Thomas Liszewski). This "mental health examination" was also discussed with FSU's psychiatrist. FSU's psychiatrist, psychologist, and physician all determined that Mbawe was not a threat to others or himself and did not agree with Respondents' attempts to have Mbawe involuntarily hospitalized. For example, as testified to by FSU's physician, in trying to figure out a way to have Mbawe removed from the University:

> "Renee Vander Myde caught me in the hall before this happened…and she said I want you to get him over to the Health Center and under the pretext of giving him some lab tests or whatever you can think of, and that when he's here the police officers will take him and put him under…their custody…And at that point I said I did not agree with that, that kind of thing happening to him, and I said no, I think that *I'm not going to be part of that*, because I think *this person needs a patient advocate.* And I did not want to be disrespectful to Ms. Vander Myde, because she was my director, so I tried to think of a good reason why I did not want to do that, but the reason why was because I did not want to be part of that kind of *deceitful t*ype of thing."

(L.R.59-14, PgID#1703). Respondents' attempt to purify their actions, and portray those actions as "careful and deliberate" should not be accepted by this Court without a review of the actual evidence contained in the record – which includes evidence in support of the findings made

Respectfully submitted,

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by the United States Department of Education Office of Civil Rights. (L.R.1-1).