22-7118

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SCOTT D. CREECH — PETITIONER
(Your Name)

vs.

OHIO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SCOTT DAVID CREECH
(Your Name)

P.O. BOX 5500-Chillicothe, Ohio 45601
(Address)

(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

1.) Did the Ohio Department of Rehabilitations and Corrections know that Petitioner was disabled and thereafter deny him a reasonable accommodation to a known disability—when said disability denied him the benefits of the services, programs, or activities under Title II of the Americans with Disability Act, (hereafter, ADA) by not being able to eat in the chow hall, go to the library, and walk for exercise as other similarly situated prisoner's, in violation of the Eight and Fourteenth Amendment of the United States Constitution?

2.) Did ODRC prove that returning a mobility aid to a disabled prisoner would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved under 42 U.S.C. § 12201(f)?

LIST OF PARTIES

[√] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

IN THE UNITED STATES

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issues to review the judgment below.

OPINIONS BELOW

[√] For cases from the **Federal Courts:** Scott D. Creech

The Opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[√] reported at Creech v. Ohio Dep't of Rehab. & Corr., 2022 U.S. App. LEXIS 25878, 2022 WL 4138415 (6th Cir. Ohio, Sept. 13, 2022).

[√] the opinion of the United States district court appears at appendix A to the petition and is

[√] reported at Creech v. Ohio Dep't of Rehab. & Corr., 2021 U.S. Dist. LEXIS 121881, 2021 WL 2677792 (S.D. Ohio, June 30, 2021).

No state court judgments initiated.

JURISDICTION

[√] For cases from **Federal Courts:**

The date on which the United States Court of Appeals decided my case was September 13, 2022.

[√] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 5th 2023.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CASES, STATUES AND OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS:

EIGHT AND FOURTEENTH AMENDMENT

STATUES:

STATEMENT OF THE CASE

INTRODUCTION

The United States Court of Appeals for the Sixth Circuit decided this case on the bases of: Did Petitioner create a genuine dispute regarding whether the Ohio Department of Rehabilitation and Correction (hereinafter, ODRC) knew he was disabled and denied him a reasonable accommodation? The Sixth Circuit reasoned that Petitioner, failed to present evidence that he was denied a reasonable accommodation, in part by the fact that his medical restrictions were reviewed several times between 2012 and 2016, as required by ODRC policy. Creech v. Ohio Dep't of Rehab & Corr., v. 2022 U.S. App. Lexis 25878, * 12 (Sixth Cir. Sep. 13, 2022). ODRC expressly requires regular review of medical restrictions. One thing that the sixth circuit and the District Court dwelled upon was the fact that "mobility devices like canes can present a security risk to inmates and prison staff alike." However, there is no indication, and there were no instances where Petitioner had ever used a cane as a weapon. In fact, ODRC did not show any evidence that there were ever instances where Old Prisoner's with mobility aids ever used them as weapons. This just seems like an easy way to eliminate disability claims without any direct evidence?

The Sixth Circuit further alleviates the States burden by averring that The record also lacks evidence to suggest that ODRC medical personnel had actual knowledge of the injuries he sustained in his two motorcycle crashes. If this is the case, then what did ODRC treat Petitioner for? And why was he prescribed a cane for in the first place? There were several medical records that prove that ODRC had actual first-hand knowledge of "One Motorcycle Crash," and there were no records suggesting that ODRC treated Petitioner for any other reason. It is well known throughout the prison population that Chillicothe Correctional Institution (hereinafter, CCI) has a culture of care that denies prisoner's medical assistance, and routinely takes prisoner's off

medication and/or mobility aids, that only becomes problematic once the prisoner dies or is taken to the hospital because of the lack of concern the medical staff have, even with serious injuries.

Moreover, as the Sixth Circuit stated themselves, it took almost four years to reissue the cane from the time Petitioner started his prison sentence until CCI gave it back. And then another three years to return it the second time. At the time Petitioner had access to the cane, he was able to walk five miles a day with the assistance of the cane. After the cane was taken, Petitioner was only able to walk two to three miles a day if at all. Petitioner became unable to walk to the chow hall to eat, and if it were not for his mother, he would have starved to death. The District Court and the Sixth Circuit seemed to believe that this was reasonable. As long as a prisoner is still alive to some degree, he/or she has not been denied a reasonable accommodation? Petitioner also complained that he did not have full access to the law library and the gym or recreational yard.

During the litigation of this case, the system of justice threw up many road blocks to ostensibly apply the Americans with Disability claim, (hereafter ADA) such as: (1) Petitioner never filed an accommodations request under ADA with the ADA Coordinator for ODRC; (2) Petitioner has not pleaded any conduct that by ODRC which infringes on rights protected by the Fourteenth Amendmet. Petitioner has since filed for an accommodation request and was told that this request did not exist. That if Petitioner needed further assistance with the cane issue it should be brought up at the time when there is a problem. On May First 2019, Petitioner had an appointment with Chief Medical Officer, Sonya Peppers MD, who on September twenty third (23), 2019, reissued the cane based upon review of old records and to assist with ambulation. This decision was also based upon new complaints of joint pain. The crux of the Sixth Circuit's argument against Petitioner is that each time he filed a health form request, he was promptly seen by a qualified medical professional, which created meaningful access to medical treatment.

Thus to the extent that Petitioner was seen by medical professionals, he was still denied medical treatment that further exacerbated his already sever injuries to the point where he now requires the cane at all times. This is why Dr. Sonya Peppers gave the cane back because old injuries caused new injuries, by not being able to walk with a swift gate without the cane, which the District Court wrote off as: In an abstract sense walking and eating can be seen to be liberties which, in the area of expansive reading of "substantive" due process protections, might have been held by the Supreme Court to be constitutionally protected. Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). However, the Supreme Court has never reached that point with respect to eating or walking. Because those are major life functions the Supreme Court has not held to be protected by the Fourteenth Amendment, protecting those functions under Title II of the ADA is beyond Congressional authority conferred by § 5 of the Fourteenth Amendment.

What the District Court and the Sixth Circuit failed to mention was that Petitioner would not have been able to eat period, if his Mother would not have been sending money to do so. As pointed out by the Sixth Circuit: After losing his cane, Plaintiff went from walking four or five miles a day to at most one or two miles a day, if at all. If there was nice weather and Plaintiff was not suffering from chronic pain, he was able to walk two or three times a week, but he still suffered from significant pain while standing still, which caused him to stop going to the chow hall. Petitioner also asserted that, without the cane, he was prevented from having full access to the la§w library and that he also had reduced access to the gym and the yard.

42 USCS § 12102 (2)(A) States that:

(2) Major life activities.

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing,

lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The Sixth Circuit also stated that: Petitioner rightfully points out that the ADA states "episodic" impairment is a disability if it "substantially limits a major life activity when active." *See* Appellant Br. at 22 (quoting 42 U.S.C. § 12102(4)(D)). The ADA also instructs that "whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . mobility devices." Id. § 12102(4)(E)(i).

Therefore, Petitioner avers that ODRC discriminated against him by removing his cane, and under the Title II of the ADA—he was denied a reasonable accommodation to a known disability. this court should reverse and remand to determine if the Sixth Circuit improvidently applied the wrong standard for judging ADA claims when dealing with prisoner's.

The Due Process Clause of the Fourteenth Amendment incorporates the Eighth Amendment's guarantee against cruel and unusual punishment which was violated when Petitioner was unable to eat in the chow hall due to the removable of his mobility aid.

REASONS FOR GRANTING THE WRIT

POINT I

The Sixth Circuit Opinioned that, and the district court found, as both agreed, that Petitioner failed to present evidence that he was denied a reasonable accommodation. Petitioner's medical restrictions were reviewed several times between 2012 and 2016, as required by ODRC policy. ODRC expressly requires regular review of medical restrictions. Petitioner's medical records also reflect that—and he concedes as much—Artrip removed the cane based on his medical judgment, and Dr. Sonya Peppers reissued the cane based

on her own medical judgment. And in his deposition, Petitioner recognized that mobility devices like canes can present a security risk to inmates and prison staff alike. Creech v. Ohio Dep't of Rehab. & Corr., 2022 U.S. App. LEXIS 25878 * 12-13, 2022 FED App. 0372N 2022 WL 4138415 (6th Cir. Sep. 22, 2022).

The final conclusion was that, Petitioner simply has not created a genuine issue of material fact regarding whether ODRC denied or removed a reasonable accommodation where the relevant decisions were all made by competent, qualified medical professionals acting in accordance with ODRC policy. Therefore, the sixth circuit opined that the district court properly awarded summary judgment on Petitioner's failure-to-accommodate claim. Id. at 15.

Under the Eighth Amendment, as made applicable to the states through the Fourteenth Amendment, a state has an obligation to provide adequate medical care to its inmates. Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). It is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (internal quotation marks and citations omitted). Thus, pursuant to the Eighth Amendment's prohibition against "cruel and unusual punishments," U.S. Const.amend.VIII,"prison officials must ensure that inmates receive adequate food, clothing, shel ter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" Farmer, 511 U.S. at 832 (quoting Hudson v. Palmer, 468 U.S. 517, 526-527, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)).

However, this did not happen in this case. Petitioner was subjected to the whimsical and arbitrary decision making of Nurse Practitioner, Gary Artrip, who is known to have a clear lack of concern when it comes to inmate's. When the cane was taken, Petitioner's health went downhill

to the point where he needed the assistance of his mobility aid on a regular basis, and where before it was only needed when going to the chow hall to stand in line and when walking on occasions when pain was an issue, and when walking for exercise. This is why the mobility aid was returned by Dr. Sonya Peppers. The sixth circuit's opinion that the cane was reissued based on her medical judgment makes no sense on a factual matter that involves medical reasoning?

The ADA Clearly states an "episodic" impairment is a disability if it "substantially limits a major life activity when active. (quoting 42 U.S.C. § 12102(4)(D). The ADA also instructs that "whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . mobility devices." *Id.* § 12102(4)(E)(i). The other excuse the sixth circuit used was that canes can be used as weapons. The correctional facility here has on a regular basis, inmate's walking around the yard with canes. There hasn't been an episode where an older disabled prisoner had used their mobility aids for weapons. If this were the case, then the State would have mentioned it in their briefs. Thus, the sixth circuit opinion, that providing a cane in express contravention of ODRC policy, where competent medical professionals' medical judgment goes unchallenged, would fundamentally alter the nature of the accommodations involved, has no factual basis and only serves as a weapon to dismiss ADA claims.

Petitioner's cane was taken before he was transferred to Chillicothe Correctional Institution in December 2008. It was not reissued until 2012. Then on August 23, 2016, the cane was once again taken and not returned until September 2019. Dr. Peppers decision to reissue the cane was based on several factors, including her review of medical records, new complaints of joint pain, a new physical exam, and her medical opinion. In all, the cane was taken for a total of seven years while Petitioner suffered because of the inadequacy and utter disregard for the welfare of

prisoner's. This is deliberate indifference to a serious medical need, and should be the nexus to advance Eighth Amendment protections that clearly violate the Fourteenth Amendment of the United States Constitution. The objective component clearly shows a serious medical need. As to the subjective component, there is an indication of a culpable state of mind when the mobility aid was returned.

Certiorari should be granted to review the Sixth Circuit's departure from American with Disability Act and Congressional intent to decide if walking and eating are in fact held to be protected by the Fourteenth Amendment as incorporated by the Eighth Amendment guarantee against cruel and unusual punishment.

POINT II

The Sixth Circuit reasoned that—the ADA specifies that an entity is not required to provide a proposed accommodation if it would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved." 42 U.S.C. § 12201(f). They further averred that it can hardly be disputed that providing a cane in express contravention of ODRC policy, where competent medical professionals' medical judgment goes unchallenged, would fundamentally alter the nature of the accommodations involved.

The ADA defines a disability as a physical or mental impairment that substantially limits one or more of the major life activities of the individual. According to the ADA regulations, an individual is "substantially limited" in performing a major life activity if he/she is either: (1) unable to perform a major life activity that the average person in the general population can perform (e.g., walking), or (2) significantly restricted as to the condition, manner, or duration under which he/she can perform a particular major life activity as compared to the condition, manner, or duration under

which the average person in the general population can perform that same major life activity (e.g., being able to walk only for brief periods of time). 29 C.F.R. § 1630.2(j)(1)(i)-(ii).

Title II of the ADA provides that no qualified individual with a disability shall, because of that disability, be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity, 42 U.S.C.S. § 12132. The ADA's broad definition of discrimination includes failing to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such entity, 42 U.S.C.S. § 12112(b)(5)(A).

In the district courts' supplemental report and recommendation, the undisputed conclusions were that: The Report rejected Petitioner's claim that he had proven he was disabled by showing the Social Security Administration had paid him disability benefits until he was incarcerated, but also found ODRC had effectively conceded his disability by providing a cane as a reasonable accommodation to his condition from his date of admission to CCI until Nurse Practitioner Artrip revoked that medical restriction in August 2016 Again, Defendant has not objected and its time to do so has expired. See Creech v. Ohio Dep't of Rehab. & Corr., 2021 U.S. Dist. LEXIS 66215, 2021 WL 1267271 *2 (S.D. Ohio, Apr. 5, 2021).

Another words, during the time that Petitioner was provided a cane, he was disabled, but then not disabled as soon as N.P. Artrip removed the cane. This makes no sense—even on a theoretical level—much less an undisputed fact as the district court averred? Thus, the court has drawn its own conclusions from facts unknown about whether Petitioner was actually disabled in the period the cane was removed. The sixth circuit left this anomaly alone and judged the case without consideration of whether he was disabled period. N.P. Artrip's decision was based upon

the fact that he had a swift gait while using the cane. It wasn't until the law suit was filed that the matter turned to seeing him walking in the yard, among other observations that lacked merit.

Moreover, excuses used to dismiss ADA claims, such as "canes can be used as weapons," are overprotective rules and policies that are designed to shield the prison system from obvious forms of discrimination. See 42 USCS § 12101(a)(5) which states that: Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, "overprotective rules and policies," failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

This rule makes clear that it is meant as a sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. 42 USCS § 12101(b)(4). If an ADA Title II plaintiff brings a claim for failure to provide a reasonable accommodation, then the court analyses this claim on a different basis—than say an intentional discrimination claim. A plaintiff alleging a failure-to-accommodate claim does not need to make the animus showing required to support a claim of intentional discrimination via disparate treatment. Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 909-10 (6th Cir. 2004). Instead, "refusal to provide a reasonable accommodation can serve as direct evidence of disability discrimination." Keller v. Chippewa Cnty., Mich. Bd. of Comm'rs, 860 F. App'x 381, 385 (6th Cir. 2021). This is because a regulation implementing Title II requires a public entity to make "reasonable modifications" to its "policies, practices, or procedures" when necessary to avoid discrimination' based on disability." Wilson v. Gregory, 3 F.4th 844, 859 (6th Cir.

2021) (quoting Fry v. Napoleon Cmty. Schs., 580 U.S. 154, 137 S. Ct. 743, 749, 197 L. Ed. 2d 46 (2017)); see 28 C.F.R. § 35.130(b)(7)(i); see also Alexander v. Choate, 469 U.S. 287, 301-02, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985). To assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. When a plaintiff shows that the proposed modification is needed to avoid the denial of services or benefits, the causation requirement is satisfied. Madej v. Maiden, 951 F.3d 364, 373 (6th Cir. 2020). As a result, "the denial of meaningful access to medical care, bathroom facilities, or meals" through a refusal to make a needed modification "could support the required prima facie showing." Keller, 860 F. App'x at 386.

Therefore, when Petitioner was unable to go to the chow hall, library, and exercise facilities at the prison, he was automatically denied a reasonable accommodation to a known medical need. As the sixth circuit stated themselves; failure to provide reasonable accommodations is direct evidence of disability discrimination. Certiorari should be granted to review the sixth circuits departure from its own prior law when dealing with disabled prisoner's and Title II ADA claims. Providing a mobility aid would not have altered the nature of the goods, services, facilities, privileges, advantages, or accommodations involved in providing assistance to disabled prisoner's?

CONCLUSION

For the reasons stated herein, this petition for a writ of certiorari should be granted.

Scott D. Creech 3-14-23

Scott D. Creech
CCI, P.O. Box 5500
Chillicothe, Ohio 45601