

In the
Supreme Court of the United States

RALPH KELLER,

Petitioner,

v.

CHIPPEWA COUNTY BOARD OF COMMISSIONERS AND
CHIPPEWA COUNTY SHERIFF'S DEPARTMENT,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

FRANK G. BECKER
COUNSEL OF RECORD
FRANK G. BECKER & ASSOCIATES
18501 WEST TEN MILE ROAD
SOUTHFIELD, MI 48075-2663
(248) 789-2437
FRANKGBECKER@YAHOO.COM

QUESTION PRESENTED

Did the Lower Courts err in failing to recognize the discrimination against Petitioner, in violation of the Americans with Disabilities and Rehabilitation Acts, based on Respondents' arbitrary confiscation and retention of Petitioner's long used and needed accommodations (his prosthetic leg and handheld rescue inhaler) for his undisputed disabilities, based on a blanket policy of jail seizure at booking, with no individual assessment or consideration of the Petitioner's needs and any safety or health risk if Petitioner were allowed to retain these items.

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit
No. 20-2086

Ralph Keller, *Plaintiff-Appellant, v.*
Chippewa County, Michigan Board of Commissioners;
Chippewa County, Michigan Sheriff's Department,
Defendants-Appellees.

Date of Final Opinion: June 14, 2021

Date of Rehearing Denial: July 15, 2021

United States District Court for the Western District
of Michigan, Northern Division

No. 2:19-cv-00011

Ralph Keller, *Plaintiff, v.* Chippewa County Board of
Commissioners, et al., *Defendants.*

Date of Final Opinion and Judgment: October 7, 2020

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PETITION FOR A WRIT OF CERTIORARI

Ralph Keller respectfully prays that a writ of certiorari issue to review the Order Denying Keller's Petition for Reconsideration and Rehearing *en banc* entered on July 15, 2021, as to the opinion of the Sixth Circuit Court of Appeals that was issued on June 14, 2021, affirming the District Court's Order of summary judgment entered on October 7, 2020. It is contended that Petitioner suffered discrimination, pursuant to the Americans with Disability Act when his prosthetic leg and handheld inhaler were confiscated and not returned, based on a Respondents' blanket policy of confiscation without any individual assessment or balancing of the harm to the Petitioner and any health or safety concerns at the time of jail booking and continuing during Petitioner's stay at the Chippewa County Jail, where Petitioner was housed in a noncompliant holding cell with an ordinary commode and no safety rails on the walls.¹ Petitioner contends that it is clear discrimination to arbitrarily remove and retain needed accommodations of a disabled person without any stated reason or determination of any health or safety concerns and to deliberately ignore the harm, discomfort, humiliation and pain to Petitioner

¹ The District Court Magistrate and Sixth Circuit Panel, without any record support, and without Respondents ever asserting this position, apparently to render their Opinions more palatable, stated that the Holding Cell

Cell and Commode may have had handrails. (Panel Opinion pg. 10; Magistrate's Opinion pg. 11) This is totally false. Petitioner was placed in a basic concrete and steel holding cell with no safety concerns.

caused by the unnecessary confiscation of these needed accommodations.



OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals that affirmed the District Court was issued on June 14, 2021. (App.1a). The Sixth Circuit then denied Keller's Petition for Reconsideration and Rehearing *en banc* on July 15, 2021. (App.55a). The opinion and order by the District Court Magistrate acting as Judge was issued on October 7, 2020. (App.16a). The Summary Judgment was entered on November 4. 2020.



JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) based on an appeal from a final order of the Sixth Circuit Court of Appeals that presents a substantial federal question. Petitioner's claims were filed based on alleged violations of the Americans with Disabilities Act 42 U.S.C. § 12131 and the Rehabilitation Act. 29 U.S.C. § 794.



STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 794(a) **The Rehabilitation Act**

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted

42 U.S.C. § 12132. **The Americans with Disabilities Act**

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.



STATEMENT OF THE CASE

Petitioner, Ralph Keller, age 61, suffered the amputation of his lower left leg due to a 1995 motorcycle accident. (Dep.Pl., R.E. # 71-17, Pg. ID 483-84) Since that time, he accommodates his limb loss by utilizing a prescribed prosthetic leg to stand, walk and move about. (*Id.* Pg. ID 504)² Petitioner also suffers from long term, stage 4 Chronic Pulmonary Obstructive Disease (COPD).³ Keller has long accommodated his COPD disability by using prescribed, emergency hand-held inhalers, kept on his person for necessary immediate use. (*Id.* Pg. ID 496-500) Defendants' have admitted that Petitioner has these two disabilities, so he is "qualified individual with a disability" under the Americans with Disabilities Statute. 42 U.S.C. § 12132. (Tr. Motion for Sum. Judg., R.E. # 90 Pg. ID 971)

Petitioner was booked into the Chippewa County Jail on January 16, 2016, following a traffic stop based on an old Chippewa County drug possession warrant. To control his COPD, Petitioner had three (3) pre-

² Keller's right leg is also impaired due to an ill healed fracture as a child, so the prosthetic is even more critical. (*Id.*, Pg. ID 493)

³ Mr. Keller's COPD condition was resultant from emphysema and bronchitis. His principal treating Physician for this condition, since 2013, is Board Certified Pulmonologist, Dr. Amarjeet, Sethi. (R.E. # 71-19 Pg. ID 508-23). Ralph Keller has stage 4 COPD with numerous exacerbations that have required previous hospitalizations. (R.E. # 71-17. Pg. ID 501, Exhibit S, Pg. *Id.* 513-515) Dr. Sethi was not contacted by Defendants. (R.E. #7, Pg. ID 509-521)

scribed inhalers (Proair⁴, Symbicort, and Tudorza in his possession, which were all approved by the Jail's contracted Physician, Dr. Dood. (R.E. 71-1 Pg. ID 366) Although noting that Petitioner was cooperative and was not an assault risk; Petitioner was placed into the regular holding cell, without any handrails or a safety commode without his prosthetic leg and inhalers, including his emergency handheld inhaler⁵ that were seized from him during booking without any assessment, noted reason, explanation to Petitioner any concerns. (Dep.Pl., R.E. # 71-17, Pg. ID 483-84) (Visual Booking Report., R.E. # 71-3, Pg. ID 376) The Defendants did not have any policy regarding the assessment of risk as to accommodating inmates with prosthetic limbs or prescribed hand-held emergency inhalers but relied on a blanket procedure of confiscation and retention that demanded the removal and retention of his prosthetic limbs and all medication, including harmless emergency inhalers. (R.E. # 71-1, Pg. ID 365-371)

Nor is there a history of reported jail incidents involving prosthetic limbs or emergency inhalers or the existence of any written or expressed policy to weigh the need of the inmate and any safety concerns (R.E. # 71-2, 8,17 Pg. ID 373-78, 493-495) Nor is there evidence or documentation in this record of

⁴ Proair is used as his emergency "rescue inhaler" according to his Pulmonologist, Dr. Sethi. (R.E. # 71 Ex. S Pg. ID 513)

⁵ His prosthetic leg and inhalers are recognized mitigating measures for disabled persons. 42 U.S.C. § 12102 Mitigating measures are things like medications, prosthetic devices, assistive devices, or learned behavioral or adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment. (Emphasis added)

any training as to ADA compliance submitted by Defendants. Defendants' Expert only refers to a blanket unwritten Defendants' "procedure" to remove all prosthetics and medications, although prosthetics and inhalers are recognized by the ADA as being mitigating measures for disabled persons.⁶ (R.E. # 71-1, Pg. ID 365-371) Petitioner had previously been incarcerated in Defendant's jail in 2010 when his prosthetic leg was not removed. (R.E. # 71-3, Ex. C, Pg. ID 368, 376)

In response to Petitioner's inquiry as to how he was to move around without his prothesis, Deputies told him that he "could hop or crawl." After Petitioner removed his artificial leg, Deputies placed it with the remainder of his seized belongings; it was not returned to him until his release by the State Court Judge. (R.E. # 71-17 Pg. ID 491-492, 493, 495) Following booking, Mr. Keller, was wheeled to the holding cell door and released to navigate with his one (1) impaired leg, being directed to "hop or crawl." Petitioner then "scooted" along holding cell's wall relying on his one impaired leg for balance. There were two other inmates in the cell, who happened to be helpful. (R.E. # 71-17. Ex. C. Pg. ID 492) Petitioner, remained awake for 48 hours. The only place to sleep was on the floor. Keller could not hop but only shuffle along leaning against the wall as he moved in the jail's holding cell to the commode. (R.E. # 71-17 Pg. ID 493) His cellmates voluntarily assisted him with his meal tray as jail personnel simply set it at the cell door and Keller could not carry it. Mr. Keller had a difficult time using the

⁶ 42 U.S.C. § 12102 "an individual may use to eliminate or reduce the effects of an impairment.

non-ADA compliant toilet, which had no support bars. (R.E. # 71-17. C. Pg. ID 502-503)

Because of his severe COPD condition, Petitioner had long been prescribed a handheld emergency inhaler to combat sudden and unpredictable incidents of acute shortness of breath. These inhalers merely aid his breathing and do not have any mood-altering or deleterious health effects. (*Id.* R.E. # 71-14 Pg. ID 521) The onset of acute shortness of breath, causes Keller to suffer and panic as though he is drowning. (MFSJ, R.E. # 71-14 Ex. S. Dep. Sethi Pg. ID 520-21) Petitioner's ability to breathe was literally left to the availability, attention, whim, and caprice of his jailers, causing mental and physical torment and ultimate hospitalization upon discharge. The jail's Physician, Dr. Dood, ordered that Mr. Keller was not to be hospitalized "unless he is turning blue or discolored and temperature is low." (MFSJ, R.E. # 71-14 Ex. N, Pg. ID 466) (Transcript. Mot. Sum. Judg., R.E. # 90 Pg. ID 983)

Dr. Amarjeet Sethi, Petitioner's Board-Certified Pulmonologist, testified as to objection to this directive as the degree of pain to Petitioner due to his breathing impairment was "terrible." (MFSJ, R.E. # 71-14 Ex. S. Dep. Sethi Pg. ID 520-21) During his incarceration, Keller's breathing deteriorated quickly, without his emergency inhaler. (R.E. # 71-17. C. Pg. ID 493-494) On the second day of his incarceration, Petitioner was moved to an observation cell due to his severe COPD exacerbated by the lack of an inhaler. He was then transported to a cold gymnasium for a few hours, returned to the holding cell and subsequently moved to an apparent medical cell that also housed an inmate suffering from pneumonia. Mr. Keller attempted to remain calm as being upset worsens his breathing

condition. (R.E. # 71-17. C. Pg. ID 496) While isolated from jail staff, Mr. Keller, gasping for breath, desperately called 911 prompting an officer to finally inquire as to Petitioner's condition. (R.E. # 71-17. C. Pg. ID 495) Petitioner's hospitalization request was also denied; instead, he was treated with a breathing nebulizer, which provided minimal relief.

Petitioner was immediately released following his Court appearance on the Warrant charge, the Circuit Judge credited Mr. Keller with 4 days of jail time. (R.E. # 71 Ex. K. Pg. ID 397-398) Upon being released from the jail by the Court, Keller went directly to the local hospital because of his continued breathing problems. (R.E. # 71-17. C. Pg. ID 500) A few days later he went to his Physician's Hospital where he presented to the emergency room for shortness of breath and COPD. (R.E. # 71-17. C. Pg. ID 500)

Despite the absence of record or testimonial support or any ADA Policy or ADA Training, Respondents relied on the "defense" that that the "Confiscating Petitioners prosthetic leg was done for security purposes." (*Id.*, Pg. ID. 368) Yet Respondents' employees never inspected the prosthetic leg. The Personal Property Inventory contained no description of the prosthetic leg. (R.E. # 71-18, Ex. H, Pg. ID 387) There was no photo or description of the prosthetic leg retained in the jail records. This is no evidence or testimony of any review or assessment of the prosthetic leg—only that the prosthetic leg was taken. Respondents are totally reliant on Petitioner's description and the photo of Petitioner, and his prosthetic leg supplied during discovery. (R.E. # 71-18, Ex. R, Pg. ID 506, photo contained in Appendix) There is no record kept regarding the composition or weight of the prosthetic

leg. Consequently, how could Respondents have considered the alleged potential danger of the prosthetic, when there is no evidence that Respondents even knew of the weight or composition of the prosthetic?

Indeed, the only legitimate safety concern was Mr. Keller's safety, without his prosthetic leg and inhaler. There was an incredible risk of a serious fall in the concrete and steel holding cell by a one-legged man with an impaired "good" leg. Keller was also more vulnerability to intentional or accidental injury from other inmates and jail staff. There simply was never an individual assessment of any risks to the safety of Petitioner or others made prior to the removal of Mr. Keller's prosthetic leg or handheld inhaler. There was no gathering of facts as to Petitioner's disabilities and no assessment as to incidents of a similar nature, no consideration of Petitioner's previous incarceration where his prosthetic leg was not removed,⁷ or whether depriving Mr. Keller of his prosthetic inhaler promoted any purpose.

Respondents did not have and did not have their booking personal use any written admission form that addressed ADA concerns and Respondents admittedly had no written ADA policy regarding the acceptance of persons suffering from a disability, such as loss of a limb. (R.E. # 90, Pg. ID 994) Defendants' Medical Screening noted no signs that Petitioner was under the influence of drugs or alcohol. Petitioner was noted to be cooperative, mentally stable, not an assaultive risk and it was recommended that he be housed in

⁷ Plaintiff had previously been incarcerated in Respondents' jail in 2010 when his prosthetic leg was not removed. (R.E. # 71-3, Ex. C, Pg. ID 376)

the jail's general population. (R.E. # 71-6 Ex. F, Pg. ID 383) There is no evidence or documentation of any policy or procedure of Defendants to inquire and assess persons with disabilities upon admission to the Jail to determine whether any accommodation is necessary or appropriate. Nor is there a record of Respondents establishing any Officer to be in charge of ADA compliance. (R.E. # 71 Ex. C. D. E Pg. ID 376-383) Nor is there any evidence or documentation of any policy or procedure to continue to assess persons with disabilities following admission as an inmate to the Jail to determine whether any accommodation would be necessary or appropriate based on observed behavior, illnesses, and interactions with others. Nor do the Jail records indicate any observation or recording of Petitioner's difficulties in navigating about the jail and using the non-ADA compliant commode. (R.E. # 71 Ex. C. Pg. ID 376)

Petitioner filed a Two Count Complaint pursuant to Title II of the Americans with Disabilities Act (ADA) (42 U.S. C. § 12131 et seq.) and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.) alleging discrimination based on the taking and retention of Petitioner's prosthetic leg and emergency handheld inhaler⁸ despite his disabilities of leg

⁸ Plaintiff presented to the Chippewa County Jail with three (3) inhalers (Proair, Symbicort, and Tudorza. Proair is used as his emergency "rescue inhaler" according to his Pulmonologist, Dr. Sethi. (R.E. # 71 Ex. S Pg. ID 513) Defendants' Counsel admitted that Plaintiff had two disabilities. (Tr. Motion for Sum. Judg., R.E. # 90 Pg. ID 971)

amputation and COPD.⁹

The Defendants harsh perspective and defiance of the ADA's policy was demonstrated at the Motion Hearing, wherein Defendants' Counsel opined disdain for the ADA's goal of equal treatment as he perceived Petitioner's hardship caused that depriving Petitioner of his leg was of minor significance:

Mr. Grant: Your Honor, he was able to—he testified he was able to scoot around the cell. He was able to hop around the cell. He was able to get around the cell. Just as if the other inmates in the cell were able to do. So, you know, I think the accommodation there, Your Honor, in letting him use the wheelchair to get around outside of the cell, I think that was appropriate. (R.E. # 90, Pg. ID 990-91)

THE COURT: So, I mean, the problem is you're asking me to categorically find that that is a—that that's a reasonable—that's reasonable. That he wasn't denied access to a toilet. Well, certainly there's a toilet in that holding cell, but you take a guy who—and I'll just tell you what my problem is—you take a guy who on booking says he's got nerve damage, he's got a hip problem, he's got a leg problem, he's missing a leg, you take the prosthetic leg, you put him in a cell that's 20 x 20, and I don't know what the layout of the cell is, and you tell him to hop or crawl around, I mean, I think a jury is going to say—some jurors could potentially say that that's really not giving

⁹ Symbicort® . . . produced by AstraZeneca is used to control COPD and asthma by reducing inflammation in the lungs and keeping airways open.

him access to the program requirements, which, you know, a toilet is part of that. Now, he may find a way to get to a toilet because people, you know, they would rather do just about anything rather than going in their pants. But, you know, this is the problem: A deputy says “Hop or crawl,” and you’re asking me to say categorically that that is an acceptable accommodation and it’s not the denial of program benefits. (Tr. Mot for Sum. Judg., R.E. # 90 Pg. ID 990-91)

The Lower Court’s insinuations that there may have been supporting handrails in the holding cell is particularly disappointing as this was never claimed by the Respondents, their Counsel¹⁰, their expert or in their Pleadings and it is a complete concoction to bolster an otherwise baren record. For instance, Respondents’ Answer to Paragraph 9 of the Plaintiff’s Complaint is noteworthy. Paragraph 9 of the Complaint asserted:

9. The Plaintiff was housed in a holding cell during his stay until he became bedridden due to an acute exacerbation of his COPD Condition. The Holding Cell, which had only steel benches and other areas of the Chippewa County Jail, in general, was constructed and provided services, such as meal distribution, commode facilities and exercises, were designed for use by persons who had two legs and were able to breathe normally. Consequently, it was necessary for the plaintiff to have the use of his prosthetic leg and

¹⁰ The fact that the Holding Cell was not ADA Compliant is referenced in the portion of colloquy contained in the Oral Argument quoted on in Paragraph 6 below.

inhaler for him to effectively obtain his meals, comply with orders, have his meals, maintain hygiene and otherwise have full access to the Chippewa County Jail facilities and services.

Respondent's ANSWER:

Answering paragraph 9, Defendants neither admit nor deny the allegations therein as Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations and leaves Plaintiff to his proofs.

(Answer, R.E. # 5, Pg. ID 24)

Here is a glimpse at the Mr. Keller's testimony that the Sixth Circuit's Opinion viewed as deficiently vague and lacking as it provided "very little information" about any difficulty accessing the toilet¹¹:

- Q. And in response to them asking you to remove the leg, what did you say?
- A. "How am I going to get around?"
- Q. Okay. And did they have a response for you?
- A. Yes.
- Q. What was that?
- A. He said hop around or crawl.
- Q. Okay. And so what did they do with the leg; do you know?
- A. They just stuck it with my belongings.
- Q. Put it with your personal property?
- A. Yes.

¹¹ Opinion pg. 10)

Q. And then—I've been in that booking area before. Do they put you in a wheelchair then and take you to holding?

A. Yes.

Q. So they put you in the wheelchair, they take you into holding. And do they wheel you right into the holding cell?

A. No.

Q. They wheel you to the doorway?

A. Yup.

Q. And then you have to get out of the wheelchair?

A. Yes.

Q. And then what do you do? Just hop in?

A. I can't hop.

Q. Okay. So how did you get in from the doorway of the holding cell?

A. Basically held the—you know, just scooted along with my one leg. Held against the wall or something and just—

A. Yes.

Q. Okay. Just—

A. Yeah.

Q. And then—what?—found a place to sit?

A. Yes.

Q. There's like concrete benches in there, in that holding cell?

A. Yup.

Q. And was there anybody else in that cell?

A. Yes, there was two.

Q. Two other people?

A. Yeah.

Q. Men?

A. Yeah.

Q. Okay. Did you have any conversations with the men that were in there?

A. Yes.

Q. So was it the same three guys in the holding cell?

A. Yes.

Q. Other than the toilet and sink, is there a shower in that holding cell?

A. No.

Q. Did—can you describe the cell at all to me that you recall?

A. It was about the size of this room, with I think only one bench in it.

Q. Right.

A. And the bench didn't—like say over there there's maybe like—maybe ten feet or something there was the wall and then the bathroom right there.

Q. Okay. And how did you get over to the toilet and the sink then?

A. Like I said, I shuffled.

A. Yes.

Q. Shuffled over?

A. Yeah.

Q. Okay.

A. Because I don't hop.

Q. You don't hop?

A. No

Q. Why is that?

A. Yeah. Because of my other leg is broke.

Q. You have a broken right leg?

A. Yeah—

Q. Was it broke in 2016?

A. No, it was broken years before that

Q. Did it ever ~ did you ever get treatment for it?

A. Yes.

Q. What happened? It just didn't heal right?

A. Right

Q. So are you still having pain in your right leg?

A. No.

Q. But in 2016 were you?

A. No.

Q. Okay

A. But I ain't going to hop on it because they told, you know—

Q. Understood.

A. I don't got good balance anyways, so—

Q. Right. Okay.

A. And I'm over 50 years old, would you like to hop around after 50?

Q. I don't want to hop—I don't want to hop around now. But—so let me say this: You spent at least two nights in the holding cell?

A. Yes.

Q. And I'm assuming you slept during that period?

A. No.

Q. There was no sleep?

A. No.

Q. You went 48 hours without ever sleeping?

A. Yes.

Q. Okay. Could you have laid down and slept?

A. I tried to lay down and sleep, but—

Q. Its not comfortable?

A. No.

* * * *

Q. It says, "Could not walk normally around for exercise, to obtain food, and to use the facilities." What do you mean by "use the facilities"?

A. Well, it really was a hard time to get to the bathroom.

Q. Right. It was hard but you did it?

A. Well, I wasn't going to pee my pants.

Q. Right. I mean, it was hard to do but were able to do it; correct?

A. Yeah.

Q. Okay. And I'm not suggesting that it was easy or anything like that. I'm just—I have to ask the questions so you've got to answer them, you know.

A. Okay.

Q. Again, you reference here that you were in a 20-by-20 foot holding cell and you were placed in the gymnasium. And we've talked about that; right?

A. Yes.

Q. You say, "I felt it was degrading and needlessly hurtful and vindictive." Do you see that?

A. Yes.

Q. And you believe that?

A. Yes.

(Deposition of Plaintiff, R.E. # 71-17, Pg. ID 492-493, 503)

The Lower Courts misinterpreted the nature of this case. This is not a case where Petitioner was seeking access to a special activity, such as wheelchair basketball, Petitioner was more fundamentally seeking to retain his prosthetic leg (or have it returned shortly following an inspection—which never occurred) and have a known harmless and prescribed hand held rescue inhaler in his possession so he could more easily—with the aid of these well-established mitigating measures—walk, move about balance himself, carry his meal tray, use the toilet and even,

breathe.¹² (*Id.*, R.E. # 84, Pg. ID 939-944) This Petitioner argued is the most fundamental form of discrimination against the disabled. Petitioner timely appealed the Judgment that was entered on November 4, 2020, by filing a Notice of Appeal. (Judgment, R.E. # 85, Pg. ID 952) Petitioner has now timely appealed to this Court.

12 Federal regulations further define these elements. Federal regulations define “major life activities” as “functions such as caring for one’s self, performing manual tasks walking, seeing, hearing, speaking, breathing, learning and working.” 28 C.F.R. § 42.540(k)(2)(ii) (1992).



REASONS FOR GRANTING THE PETITION

The ADA and Rehabilitation Acts not only promote inclusion in programs and activities for disabled persons but protect against discrimination against disabled persons. Respondents discriminated against Petitioner when he was deprived of the accommodations which he had long used to engage in fundamental activities of daily living like walking and breathing. Petitioner has a viable cause of action herein because he was treated differently and less favorably than nondisabled persons. To treat one differently and less favorably is the simple, precise definition of discrimination as defined by the following decisions of this Court: *Olmstead v. L.C.*, 527 U.S. 581 (1999); *Newport News Shipbuilding v. EEOC*, 462 U.S. 669, 682, n. 22 (1983); *Los Angeles Dept. of Water v. Manhart*, 435 U.S. 702 (1978) *See also, Bryant v Steele*, 25 F.Supp.3d 233 (E.D.N.Y. 2014) (The purpose of the ADA and the Rehabilitation Act is to eliminate discrimination based on disability and to ensure even handed treatment between the disabled and the able-bodied); *Holiday v. City of Chattanooga*, 206 F.3d 637, 642 n. 1 (6th Cir. 2000) (ADA mandates individualized inquiry)

Prosthetic legs and handheld rescue inhalers are widely used and accepted as accommodations by the Courts, medical community, and public. Keller has long accommodated his disabilities by using a prescribed and specially made prosthetic leg and emergency hand-held rescue inhalers, kept on his person for necessary immediate use. (Dep.Pl., R.E. # 71-17, Pg. ID 496-500,504) Petitioner was not

requesting any new accommodation by Respondents' jail but only to retain his accepted mitigating measures¹³ (accommodations) that Mr. Keller had already adopted and used so that he could live a more normal life. Consequently, the discrimination in this case was far worse because the Respondents prevented

Petitioner from living the more normal life that he had already adapted to through his accommodations, without any threat or inconvenience to others. Petitioner's reliance on these accommodations was for such fundamental activities as walking independently with balance and breathing normally, without the sensation of drowning.

At booking, Respondents' Agents found no danger or threat of harm from Petitioner if allowed to retain his prosthetic leg and handheld rescue inhaler. Jail personal had an opportunity to inspect these items and consult with the Jail Physician and Petitioner's Pulmonologist. Even though there was no evidence that Keller posed a danger if allowed to keep his prosthetic leg and a rescue inhaler, which had been approved for use by the Jail's Physician, these items were not returned to him. Thus, Petitioner was treated differently and less favorably because his

13 Significant "mitigating measures" in the ADA context are specifically enumerated: C.F.R. 28 § 36.105(4) *Mitigating measures* include, but are not limited to:

(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies

ability to walk, move about, balance himself and breathe were denied because Petitioner was different: He had disabilities Contrarily, inmates with two normal legs (even if trained kick boxers), who have a far greater capacity to cause injury to others with their legs and no breathing problems, were treated more favorably as their ability to function was not compromised—even if determined to be assaultive: Their legs would not be shackled and breathing limited based on an unwritten blanket procedure. Only disabled persons, such as Ralph Keller

The Panel's decision is an outlier in ADA law, ignores the lack of any individual assessment of possible danger, asserts the fallacious position that the Defendants had any ADA policy regarding the seizure of prosthetic limbs, infers, without any evidence or claim by Defendant, that the holding cell may have had supporting hand rails on its walls and ultimately accepts the Defendant's and Magistrates uniquely incredible position that because the admittedly disabled Plaintiff was somehow, by shuffling or crawling, able to make it to the commode, it was acceptable to retain his prosthetic leg without discriminating. One would think that most people would have a sufficient empathetic imagination to envision the difficulties a person would have who was denied his prosthetic limb and inhalers. However, for those that do not, the above testimony, one would hope, should suffice.

The following colloquy in the Lower Court clearly demonstrates the extreme position that the Lower Courts have accepted in this case and this Panel adopted:

THE COURT: The holding cell, according to Dr. Ross, was 20 x 20 and it's got a sink, it's got some

benches, and it's got a toilet, and he's put in there. And he goes in there and he doesn't have the wheelchair and he doesn't have a walker, and according to Mr. Keller anyway he's told—you know, Keller asks for the leg, and says he can't hop. He says that he scooted along on one leg held against the wall or something. So, I mean, the problem is you're asking me to categorically find that that is a—that that's a reasonable—that's reasonable. That he wasn't denied access to a toilet. Well, certainly there's a toilet in that holding cell, but you take a guy who—and I'll just tell you what my problem is—you take a guy who on booking says he's got nerve damage, he's got a hip problem, he's got a leg problem, he's missing a leg, you take the prosthetic leg, you put him in a cell that's 20 x 20, and I don't know what the layout of the cell is, and you tell him to hop or crawl around, I mean, I think a jury is going to say—some jurors could potentially say that that's really not giving him access to the program requirements, which, you know, a toilet is part of that. Now, he may find a way to get to a toilet because people, you know, they would rather do just about anything rather than going in their pants. But, you know, this is the problem: A deputy says "Hop or crawl," and you're asking me to say categorically that that is an acceptable accommodation and it's not the denial of program benefits. And that's—this is a motion for summary judgment. I mean, you've got arguments you can make at trial, but do you see my point? I don't get it.

MR. GRANT: Your Honor, I see your point, but I guess the situation would be different if he was unable to make it to the toilet at all. In this case he was able to. Like I said before, he was able to do everything any other inmate could do.

THE COURT: Okay.

MR. GRANT: If he couldn't make it to the toilet, let's say he had no legs and no arms and wasn't able to make it to the toilet, then surely there would have to be a different accommodation there. But he did everything that he needed to do. Was it more difficult for him to do so? Sure it was. Was it more difficult for him to do other things because he has COPD? Sure it was. But the fact of the matter is he was able to do everything.

THE COURT: Right. Okay. Well, that brings up—you bring up a good point. So let's say someone is a double amputee, no way they can get to the toilet, what does Chippewa County do with that person?

MR. GRANT: Well, Your Honor, I mean, we're looking at a completely different set of circumstances here. I haven't had that situation come up.

(Oral Argument R.E. # 90, Pg. ID 992-994)

This incredible colloquy recalls this Court's decision in *PGA Tour v. Martin*, 532 U.S. 661 (2001). Did this Court require the Plaintiff golfer, Casey Martin, who had both of his limbs but continued leg pain, to shuffle and crawl up the fairways to the Greens? No, this Court based on a sensible weighing of considerations, allowed the use of a golf cart accommodation by the disabled Casey Martin.

PGA Tour, Inc. v. Martin, *supra* at 690 (2001) recognized that “Congress concluded that there was a “compelling need” for a “clear and comprehensive national mandate” to eliminate discrimination against disabled individuals, and to integrate them “into the economic and social mainstream of American life.” S. Rep. No. 101-116, p. 20 (1989); H. R. Rep. No. 101-485, pt. 2, p. 50 (1990). In the ADA, Congress provided that broad mandate. *See* 42 U.S.C. § 12101(b). Moreover, *PGA v Martin*, *supra*, held that under the ADA’s imposed a “basic requirement” that the need of a disabled person be evaluated on an individual basis. Here, it is undisputed that there was no individual assessment of whether Mr. Keller posed any security threat whatsoever if he were allowed to keep his prosthetic leg and handheld emergency inhaler. Both the denial of Mr. Keller’s prosthetic leg and handheld emergency inhaler, directly contrary to the spirit and language of the ADA, left Mr. Keller at the whim and caprice of his jailers, who were instructed to hospitalize Mr. Keller only if he turned blue.

This case involves a question of exceptional importance in which this Court could clarify the meaning of discrimination to the disabled within and outside of the jail and prison context. The Sixth Circuit decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue including *Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2010), *Miller v. King*, 384 F.3d 1248, 1262 (11th Cir. 2004) *See also, Echols v. Illinois Department of Corrections*, 3:20-cv-00583-GCS2021 WL 25359 (2021)

Keeping Plaintiff in the suicide watch cell for several days without his prosthetic leg or any other

mobility aid may have violated the Eighth Amendment’s prohibition on cruel and unusual punishment if it denied him “the minimal civilized measure of life’s necessities,” creating an excessive risk to his health or safety . . .”; *Beasley v. Hairrs, et al.*, Civil No. 10-cv-587-JPG. 2011 WL 766980 (S.D. Ill. 2011.) (Recognized ADA and 8th Amendment violations for not providing padding for Plaintiff’s prosthetic leg. *Garcia v. Schnurr*, 19-3108-SAC, 2021 WL 2413391 (D. Kansas. 2021) inadequate commode and shower for person needing prosthetic leg

Lastly, the Lower Courts’ attempts to trivialize this cause of action based on Petitioner’s relatively short four (4) day jail incarceration. However, the short jail stay does not mitigate the reality of the discrimination against Keller. This Court’s decision in *Hudson v. MacMillan*, 503 U.S. 1, 15 (1992), held that the Eighth Amendment could be violated, even in the absence of a significant injury based on contemporary standards of decency: “When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. *See Whitley, supra*, at 327, 89 L.Ed.2d 251, 106 S.Ct. 1078. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been unacceptable to the drafters of the Eighth Amendment as it is today.” The same logic applies to this case.



CONCLUSION

Respondents were not entitled to Summary Judgment as no showing was made that there was even an attempt to comply with the ADA and Rehabilitation Act. Indeed, Petitioner was rendered further disabled by the Respondents' actions in removing his prosthetic leg and his hand-held inhaler without any established evaluation policy or even an assessment of Petitioner's needs and any potential safety concern or undue hardship. The Lower Courts have offered no legally valid justification for the initial confiscation and continued retention of the prosthetic leg and prescribed COPD rescue inhalers in the face of Keller's known disabilities. Thus, this Petition for Certiorari should be granted.

Respectfully submitted,

FRANK G. BECKER
COUNSEL OF RECORD
FRANK G. BECKER & ASSOCIATES
18501 WEST TEN MILE ROAD
SOUTHFIELD, MI 48075-2663
(248) 789-2437
FRANKGBECKER@YAHOO.COM

COUNSEL FOR PETITIONER

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