FILED
United States Court of Appeal
Tenth Circuit

November 8, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HITOSHI OMBE,

Plaintiff - Appellant,

v.

STATE OF NEW MEXICO; NEW MEXICO PUBLIC EDUCATION DEPARTMENT; NEW MEXICO DIVISION OF VOCATIONAL REHABILITATION SERVICES; SUSANA MARTINEZ, HANNA SKANDERA, ROSA LIMA, RICHARD SMITH, JOHN FULLINWIDER, TERRI DOUGLASS, ADRIAN APODACA, SUSAN LOPEZ, REYES R. GONZALES, AVA GUTIERREZ, LEE MARTINEZ, GARY LUCAS, CAROL DAY, TANYA SHATZ, MARTHA JARAMILLO, PATRICIA GUILINO, EARNEST O. PACHECO, RALPH VIGIL, and ADAM CARRASCO, in their official, personal, and conjugal partnership capacities;; DISABILITY RIGHTS NEW MEXICO; THE BOARD OF DIRECTORS OF DISABILITY RIGHTS NEW MEXICO, INC.; JAMES JACKSON, BERNADINE CHAVEZ, JASON C. GORDON, NANCY KOENIGSBERG, and TIM GARDNER, in their personal, official, and conjugal partnership capacities as members of the Board of Directors of Disability Rights New Mexico, Inc.,

Defendants - Appellees.

No. 18-2031
(D.C. Nos. 1:14-CV-00763-RB-KBM,
1:14-CV-00856-RB-KBM and
1:14-CV-00857-RB-KBM)
(D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **McKAY** and **MATHESON**, Circuit Judges.

Hitoshi Ombe, appearing pro se, appeals from the final judgment entered against him in three consolidated civil rights suits. In those cases, he asserted claims for disability discrimination, age discrimination and other civil rights violations against the state of New Mexico, its Division of Vocational Rehabilitation (DVR), its Public Education Department (PED) and numerous state employees (collectively "State Defendants"), as well as the non-profit Disability Rights of New Mexico, Inc., its board of directors, and several of its employees (collectively "DRNM Defendants").

Mr. Ombe also appeals the district court's order imposing filing restrictions on him and seeks leave to proceed in forma pauperis on appeal. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the district court's judgment and order and deny Mr. Ombe leave to proceed in forma pauperis.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

Mr. Ombe is a mathematician and former university professor of Japanese origin who was diagnosed with Asperger's Syndrome, a form of autism, later in life. He also reports that he suffers from severe depression because of difficulties he has experienced as a result of his autism disorder.

One of these difficulties was Mr. Ombe's years of underemployment as a cashier at a gas station sometime after his university position ended. In an effort to obtain a job better suited to his skills and interests, Mr. Ombe applied for services offered by DVR, which is a division within the PED that seeks to increase the independence of individuals with disabilities through employment. Mr. Ombe became dissatisfied with DVR's services, and asked DRNM to help him in dealing with the state agency. Mr. Ombe also became dissatisfied with DRNM's efforts on his behalf. As a result, Mr. Ombe filed two actions against the State Defendants and an additional action against the DRNM Defendants. The essence of Mr. Ombe's claims in each case was that these entities and their employees failed to provide him with adequate assistance and did not properly accommodate his disabilities in communicating with him, thereby violating his civil and constitutional rights and impermissibly discriminating against him on account of his disabilities, race, national origin, and age.

The district court consolidated the three cases and granted the DRNM Defendants' motion to dismiss the claims against them for failure to state a claim. It also granted in part and denied in part the State Defendants' motions to dismiss

Mr. Ombe's claims for failure to state a claim and for lack of jurisdiction. The district court subsequently denied Mr. Ombe's motions to reconsider its decisions granting these motions to dismiss, denied his motions to amend his complaint, granted summary judgment to the State Defendants on the remaining claims, and entered final judgment dismissing his cases with prejudice. It also denied Mr. Ombe's motion to proceed in forma pauperis on appeal.

In addition, after providing Mr. Ombe with notice and an opportunity to object, the district court issued a post-judgment order imposing restrictions on his district court filings in this matter. This order was issued at the request of the State Defendants in response to Mr. Ombe's excessive filings in this case, many of which disparaged the Court and opposing counsel in derogatory and abusive terms.

DISCUSSION

A. Appellate Jurisdiction

The State and DRNM Defendants assert that our jurisdiction in this appeal is limited by Mr. Ombe's failure to identify all of the district court orders he challenges in his notice of appeal. *See* Fed. R. App. P. 3(c)(1)(B) (notice of appeal must "designate the judgment, order, or part thereof being appealed"); *Williams v. Akers*, 837 F.3d 1075, 1078 (10th Cir. 2016) ("Rule 3(c)(1)(B)'s designation requirement is jurisdictional."). They are mistaken.

Mr. Ombe's notice of appeal states that he is appealing the district court's final judgment and its filing restrictions order. *See* R. Vol. I at 476. "[A] notice of appeal which names the final judgment is sufficient to support review of all earlier orders

that merge in the final judgment." *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002). And as "a general rule . . . all earlier interlocutory orders merge into final orders and judgments," with the result that "[h]aving appealed from the judgment, the appellant is free to attack any nonfinal order or ruling leading up to it." *Id.* (internal quotation marks omitted). As a result, our jurisdiction in this appeal extends to any of the district court's pre-judgment, nonfinal rulings that Mr. Ombe opted to challenge on appeal, as well as the filing restriction order he separately designated in his notice.

The State and DRNM Defendants do not contend any of the district court's pre-judgment rulings were final orders that fall outside of these rules.[1] Instead, they assume that Mr. Ombe's notice of appeal from the district court's judgment only encompasses the orders the district court specifically referenced in its judgment, which were its recent orders granting the State Defendants' motion for summary

[1] With respect to the DRNM Defendants and their motion to dismiss on jurisdictional grounds, we note that the district court's September 3, 2015 order dismissing the claims asserted against them was not a final, appealable order because the district court did not direct entry of final judgment regarding these claims at that time. *See Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1370 n.2 (10th Cir. 1979) ("In multiparty actions such as this, unless the trial judge expressly directs entry of a final judgment as to less than all the parties in accordance with the requirements of Fed.R.Civ.P. 54(b), the order [dismissing claims against a single defendant] does not become final until entry of judgment adjudicating all the claims, rights and liabilities of all the parties."); *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (per curiam) (adopting "the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291. To obtain review of one part of a consolidated action, appellant must obtain certification under Fed.R.Civ.P. 54(b)").

judgment and denying Mr. Ombe's motions asking the court to reconsider its previous dispositive decisions and to allow him to amend his complaint. The Defendants' assumption is incorrect for the reasons stated above.

B. Issues on Appeal

Because Mr. Ombe is appearing pro se, we liberally construe his filings.[2] *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Even so, we have some difficulty discerning the issues Mr. Ombe is attempting to raise on appeal. But it is clear Mr. Ombe argues that he was wronged by the district court, the magistrate judge, and defense counsel because, he contends, they did not understand his autism disorder and depression, did not appreciate how difficult it was for him to prosecute his suits given these conditions, failed to accommodate his disabilities in managing his case and deciding motions, and improperly focused on what he describes as "lawyer's nonsense," Reply Br. at 15, instead of "basic fairness," Opening Br. at 5. By "lawyer's nonsense," Mr. Ombe apparently refers generally to the district court's and the defendants' adherence to the applicable legal rules, both procedural and substantive, in addressing his claims.

Construing his opening brief liberally, it also appears that Mr. Ombe seeks to challenge several specific district court's rulings, including the district court's decision to consolidate his three cases, its denial of his request for help in serving one of the

[2] In addition to his opening and reply briefs, Mr. Ombe has filed various motions to amend or supplement his briefing and to provide the court with supplemental authorities. We grant these motions below, and have considered these additional filings and attached materials as relevant in our review.

individual State defendants, some aspects of its orders dismissing or granting summary judgment against his claims, and its filing restrictions order. Throughout, Mr. Ombe colors his complaints with disrespectful language directed at the district court and magistrate judges and the other participants in the proceedings below, thus repeating a pattern that is pervasive in the district court record.[3]

In his briefing and other supplementary materials, Mr. Ombe has provided us with a great deal of information concerning his autism disorder and depression and how both affect his cognitive functions, and we appreciate his efforts to inform the court on these subjects. We also note that Mr. Ombe provided much of this information to the district court as well in an effort to educate it on his conditions. But Mr. Ombe is mistaken in believing that the district court was required to disregard the legal rules that govern civil lawsuits in response to his cognitive and mental health issues or his pro se status. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) ("The applicability of rules of law is not to be switched on and off according to individual hardship."); *Garrett*, 425 F.3d at 840 ("[T]his court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." (internal quotation marks and brackets omitted)). These rules are not mere technicalities or legal nonsense, as Mr. Ombe contends, but rather serve to bring order, consistency, and

[3] Whether borne of frustration or other motivations, such language has no place in this or any court. *See Garrett*, 425 F.3d at 841 (stating that appellate briefing that impugns the integrity of the district judge will not be tolerated and may be stricken).

predictability to legal proceedings. And while Mr. Ombe insists that the district court was required to modify or ignore otherwise applicable procedural and substantive rules as an accommodation to his cognitive and mental health issues, he cites no legal authority that supports this proposition and we are aware of none.[4] Nor was it "the proper function of the district court to assume the role of advocate" for Mr. Ombe, as he apparently assumes. *See Garrett*, 425 F.3d at 840 (internal quotation marks omitted). In short, Mr. Ombe's report that he "[s]imply . . . could not handle" the applicable legal rules as a result of his autism and severe depression does not make the district court's adherence to them "completely wrong or unfair" as Mr. Ombe claims. Opening Br. at 23 & n.60; *cf. Sieverding v. Colo. Bar Ass'n*, 469 F.3d 1340, 1343 (10th Cir. 2006) ("[T]he right of access to the courts is neither absolute nor unconditional." (internal quotation marks omitted)).

Mr. Ombe's attempt to challenge the district court's filing restriction order and some of its other specific decisions also falls short. In presenting these issues for our review, Mr. Ombe was required to provide reasoned argument in his opening brief

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[4] Mr. Ombe briefly refers to the American Disabilities Act, Section 504 of the Rehabilitation Act, the First and Fourteenth Amendments and various civil rights statutes in his general complaints regarding the district court proceedings, but does not identify any authority holding that these laws required the district court or defense counsel to act differently than they did. Mr. Ombe's assertion that 34 C.F.R. § 361.18(c)(2)(ii) is relevant here is incorrect for several reasons, including that it applies to state agencies that provide vocational rehabilitation services and thus has no application in a judicial proceeding. *See id.* § 361.18. Nor is there a "Federal Court Policy on Disability," as Mr. Ombe reports, *see, e.g.*, Opening Br. at 6, or any other court policy that required the district court to modify or abandon otherwise applicable legal rules in response to his conditions.

describing how he thinks the district court erred in each challenged order or decision, with citations to the legal authorities and parts of the record on which he relies. *See* Fed. R. App. P. 28(a)(8)(A); *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223 n.6 (10th Cir. 2008) (refusing to consider argument where appellant failed to "advance reasoned argument as to the grounds for the appeal" (internal quotation marks and brackets omitted)). The purpose of this rule, which applies to all appellants, is to ensure that an appellant provides us with the information necessary to decide the appeal, because it is not our role to serve as the appellant's attorney in constructing arguments, researching the law, or searching the record. *See Garrett*, 425 F.3d at 840.

Mr. Ombe's arguments regarding the specific district court orders and decisions he apparently seeks to challenge do not comply with this rule because they are conclusory and not supported by relevant legal authority. *See, e.g., Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1370 (10th Cir. 2015) ("A brief must contain an argument consisting of more than a generalized assertion of error, with citations to supporting authority." (internal quotation marks and brackets omitted)); *Garrett*, 425 F.3d at 841 (holding issues are inadequately briefed if they are supported by "conclusory allegations with no citations to the record or any legal authority"). In other words, Mr. Ombe's arguments regarding these decisions are inadequately presented for purposes of appellate review. When this occurs, we deem the inadequately briefed arguments waived and do

not review them on appeal.[5] *See, e.g.*, *Nixon*, 784 F.3d at 1368 (arguments "not adequately developed in a party's [opening] brief" are waived); *Garrett*, 425 F.3d at 841 (same). Accordingly, we do not consider Mr. Ombe's challenges to any specific district court order or decision in this appeal.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's final judgment and order imposing filing restrictions.

With respect to the pending motions, we DENY the DRNM Defendants' motion to dismiss the appeal against them for lack of jurisdiction because, as discussed above, the interlocutory order dismissing the claims against them merged into the final judgment Mr. Ombe properly appealed. We also DENY Mr. Ombe's motion to withdraw his motion for an extension of time to file his reply brief, filed June 11, 2018, as moot, but GRANT his motions seeking leave to file amendments or supplements to his briefs and to file supplemental authority, filed on July 11, July 19, August 29, October 1, and November 1, 2018, respectively. Finally, we DENY Mr. Ombe's motion to proceed in forma pauperis on appeal because, for the reasons discussed above, his briefs do not demonstrate "the existence of a reasoned,

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[5] In addition, we do not consider any issues Mr. Ombe raised in his reply brief or supplemental filings that were not included in his opening brief, because the appellees had no opportunity to respond to them. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000). Except in very limited circumstances, we also do not consider issues that were not raised before the district court, *see Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011), such as Mr. Ombe's contention for the first time in this court that he was not able to respond to the State Defendants' summary judgment motion because it was not properly served on him.

nonfrivolous argument on the law and facts in support of the issues raised on appeal."

DeBardeleben v. Quinlan, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court
Per Curiam

Appendix D

FILED
United States Court of Appeals
Tenth Circuit

December 10, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

HITOSHI OMBE,

Plaintiff - Appellant,

v.

STATE OF NEW MEXICO, et al.,

Defendants - Appellees.

No. 18-2031

ORDER

Before **TYMKOVICH**, Chief Judge, **McKAY**, and **MATHESON**, Circuit Judges.

These matters are before the court on Appellant's petition for rehearing en banc and Motion for Leave to File Attachments to the Petition for Rehearing en Banc. The petition for rehearing is denied. The Motion for Leave to File Attachments to the Petition for Rehearing en Banc is granted. The attachments will be filed as of the date they were received, November 23, 2018.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Appendix M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HITOSHI OMBE,

Plaintiff,

vs.

STATE OF NEW MEXICO, *et al.*

Defendants.

No. CV 14-00763 RB-KBM

No. CV 14-00856 RB-KBM
No. CV 14-00857 RB-KBM
(consolidated)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' motion for summary judgment against Plaintiff Hitoshi Ombe. Defendants—the State of New Mexico, the New Mexico Public Education Department (PED), and the New Mexico Division of Rehabilitation Services (DVR)—ask the Court to grant summary judgment against Mr. Ombe on his claims under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. After considering the relevant information, the Court grants Defendants' motion. Defendants are protected by state sovereign immunity against Mr. Ombe's Title II claim. Regarding Mr. Ombe's Rehabilitation Act claim, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

FACTS

Hitoshi Ombe is an accomplished mathematician who once taught mathematics as a university professor. (*See* Doc. 8 at 4.) For over six years, however, Mr. Ombe has been working as a cashier at a gas station. (*See id.*) To understand what happened to Mr. Ombe, it may be helpful to hear a story Mr. Ombe shared with the Court.

Mr. Ombe grew up in Japan. (*See* Doc. 75 at 2.) One day in school, Mr. Ombe's class read about a boy who put a stone on a train track. (*See id.*) Putting a stone on the track was dangerous, and an incoming train stopped just before the stone, barely avoiding an accident. (*See id.*) The class was asked, what should be done with the boy who had placed the stone on the track? (*See id.*) Except for Mr. Ombe, the entire class, including the teacher, said that they should forgive the boy. (*See id.*) Mr. Ombe just could not understand why the boy should be forgiven and raised the lone voice that said the boy should be reported to the police. (*See id.*) All Mr. Ombe could think about was reporting the boy because that was the logical thing to do and it adhered to the rules. (*See id.* at 3.)

It was not until much later in his life that Mr. Ombe was diagnosed with Asperger's Syndrome (Asperger's). (*See* Doc. 8 at 2.) Individuals with Asperger's think differently than those without the syndrome. (*See* Doc. 75 at 4.) Mr. Ombe's disconnect with others may be attributable to his Asperger's. In addition to Asperger's, Mr. Ombe also suffers from a mood disorder and mild neurocognitive problems. (*See* Doc. 8 at 2.) These disabilities have contributed to Mr. Ombe's state of affairs, including his underemployment. To get back on his feet, Mr. Ombe looked to the New Mexico Division of Vocational Rehabilitation (DVR) to help him secure a job that better suited his talents and interests.

DVR is a branch of the New Mexico Public Education Department (PED) that provides services to assist eligible people in finding suitable employment in a career of their choice. *See Steps of the Rehabilitation Process*, New Mexico Division of Vocational Rehabilitation (Jan. 15, 2018), http://www.dvr.state.nm.us/steps-of-the-rehabilitation-process.aspx; *NMPED Offices & Programs*, New Mexico Public Education Department (Jan. 21, 2018), http://webnew.ped.state.nm.us/officesandprograms/. Three DVR counselors met with Mr. Ombe

to try to provide him with rehabilitation services, but Mr. Ombe was unsatisfied with all of them. (*See* Doc. 93 at 2.) During and after the period of time in which Mr. Ombe met with DVR counselors, Mr. Ombe also exchanged written correspondence with many DVR employees, participated in mediation with DVR to try to address his concerns, and had an opportunity to pursue a post-deprivation fair hearing. (Doc. 8 at 12–16.)

In 2014, frustrated with the process, Mr. Ombe filed suit against the State of New Mexico, the PED, the DVR, and a host of other parties. (*Id.* at 1.) The Court dismissed all of the defendants except the State of New Mexico, the PED, and the DVR (collectively, "Defendants"). Mr. Ombe had charged Defendants with violating Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act because they failed to reasonably accommodate his disability. (*See* Doc. 93 at 14–15.) The Court found that Mr. Ombe's allegations that: Defendants could have used more straightforward language in communicating with him; Defendants had consistently failed to honor his request to have correspondence sent to him through email or fax; and Defendants had forced him to conduct a mediation and prehearing conference over the phone instead of in person were enough to state a plausible claim under Title II and the Rehabilitation Act against Defendants.

Defendants have filed for summary judgment, which the Court now considers.

LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering a summary judgment motion, the Court views "the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the

nonmoving party." *See Parker Excavating, Inc. v. Lafarge W., Inc.*, 863 F.3d 1213, 1220 (10th Cir. 2017) (citation omitted).

The party seeking summary judgment bears the burden of proving that there is no genuine issue of material fact. *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283 (10th Cir. 2010) (citation omitted). If it successfully does this, the burden shifts to the party opposing summary judgment to "set out specific facts showing a genuine issue for trial." *See id.* (citing Fed. R. Civ. P. 56(e)(2). In proving the existence of a genuine trial issue, the party opposing summary judgment may not rest on its own pleadings, but it must come forward with facts supported by admissible evidence. *See id.* (citation omitted). If the party opposing summary judgment cannot do so, then summary judgment is appropriate. *Id.* (citation omitted).

DISCUSSION

I. Conduct by party other than Defendants.

The Court previously ruled that Mr. Ombe's failure-of-accommodation claims under Title II and the Rehabilitation Act could proceed against Defendants in part because Mr. Ombe had alleged that he was forced to conduct mediation and a prehearing conference over the phone instead of in person. (Doc. 93 at 14–15.) The Court found that this arrangement could constitute failure to provide reasonable accommodations. (*See id.*)

Defendants, however, have pleaded in their summary judgment motion that they were not responsible for the fact that the mediation and the prehearing conference were conducted telephonically. (*See* Doc. 175 at 21–23.) To support their claims, Defendants have attached evidence showing that another party was responsible for arranging the mediation. (*See, e.g.*, *id.* Ex. R.) Exhibit R is an email chain between Mr. Ombe and David Martinez, a mediator from the Federal Mediation and Conciliation Service (FMCS), where Mr. Ombe explains his scheduling

needs to Mr. Martinez, and Mr. Martinez explains the mediation process to Mr. Ombe. (*See id.*) The nature of the communication between the two parties—which is not dependent on the truth of the email chain's contents—suggests that Mr. Martinez, not Defendants, was responsible for the mediation's arrangements.

Defendants have also attached evidence showing that another party was responsible for arranging the prehearing conference. (*See id.* Ex. X.) In Exhibit X, Defendants inform Ernest O. Pacheco, the hearing officer overseeing a hearing between Mr. Ombe and Defendants, that Defendants would not oppose conducting a prehearing conference face-to-face, but that they would defer to Mr. Pacheco's decision in that regard. (*See id.*) The nature of the correspondence in Exhibit X—which is not dependent on the truth of the exhibit's contents—suggests that Mr. Pacheco, not Defendants, was responsible for the arrangements of the prehearing conference.

Mr. Ombe has not attempted to refute Defendants' pleadings about the mediation and prehearing conference. Accordingly, there is no genuine dispute that Defendants were not responsible for the fact that the mediation and prehearing conference were conducted telephonically.

II. Sovereign Immunity.

The Eleventh Amendment grants a state sovereign immunity in federal court from lawsuits brought by citizens of the state. *See Guttman v. Khalsa*, 669 F.3d 1101, 1111 (10th Cir. 2012). This immunity extends to arms of the state and state officials who are sued for money damages in their official capacity. *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (citations omitted). Congress, however, can pierce the shield of Eleventh Amendment immunity. *Guttman*, 669 F.3d at 1111. To do so, it must make its intention to abrogate Eleventh

Amendment immunity unmistakably clear, and it must be acting within its power under § 5 of the Fourteenth Amendment. *Id.*

The Fourteenth Amendment prohibits states from depriving anyone of "life, liberty, or property, without due process of law" or denying "any person within its jurisdiction the equal protection of the laws." *See id.* To enforce its provisions, § 5 of the 14th Amendment provides: "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. As long as Congress validly enacted legislation in accordance with § 5, then such legislation can abrogate state sovereign immunity if Congress intended it to do so.

Mr. Ombe is suing Defendants for violations of Title II of the ADA, which forbids a public entity from discriminating against a qualified person with a disability solely on the basis of that person's disability. 42 U.S.C. § 12132. Because Defendants are either a state or a state entity, they are entitled to state sovereign immunity under the Eleventh Amendment. Thus, Mr. Ombe's Title II claim can only proceed if Congress validly intended Title II to bypass sovereign immunity.

That Congress intended Title II to pierce sovereign immunity is clear, as the ADA states in no uncertain terms, "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. The question is whether Congress acted validly within its § 5 power in attempting to have Title II pierce sovereign immunity. Considering this precise question in *United States v. Georgia*, 546 U.S. 151 (2006), the Supreme Court ruled that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates

state sovereign immunity." *Id.* at 159. To the extent, however, that Title II creates a private cause of action for damages against the states for conduct that does *not* violate the Fourteenth Amendment, a court must analyze whether Congress's intent to abrogate sovereign immunity was otherwise a valid exercise of its § 5 power. *Guttman*, 669 F.3d at 1117.

If a court determines that Congress overstepped its § 5 power in creating a cause of action for conduct that does not violate the Fourteenth Amendment, then that portion of the Title II claim will be blocked by sovereign immunity.

Applying the framework above, the Court first investigates the degree to which Defendants' alleged violations of Title II also violated the Fourteenth Amendment. Again, any Title II claim based on conduct that infringes *both* Title II and the Fourteenth Amendment would bypass sovereign immunity. *See Georgia*, 546 U.S. at 159. To determine any overlap between Title II and the Fourteenth Amendment, the Court takes the aspects of Defendants' conduct that allegedly violated Title II and compares it to the extent that same conduct violates the Fourteenth Amendment. *See Guttman*, 669 F.3d at 1113.

The conduct at issue is Defendants' alleged failure to communicate with Mr. Ombe through fax or email in straightforward and organized language, as Mr. Ombe requested. (*See* Doc. 93 at 14.) Even assuming Defendants' conduct violated Title II, such conduct did not violate the Fourteenth Amendment, as the Court already explained in a prior ruling. (*See id.* at 6–10 (ruling that no defendants violated the Fourteenth Amendment in this case).) The entirety of Mr. Ombe's Title II claim thus rests on conduct that is *not* prohibited by the Fourteenth Amendment, so the Court must examine whether Congress validly used its § 5 power to abrogate sovereign immunity with regard to the specific conduct in this case. *Guttman*, 669 F.3d at 1117.

Whether Congress validly used its § 5 power to abrogate immunity depends on:

> (1) the nature of the constitutional right at issue; (2) the extent to which Congress's remedial statute was passed in response to a documented history of relevant constitutional violations; and (3) whether the congressional statute is "congruent and proportional" to the specific class of violations at issue, given the nature of the relevant constitutional right and the identified history of violations.

Id. (citations omitted). In considering the three factors above, the Court considers the *specific conduct at issue in the case*, not Title II as a whole. *See id.* (citation and quotation omitted). For example—and keeping in mind that Title II was passed to protect people with disabilities—in analyzing factor two, the Court does not consider the documented history of discrimination against people with disabilities, but rather the Court considers the documented history of vocational rehabilitation programs discriminating against disabled people—the alleged conduct in this case.

Turning to factor one, Defendants urge the Court to construe the right at issue in the case as "the ability of a vocational participant to access a state's vocational rehabilitation program." (Doc. 175 at 13.) This construction makes sense because Mr. Ombe's complaint that Defendants did not communicate with him in the manner he requested could be construed as a complaint that he was not given meaningful access to Defendants' vocational rehabilitation services. But there is another way to view the right at issue. Mr. Ombe is only fighting for access to vocational services because such services are a means to his desired end: employment suited to his skills and interests. So another plausible construction of the right at issue is the right of a disabled individual to participate in his chosen profession. Either way, whether the right at issue is "the ability of a vocational participant to access a state's vocational rehabilitation program" or "the right of a disabled individual to participate in his chosen profession," the result is the same. Persons with disabilities are not a suspect class, so discrimination against them does not invoke

heightened scrutiny, only rational basis review.[1] *Guttman*, 669 F.3d at 1118. Consequently, the scope of any right at issue is limited, so this factor leans against abrogating immunity.

Moving to the second factor, the Tenth Circuit has already settled that "the history of unconstitutional discrimination against the disabled regarding their right to practice in their chosen profession, as reflected in the congressional record, is minimal." *Id.* at 1119. In addition, Mr. Ombe has not alleged that there is a history of unconstitutional discrimination by vocational rehabilitation programs against vocational participants. And based on the Court's scan of the record, Congress has never identified a history of unconstitutional discrimination by vocational rehabilitation programs against people with disabilities. *See* H.R. Rep. No. 101–485 pts. 1, 2, 3 & 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267. The second factor also weighs against abrogating immunity.

The final factor asks the Court to consider whether Title II is congruent and proportional to the class of violations at issue. Since Mr. Ombe is complaining about Defendants' alleged failure to communicate with him through simple language in email and fax, this is a case about whether Congress can manage the way state vocational rehabilitation services correspond with those accessing their services. *See Guttman*, 669 F.3d at 1120 (ruling that in a case where plaintiff brought Title II claims against a state for its licensing decisions, the issue is whether Congress can control how a state administers professional licensing).

There is no easily administrable test to determine proportionality and congruence, but the Court takes guidance from the Tenth Circuit's example in *Guttman*. *See id.* at 1122. In *Guttman*, the Circuit declined to abrogate sovereign immunity for a Title II claim largely due to four reasons. *See id.* at 1123–24. First, the right at issue was subject only to rational basis review, so

[1] Only a person with an eligible disability can access DVR's services, so any viable "vocational participant" is a person with a disability. *See Eligibility Determination*, New Mexico Division of Vocational Rehabilitation (Jan. 20, 2018), http://www.dvr.state.nm.us/ eligibility-determination.aspx.

the state was afforded "significant discretion" in acting. *See id.* Second, there was insufficient evidence to show "pervasive discrimination" in the specific area at issue in the case. *See id.* Third, the Title II remedy was overbroad in that it would force states into costly litigation to justify constitutional actions. *See id.* And fourth, given a state's "core governmental function of promoting and protecting the general public welfare," the state had a "strong interest in crafting reasonable, cost-effective" policies in the area at issue. *See id.*

All four of the above considerations are also present in this case. First, the right at issue is subject only to rational basis review, so New Mexico has "significant discretion" in deciding how its vocational services correspond with those seeking assistance. Second, there is insufficient evidence of either "pervasive discrimination" by vocational services against disabled individuals or discrimination against disabled people regarding their right to practice in their chosen profession. Third, permitting the Title II claim here to bypass sovereign immunity would force New Mexico into costly litigation to justify otherwise constitutional—rational—decisions, so Title II would be just as burdensome and costly as it was in *Guttman*. *See id.* at 1124. And fourth, New Mexico has a strong interest in "crafting reasonable, cost-effective" methods of communication between its vocational services and those seeking services because helping people with disabilities is part of New Mexico's "core governmental function of promoting and protecting the general public welfare." *See id.* As applied in this case, Title II is not congruent and proportional to the violation at issue, so Defendants' sovereign immunity remains. Mr. Ombe's Title II claim cannot proceed.

III. Rehabilitation Act.

Mr. Ombe also sued Defendants under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. (*See* Doc. 8 at 18.) The Rehabilitation Act prohibits any entity that receives federal

funds from discriminating against people with disabilities solely because of those people's disabilities. *See id.* As amended, the Rehabilitation Act specifies that a state, by accepting federal funds, waives its sovereign immunity defense to claims brought under the Rehabilitation Act. *See* 42 U.S.C. § 2000d-7(a)(1). The Tenth Circuit has "concluded 'that by accepting federal financial assistance as specified in 42 U.S.C. § 2000d-7, states and state entities waive sovereign immunity from suit.' " *Arbogast v. Kan., Dep't of Labor*, 789 F.3d 1174, 1182 (10th Cir. 2015) (citing *Robinson v. Kansas*, 295 F.3d 1183, 1190 (10th Cir. 2002)).

DVR receives federal funds. *See About NMDVR*, New Mexico Division of Vocational Rehabilitation (Jan. 21, 2018), http://www.dvr.state.nm.us/about-nmdvr.aspx (DVR is a "State and Federally funded program."). Since DVR is a part of the PED, which is an entity of New Mexico, it appears that Defendants have waived their sovereign immunity defense with respect to the Rehabilitation Act. *See NMPED Offices & Programs*, New Mexico Public Education Department (Jan. 21, 2018), http://webnew.ped.state.nm.us/officesandprograms/. Additionally, though Defendants invoked sovereign immunity for Mr. Ombe's Title II claim in their summary judgment motion, Defendants conspicuously did not invoke sovereign immunity for the Rehabilitation Act claim. Accordingly, the Court will consider Mr. Ombe's Rehabilitation Act claim against Defendants.

A party can violate the Rehabilitation Act by not providing reasonable accommodations to people with disabilities. *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1226 n.2 (10th Cir. 2009). Mr. Ombe's Rehabilitation Act claim boils down to his allegation that Defendants did not reasonably accommodate him by communicating with him in his desired manner. (Doc. 8 at 8, 12, 13–14.) Specifically, Mr. Ombe alleged in his complaint that DVR had a "special flavor of language" that did not connect with him. (*See id.* at 9.) Instead, Mr. Ombe

wanted "more straightforward and organized language," "black-and-white like math language," and he wanted communication with him to be slower and "more indepth [sic]." (*See id.*) Relatedly, Mr. Ombe accused a DVR employee of failing to understand that he needs "more literal language." (*Id.* at 13–14.) Mr. Ombe also claimed that DVR "often" failed to observe his request that they communicate with him through email and fax. (*Id.* at 12.)

These allegations are conclusory and vague—how often is "often" and how straightforward is "straightforward"? In their summary judgment motion, Defendants attached what they claimed to be a representative sample of email and other documents from Mr. Ombe's case file, a sample Defendants claimed would show that they reasonably accommodated Mr. Ombe. (*See* Doc. 175 at 4 n.4.) The attached exhibits include the following material from Mr. Ombe's case file:

> I delayed in responding to you so that I could consider fully what you have said and answer your questions thoughtfully. Part of the difficulty I believe is that I don't always understand what you are actually asking or requesting. I think similarly, you do not always understand what I am trying to convey to you. It is not that we are not trying. It is difficult both ways.
>
> (Doc. 175 Ex. B (email from Carol Day, DVR employee, to Mr. Ombe).)
>
> Hitoshi, I am again requesting that you call and schedule an appointment. This would be my 3rd time to ask this of you. . . . I ask you to do this in deference to your night work schedule and the fact that your schedule can change. I want the appointment to be at a time convenient for you.
>
> (*Id.* Ex. D (another email from Ms. Day to Mr. Ombe).)
>
> Thank you for noting your concerns. Due to their complexity I do not feel comfortable discussing them via e-mail. I do not want to provide you with a disservice. Let's be sure to discuss this at your next appointment when we can give it the time and energy that it requires.
>
> (*Id.* Ex. J (email from Tanya Shatz, DVR employee, to Mr. Ombe).)
>
> This letter was faxed to the participant as his preferred mode of contact (see letter). This letter follows a previous request to contact Area 2 PM and includes a

closure date of 2/14/14 if participant does not contact the PM to arrange a meeting.

(*Id.* Ex. P (Internal DVR case note regarding Mr. Ombe's case).)

Even without considering the truth of the content in these attachments, these attachments still demonstrate that DVR communicated with Mr. Ombe through email, in plain language; they demonstrate that DVR was conscious of Mr. Ombe's needs, including his preferred mode of contact; and they demonstrate that DVR employees understood the limitations of email communication and exercised judgment as to when in-person communication would be more appropriate. All of this shows that Defendants reasonably accommodated Mr. Ombe. In response, Mr. Ombe may not rest on his pleadings, but he must show through admissible evidence that there is a genuine dispute about whether Defendants reasonably accommodated him. *See Nahno-Lopez*, 625 F.3d at 1283. Mr. Ombe did not meet his burden, so the Court will grant summary judgment against Mr. Ombe on his Rehabilitation Act claim because, even viewing the evidence in the light most favorable to Mr. Ombe, there is no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law.

CONCLUSION

For the reasons provided, the Court **grants** Defendants' motion for summary judgment against Mr. Ombe's Title II and Rehabilitation Act claims. There are no remaining claims against any defendants in this case. Mr. Ombe's case, therefore, is dismissed with prejudice.

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE