

[DO NOT PUBLISH]

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11471

D.C. Docket No. 8:15-cv-00226-MSS-MAP

LENA L. YOUNG,
as Personal Representative of the Estate of Arthur Green, Jr., deceased,

Plaintiff-Appellant,

versus

CITY OF TAMPA,
OFFICER ANTHONY PORTMAN,
Tampa Police Department,
CORPORAL MATTHEW SMITH,
Tampa Police Department,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(February 20, 2018)

Before ED CARNES, Chief Judge, NEWSOM, and SILER,* Circuit Judges.

PER CURIAM:

Plaintiff Lena Young, as the personal representative of the Estate of Arthur Green, Jr., filed this action against the City of Tampa and two of its police officers. She alleged that the City failed to train its police officers under 42 U.S.C. § 1983, that it violated the Americans with Disabilities Act and the Rehabilitation Act, and that it violated state law. She also brought excessive force and deliberate indifference to serious medical need claims against the officers. The district court dismissed the federal claims against the City for failure to state plausible claims for relief, granted qualified immunity to the officers, and dismissed the state law claims for lack of jurisdiction.¹

We affirm for the reasons stated in the court's order dismissing Young's amended complaint, with the exception of one sentence. In that sentence, the court stated that: "Even assuming the Officers' restraint in that two minute interim was more than necessary or grossly negligent, as it certainly appears that it was from the allegations of the Amended Complaint, it does not amount to the level of force

* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

¹ Young contends that granting qualified immunity at the motion-to-dismiss stage is inappropriate. To the contrary, that defense "may be . . . raised and considered on a motion to dismiss." St. George v. Pinellas County, 285 F.3d 1334, 1337 (11th Cir. 2002); see also Johnson v. Breeden, 280 F.3d 1308, 1317 (11th Cir. 2002) ("[A] valid defense based upon [qualified immunity] must be recognized as soon as possible, preferably at the motion to dismiss or summary judgment stage of the litigation.").

that in character and substance meets the high threshold needed to sustain a claim of excessive force.” Doc. 37 at 20. That sentence is not necessary to the court’s decision, and we do not imply any position about whether it is correct.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LENA L. YOUNG, as Personal
Representative of the Estate of Arthur
Green, Jr., deceased,

Plaintiff,

v.

Case No: 8:15-cv-226-T-35MAP

CITY OF TAMPA, OFFICER ANTHONY
PORTMAN, and CORPORAL
MATTHEW SMITH,

Defendants.

ORDER

THIS CAUSE comes before the Court for consideration of the Motion to Dismiss Amended Complaint (Dkt. 26) filed by Defendants, the City of Tampa (the “City”), Officer Anthony Portman (“Portman”) and Corporal Matthew Smith (“Smith”), and the Response in opposition thereto filed by Plaintiff, Lena L. Young. (Dkt. 30) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **GRANTS** Defendants’ Motion to Dismiss. (Dkt. 26)

I. BACKGROUND

Plaintiff Lena L. Young, as the Personal Representative of the Estate of Arthur Green (“Green”), filed this action against Defendants on February 3, 2015. (Dkt. 1) On February 24, 2016, Plaintiff filed an Amended Complaint. (Dkt. 24) The Amended Complaint alleges that the City is liable for: Wrongful Death under Florida Law (Counts I & II); Custom and Practice of Deliberate Indifference under 42 U.S.C. § 1983 (Count III); and Violations of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act

(“RA”) (Count VIII). (Id.) The Amended Complaint alleges that Officers Portman and Smith are liable in their individual capacities for Deliberate Indifference to a serious medical need under 42 U.S.C. § 1983 (Counts IV & V) and Excessive Force under 42 U.S.C. § 1983 (Counts VI & VII). (Id.)

This action arises out of calamitous circumstances that occurred on April 16, 2014 and transpired to tragic results over a period of approximately nine minutes, timed from the time officers arrived on the scene of the incident at issue until medical protocols were applied to the decedent. (Id. at ¶¶ 14, 45) Plaintiff’s Amended Complaint alleges that had Mr. Green received medical care in a timelier manner and had he not be restrained in a prone position causing him to suffer from positional asphyxiation, his death could have been avoided. (Id. at ¶ 50) Moreover, Plaintiff alleges that as a result of the Defendant Officers’ actions, Mr. Green also suffered various lacerations, abrasions, and contusions on his face, wrist, and knee and that his brain was slightly swollen. (Id. at ¶¶ 34-35)

The factual support for these allegations follows: Plaintiff alleges that around 4:30 P.M. on April 16, 2014, the Tampa Police Department (“TPD”) received a 9-1-1 call from a citizen reporting that a truck, being driven by Mr. Green, was driving erratically on Florida Avenue. (Id. at ¶¶ 14-15) The citizen informed the 9-1-1 operator that she believed the driver may have been suffering from a medical condition. (Id. at ¶ 15) Defendant Officer Portman responded to the dispatcher’s call regarding the incident and arrived in the area around 4:39 P.M. (Id. at ¶ 16) Officer Portman was aware from the dispatch call that Mr. Green might be suffering from a medical condition. (Id.) Officer Portman located Mr. Green’s vehicle and observed it positioned halfway up on the curb

of the northbound lane facing southbound on Central Avenue. (Id. at ¶ 17) Officer Portman activated his emergency siren and Mr. Green's vehicle briefly stopped on the curb but then began moving southbound in the northbound lane of traffic. (Id. at ¶¶ 18-19) Mr. Green's vehicle made contact with two cars traveling northbound that were unable to move out of his path. (Id. at ¶ 20) The two vehicles only sustained minor damage. (Id.) Mr. Green's vehicle then came to a stop at an angle across both the north and southbound lanes. (Id. at ¶ 21)

At approximately 4:40 P.M., Officer Portman exited his patrol car, approached Mr. Green's vehicle, and requested that Mr. Green exit the vehicle. (Id. at ¶ 22) Mr. Green responded in a confused manner, stating that he had done nothing wrong and remained in the vehicle. (Id. at ¶ 23) Mr. Green's face was "droopy," he had a "blank stare," and he was unable to communicate. (Id.) Officer Portman then removed the keys from the ignition of the vehicle and again asked Mr. Green to exit the vehicle, but Mr. Green continued to remain in the vehicle. (Id. at ¶¶ 24-25) Mr. Green did not respond to Officer Portman's specific questions but kept repeating that he did not do anything wrong. (Id. at ¶ 25) According to Plaintiff, Officer Portman then attempted to forcibly remove Mr. Green from his vehicle and Mr. Green responded by pulling away and fell back into the vehicle. (Id. at ¶ 26) Plaintiff alleges that Officer Portman continued to speak to Mr. Green, during which time Mr. Green continued to seem confused. (Id. at ¶ 27)

Officer Portman then called for backup, and Defendant Officer Smith arrived on the scene at approximately 4:42 P.M. (Id. at ¶¶ 27, 29) At this point, Plaintiff alleges that Officers Portman and Smith forcibly pulled Mr. Green out of the vehicle, slammed him face-down onto the pavement, and pinned his body to the ground in a prone position

while trying to handcuff him. (Id. at ¶ 31) Specifically, Officer Portman placed weight on Mr. Green's back with his chest and then with his knee until both officers could handcuff him. (Id. at ¶ 33) Thereafter, Officer Portman continued to pin Mr. Green to the ground by placing his knee on Mr. Green's back and his shin across Mr. Green's neck. (Id.) Officer Smith used his body weight to cross Mr. Green's legs and push them up towards his buttocks. (Id.) Other TPD officers then arrived on the scene and helped Officers Portman and Smith restrain Mr. Green. (Id. at ¶¶ 36-37) Officer Barber took Officer Smith's place and continued to restrain Mr. Green's legs while Officer Scott helped Officer Portman continue to pin Mr. Green's upper body to the pavement. (Id. at ¶ 36) As he ran to his vehicle to retrieve leg shackles, Officer Smith warned the other officers that Mr. Green might have diabetes because he noticed discoloration on Mr. Green's legs. (Id.) Officer Portman continued to pin Mr. Green to the ground. (Id.)

Plaintiff alleges that after two minutes of being deprived of oxygen, Mr. Green became limp, unresponsive, stopped breathing, and a foam substance came out of his mouth. (Id. at ¶ 37) Plaintiff alleges that as a result of Mr. Green's being restrained in a prone position and having force applied to him, he was severely deprived of oxygen and suffered from positional asphyxia, which caused or contributed to his death. (Id. at ¶ 38) At 4:44 P.M., Officer Portman noted that Mr. Green might be having a "diabetic issue." (Id. at ¶ 39) At approximately 4:45 P.M., a dispatcher received a call requesting emergency medical personnel to the scene of the accident. (Id. at ¶ 42) (Id.) At 4:48 P.M., TPD officers began to administer CPR chest compressions to Mr. Green. (Id. at ¶ 45)

At 4:52 P.M., Tampa Fire and Rescue ("TFR") personnel arrived on the scene and assumed medical care of Mr. Green. (Id. at ¶ 47) TFR personnel attempted to resuscitate Mr. Green and administered dextrose for the treatment of hypoglycemia.¹ (Id. at ¶ 48) After resuscitation efforts failed, TFR transported Mr. Green to St. Joseph's Medical Hospital where emergency room personnel assumed his care at 5:15 P.M. (Id. at ¶ 48) Hospital personnel were unable to revive Mr. Green and he was pronounced dead at 5:34 P.M. on April 16, 2014. (Id. at ¶ 49)

Defendants have now moved to dismiss the Amended Complaint. (Dkt. 26) Defendants argue that the Counts asserted against the City must be dismissed for failure to state a claim and that the Counts asserted against Officers Portman and Smith must be dismissed on the basis of qualified immunity. (Id.) Plaintiff responds that the Amended Complaint contains sufficient factual allegations to support all claims alleged and that the Defendant Officers are not entitled to qualified immunity. (Dkt. 30)

II. LEGAL STANDARD

A. Motion to Dismiss

The threshold for surviving a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is a low one. Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., et al., 711 F.2d 989, 995 (11th Cir. 1983). A plaintiff must plead only sufficient facts to state a claim to relief that is plausible on its face. Bell

¹ "Hypoglycemia" is the medical term used to refer to the "[s]ymptoms resulting from low blood glucose . . . , which are either autonomic or neuroglycopenic. Autonomic symptoms include sweating, trembling, feelings of warmth, anxiety, and nausea. Neuroglycopenic symptoms include feelings of dizziness, confusion, tiredness, difficulty speaking, headache, and inability to concentrate." Hypoglycemia Definition, FARLEX PARTNER MEDICAL DICTIONARY (2012), *available at* <http://medical-dictionary.thefreedictionary.com/hypoglycemia> (last visited February 1, 2017).

Atlantic Corp. v. Twombly, 550 U.S. 544, 561-62 (2007) (abrogating the “no set of facts” standard for evaluating a motion to dismiss established in Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Although a complaint challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the “grounds” for his entitlement to relief. Berry v. Budget Rent A Car Sys., Inc., 497 F. Supp. 2d 1361, 1364 (S.D. Fla. 2007) (quoting Twombly, 550 U.S. at 555). In evaluating the sufficiency of a complaint in light of a motion to dismiss, the well pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff. Quality Foods, 711 F.2d at 994-95. The Court’s consideration must be limited to the pleadings and any exhibits attached thereto. Ahern v. Fidelity Nat. Title Ins. Co., 664 F. Supp. 2d 1224, 1226 (M.D. Fla. 2009) (internal citations omitted) (citing GSW, Inc. v. Long Cnty. Ga., 999 F.2d 1508, 1510 (11th Cir. 1993)); see also Quality Foods, 711 F.2d at 994-95.

B. Qualified Immunity - § 1983

Qualified immunity shields a law enforcement officer who is sued in his individual capacity for alleged federal constitutional violations that may arise during the performance of discretionary functions. Case v. Eslinger, 555 F.3d 1317, 1325 (11th Cir. 2009) (recognizing that “qualified immunity is a privilege that provides an immunity from suit rather than a mere defense to liability.”). Qualified immunity applies so long as the officer’s conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Grider v. City of Auburn, Ala., 618 F.3d 1240, 1254 (11th Cir. 2010). In invoking qualified immunity, the defendant officer must first prove that the challenged action was within the scope of the officer’s discretionary

authority. Case, 555 F.3d at 1325. Whether the Defendant Officers were acting within the scope of their discretionary authority is not at issue in this case.

After a defendant officer invokes qualified immunity, the plaintiff must then be prepared to prove (1) that the officer violated a constitutional right and (2) that the right was clearly established “in light of the specific context of the case, not as a broad general proposition.” Case, 555 F.3d at 1326. Thus, the Court must determine whether the plaintiff’s allegations, if true, establish a constitutional violation and whether the constitutional violation was clearly established. See Keating v. City of Miami, 598 F.3d 753, 762 (11th Cir. 2010). If the plaintiff fails to allege facts supporting either prong, the officer is entitled to qualified immunity as a matter of law. Case, 555 F.3d at 1327.

In examining whether the officer violated the plaintiff’s clearly-established constitutional rights, the Court must consider “whether it would be *clear* to a reasonable officer that his conduct was unlawful in the situation he confronted.” Maiorano v. Santiago, No. 6:05-cv-107-Orl-19KRS, at *7 (M.D. Fla. May 19, 2005) (emphasis in original). To show that the law was clearly established, a plaintiff may cite decisions of the United States Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the pertinent state, in this case, the Supreme Court of Florida, that provide clear notice of the violation. McClish v. Nugent, 483 F.3d 1231, 1237 (11th Cir. 2007); Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000). If an officer is reasonably mistaken, the officer should not face personal liability. Maughon v. Bibb Cnty., 160 F.3d 658, 661 (11th Cir. 1998).

III. DISCUSSION

a. Counts IV & V: § 1983 Deliberate Indifference to serious medical need

Counts IV and V of the Amended Complaint are § 1983 claims for deliberate indifference to a serious medical need asserted only against Officers Portman and Smith in their individual capacities. Officers Portman and Smith argue that these claims must be dismissed because Plaintiff has not alleged sufficient facts, which if true, would establish that a constitutional violation occurred and because the law was not clearly established such that a reasonable, similarly-situated officer would know that his or her actions violated the law under the circumstances.

In order to prevail on a claim of deliberate indifference to a serious medical need,² a plaintiff must satisfy “both an objective and a subjective inquiry.” Andujar v. Rodriguez, 486 F.3d 1199, 1203 (11th Cir. 2007) (citation omitted). First, a plaintiff must prove that he had an “objectively serious medical need.” Id. The Eleventh Circuit has stated that an objectively serious medical need is either one that is “diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would recognize the need for medical treatment.” Burnette v. Taylor, 533 F.3d 1325, 1330 (11th Cir. 2008) (citing Farrow v. West, 320 F.3d 1235, 1243 (11th Cir. 2003)).

² Because Mr. Green was an arrestee, the claim in this case arises under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment, which governs deliberate indifference claims asserted by convicted prisoners. Andujar v. Rodriguez, 486 F.3d 1199, 1203 n.3 (11th Cir. 2007); Lancaster v. Monroe Cnty., Ala., 116 F.3d 1419, 1425 (11th Cir. 1997). However, the Eleventh Circuit has held that “the minimum standard for providing medical care to a pre-trial detainee [or an arrestee] under the Fourteenth Amendment is the same as the minimum standard required by the Eighth Amendment for a convicted prisoner.” Lancaster, 116 F.3d at 1425; Andujar, 486 F.3d at 1203 n. 3. Thus, the Court may rely on decisions from both types of cases. Id.

Here, Plaintiff has sufficiently alleged that Mr. Green had a serious medical need. The factual allegations in the Amended Complaint show that Mr. Green was a diabetic suffering from a hypoglycemic incident that rendered him confused and ultimately to become limp and unresponsive. Additionally, Plaintiff alleges that Mr. Green stopped breathing. When an individual becomes unresponsive and stops breathing, even a layperson would recognize the need to secure medical attention as obvious. Defendants concede as much. Accordingly, the objective inquiry is satisfied in this case.

Second, the plaintiff must also meet the subjective inquiry by establishing that the defendant acted with deliberate indifference towards that serious medical need. Andujar, 486 F.3d at 1203. To show deliberate indifference, a plaintiff must show that: 1) the defendant had *subjective* knowledge of a risk of *serious* harm; 2) the defendant disregarded that risk; and 3) the defendant's conduct amounts to *more* than gross negligence. Id. at 1203-04; Burnette, 533 F.3d at 1330. On its review, the Court finds that Plaintiff's allegations, even if true, fail to establish that the conduct of Officers Portman and Smith meets the subjective inquiry.

First, the allegations in Plaintiff's Amended Complaint do not establish that the Defendant Officers had *subjective* knowledge of the risk of *serious* harm prior to the time that Mr. Green became unresponsive and stopped breathing. Although Plaintiff alleges that Officer Portman was aware upon his arrival that Mr. Green might be suffering from a medical issue, there is no indication that Officer Portman knew the type of medical issue from which Mr. Green was suffering. The Amended Complaint alleges that Officer Portman *should have* recognized that Mr. Green was suffering from a serious medical issue after observing him, yet failed to question Mr. Green or request medical personnel.

(Dkt. 24 at ¶ 28) Additionally, there is no allegation that Officer Smith was subjectively aware or was informed of *any* potential medical issue when he initially arrived on the scene. See Burnette, 533 F.3d at 1331 (“Each individual Defendant must be judged separately and on the basis of what that person knows.”)

Although Plaintiff alleges that Mr. Green was suffering from a diabetic incident that required immediate medical attention as soon as the officers arrived on the scene, Plaintiff has not alleged sufficient facts demonstrating that the Defendant Officers were actually aware at the time of their initial encounter with Mr. Green that the issue from which he may have been suffering was one that would result in a serious risk of harm if not immediately treated, a necessary element of the deliberate indifference claims. See Mann v. Taser Int’l, Inc., 588 F.3d 1291, 1307 (11th Cir. 2009) (subjective knowledge of risk of serious harm not satisfied where even though defendants were aware that plaintiff suffering from drug overdose displayed a “disconnect from reality,” there was no indication that they were aware of the serious risk of harm that a delay in treatment could cause the plaintiff).

Plaintiff alleges that instead of attempting to restrain Mr. Green and taking him into custody, the Defendant Officers should have asked him questions about his medical history and called for emergency medical assistance immediately. (Dkt. 24 at ¶¶ 83, 92) In this regard, Plaintiff’s Amended Complaint alleges at most that the Defendant Officers *should have* taken actions to recognize Mr. Green’s *serious* medical need sooner but that they failed to do so. However, “[n]o liability arises under the Constitution for ‘an official’s failure to alleviate a significant risk that he should have perceived but did not’” Burnette, 533 F.3d at 1331 (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

Plaintiff's Amended Complaint alleges that Mr. Green became limp, unresponsive, and stopped breathing during the time that the Defendant Officers were attempting to restrain him—specifically, after two minutes of being deprived of oxygen due to the manner of the restraint. (Dkt. 24 at ¶¶ 37, 40) Thus, this would have occurred no earlier than 4:44 P.M. because Officer Smith arrived on the scene at 4:42 P.M. Notably, 4:44 P.M. is when Plaintiff alleges that Officer Portman stated that Mr. Green might be have been having a diabetic issue. (*Id.* at ¶ 39) These allegations demonstrate that once Mr. Green became unresponsive, stopped breathing, and it became obvious that he faced a serious risk of harm, medical attention was actually requested either immediately or, at most, within one to three minutes.³

Deliberate indifference may be found if an official intentionally delays requesting medical attention where he knows that the individual has a “life-threatening condition or an urgent medical condition that would be exacerbated by the delay.” Lancaster v. Monroe Cnty., Ala., 116 F.3d 1419, 1425 (11th Cir. 1997). In such a situation, whether a delay in treatment is tolerable “depends on the nature of the medical need and the reason for the delay.” Harris v. Coweta Cnty., 21 F.3d 388, 393–94 (11th Cir. 1994). Here, even if the Defendant Officers did delay requesting medical attention for Mr. Green, their delay was at most one to three minutes. This “delay” does not rise to the level of deliberate indifference. See, e.g., Pourmoghani-Esfahani v. Gee, 625 F.3d 1313, 1318 (11th Cir. 2010) (“The medical treatment that Plaintiff received will support no conclusion of deliberate indifference by Defendant. The term ‘delay’ hardly seems to fit the facts at

³ The greatest possible delay of three minutes is based on the time between Officer Smith's arrival on the scene, 4:42 P.M., and the request for emergency medical personnel, 4:45 P.M. However, the delay was likely less because Plaintiff's Amended Complaint alleges that Mr. Green was restrained for at least two minutes before he stopped breathing.

all; but to the extent that one could call the time involved in this case 'delay,' it was only a matter of minutes." The allegations of the Amended Complaint demonstrate that any further delay in Mr. Green's receiving medical treatment was attributable to the time that it took for emergency personnel to be dispatched and to arrive on the scene and was not caused by the Defendant Officers. Furthermore, to the extent that Plaintiff alleges that the Officers delayed applying CPR and chest compressions to Mr. Green for a period of three minutes following their request for emergency personnel, nothing in the Amended Complaint suggests that these actions were intentional and deliberate or more than grossly negligent.

To bolster her argument that the facts as alleged in this case support a finding of deliberate indifference, Plaintiff cites several cases from other federal circuits involving diabetic pretrial detainees. However, the Court does not find those cases persuasive on the issue because they are factually distinct from the circumstances alleged in this case. Those cases involved situations in which defendants had been repeatedly informed and placed on *actual* notice of a pretrial detainee's diabetic condition and serious medical need and the time periods during which the detainees went without medical attention were much longer, ranging from a period of hours to days. See, e.g., Ortiz v. City of Chicago, 656 F.3d 523, 527-38 (7th Cir. 2011) (detainee passed away in custody after being held for approximately two days; defendants were repeatedly informed by detainee, her family members, and her attorney that she suffered from diabetes and needed medical attention); Garretson v. City of Madison Heights, 407 F.3d 789, 798 (6th Cir. 2005) (diabetic pretrial detainee held in custody overnight without receiving insulin despite informing multiple officers of that specific need at the time of her booking); Lolli v. Cnty.

of Orange, 351 F.3d 410, 411-14, 419-21 (9th Cir. 2003) (diabetic pretrial detainee held in custody for approximately sixteen hours without receiving food or insulin despite repeatedly informing officers of his condition and need for food).

Based on the allegations of the Amended Complaint, Plaintiff has failed to satisfy the subjective prong of her deliberate indifference claims. At most, Plaintiff's allegations tend to establish that there was objective evidence that the Defendant Officers should have recognized Mr. Green's serious medical need and, therefore, should have called for emergency medical assistance one-to-three minutes sooner. Even if accepted as true, these allegations do not establish that the Defendant Officers' conduct amounts to more than gross negligence as required to state a claim for deliberate indifference to a serious medical need. See, e.g., Mann, 588 F.3d at 1308 ("While the deputies may have made an error in judgment, mere negligence or a mistake in judgment does not rise to the level of deliberate indifference. Plaintiffs' showing that harm resulted, without more, cannot carry the burden required for deliberate indifference."); see also Youmans v. Gagnon, 626 F.3d 557, 564 (11th Cir. 2010) ("The best response to a serious medical need is not required by federal law in [deliberate indifference] cases.").

Alternatively, even if the Court were to find the Defendant Officers' conduct constitutionally impermissible, the Court would nonetheless conclude that the Defendant Officers are entitled to qualified immunity because "their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The state of the law at the time of Mr. Green's arrest in April 2014

did not give the Officers “fair warning that their alleged treatment of [Mr. Green] was unconstitutional.” Id. at 741.

The Court finds that there was no factually similar case law that would have put the Defendant Officers on notice that their actions in failing to *immediately* call for medical attention under the circumstances involved in this case would violate the Constitution. “Questions of deliberate indifference to medical needs based on claims of delay are complicated questions because the answer is tied to the combination of many facts; a change in even one fact from a precedent may be significant enough to make it debatable among objectively reasonable officers whether the precedent might not control in the circumstances later facing an officer.” Pourmoghani, 625 F.3d at 1318.

To the extent that Plaintiff attempts to rely on McAllister v. Price, 615 F.3d 877 (7th Cir. 2010), to argue that qualified immunity is not warranted, the Court finds that this case could not place the Defendant Officers on notice that their actions violated the law. First, the case only dealt with an excessive force claim brought by a diabetic individual, not a deliberate indifference to serious medical need claim. Second, “[w]hen decisional law is required for prior notice, the law can be clearly established by decisions of the U.S. Supreme Court, Eleventh Circuit, or the highest court of the state where the case arose.” Youmans, 626 F.3d at 565. McAllister was decided by the Seventh Circuit Court of Appeals.

Moreover, while there was Eleventh Circuit case law establishing the general legal proposition that a government official who intentionally delays providing medical care to an individual in his custody while knowing that the individual has a serious medical condition that could be exacerbated by delay acts with deliberate indifference, see, e.g.,

Lancaster, 116 F.3d 1419, the Court cannot say that this general rule applies “with obvious clarity to the specific conduct in question.” United States v. Lanier, 520 U.S. 259, 271 (1997); see also Bozeman v. Orum, 422 F.3d 1265, 1274 (11th Cir. 2005) abrogated on other grounds by Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (noting that because “cases are highly fact-specific,” this general legal proposition “ordinarily does not preclude qualified immunity in cases involving a delay in medical treatment for a serious injury”); Evans v. Stephens, 407 F.3d 1272, 1282 (11th Cir. 2005) (en banc) (ruling that a law is clearly established only if it “dictates, that is, truly compels, the conclusion for all reasonable, similarly situated public officials that what Defendant was doing violated Plaintiffs’ federal rights in the circumstances” (internal quotation marks and citation omitted)). The circumstances alleged in this case do not meet this test because no Eleventh Circuit case law *truly compels with obvious clarity* that police officers who encounter arrestees exhibiting symptoms of confusion and non-compliance must automatically assume the presence of a *serious* medical need and request immediate medical assistance or face liability. Accordingly, the Defendant Officers would be entitled to qualified immunity on this ground even if their conduct were found to be constitutionally impermissible.

Thus, Counts IV & V are subject to dismissal on qualified immunity grounds because the allegations of Plaintiff’s Amended Complaint fail to establish that a constitutional violation occurred and because the law was not clearly established.

b. Counts VI & VII: § 1983 Excessive Force

Counts VI and VII of the Amended Complaint are § 1983 claims for excessive force asserted against Officers Portman and Smith in their individual capacities. Under these Counts, Plaintiff asserts that Officers Portman and Smith used excessive force during the

process of restraining and handcuffing Mr. Green when they allegedly pulled him out of his car, threw him onto the pavement, and pinned him to the ground in a prone position causing him to become unresponsive and stop breathing. Officers Portman and Smith argue that these claims must be dismissed because Plaintiff has not alleged sufficient facts, which if true, would establish that a constitutional violation occurred and because the law was not clearly established such that a reasonable, similarly-situated officer would know that his or her actions violated the law under the circumstances.

Excessive force claims arise from the Fourth Amendment's prohibition against unreasonable seizures. Graham v. Connor, 490 U.S. 386, 394 (1989). "An officer's use of force is excessive under the Fourth Amendment if the use of force was 'objectively unreasonable in light of the facts and circumstances confronting the officer.'" Fils v. City of Aventura, 647 F.3d 1272, 1287 (11th Cir. 2011) (quoting Graham, 490 U.S. at 397). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396.

In evaluating whether the force was excessive, the Court must examine: "(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." Fils, 647 F.3d at 1288 (quoting Brown v. City of Huntsville, Ala., 608 F.3d 724, 738 (11th Cir. 2010)); see also Graham, 490 U.S. at 396. In this respect, the Supreme Court has "recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham, 490 U.S. at 396. Additionally, courts

also consider: “the need for the application of force, . . . the relationship between the need and amount of force used, and . . . the extent of the injury inflicted.” Lee v. Ferraro, 284 F.3d 1188, 1198 (11th Cir. 2002) (citing Leslie v. Ingram, 786 F.2d 1533, 1536 (11th Cir. 1986)).

Defendants argue that the *Graham* factors weigh in favor of finding the use of force alleged in this case reasonable because Mr. Green was being arrested and resisted the process. Plaintiff argues that the *Graham* factors weigh in favor of finding the use of force alleged in this case excessive because Mr. Green: 1) was arrested for minor traffic offenses, rather than a serious, violent crime; 2) posed no threat to the safety of the officers or others due to his hypoglycemic state, and 3) did not aggressively or actively resist arrest.

Although the severity of the crime at issue weighs in favor of finding the use of force excessive because Mr. Green was being arrested for traffic offenses, the totality of the circumstances as alleged in the Amended Complaint could give an officer reason to believe that Mr. Green posed a potential risk to the safety of himself and others and that he was, albeit not aggressively or violently, resisting arrest. First, Mr. Green failed to bring his vehicle to a complete stop when Officer Portman initially activated his emergency siren, signalling for Mr. Green to pull over. Instead, Mr. Green’s vehicle continued to move forward in the opposite direction of oncoming traffic, ultimately hitting two other vehicles. When his vehicle did come to a complete stop, it was positioned across two lanes of traffic heading in opposite directions. When asked to exit the vehicle, Mr. Green, although confused, failed to exit the vehicle and stated that he had done

nothing wrong.⁴ Next, when Officer Portman removed Mr. Green's keys from the ignition and initially attempted to remove him from the vehicle, Mr. Green pulled away and fell back into the vehicle. Plaintiff argues that Mr. Green posed no threat to others at this point because his keys had been removed; however, the fact remains that his vehicle was stopped in the middle of the road in the midst of oncoming traffic, which posed a potential safety threat to Mr. Green, any officers on the scene, and other passing motorists. See, e.g., Buckley v. Haddock, 292 F. App'x 791, 794-95 (11th Cir. 2008)⁵ (finding that officer's use of force to move handcuffed plaintiff arrested for minor traffic offense away from passing traffic on the side of the road was supported by government's legitimate interest in protecting the safety of the officers, the plaintiff, and passing motorists). Furthermore, the safety and resistance factors weigh in favor of finding the initial use of force reasonable taking into account the Defendant Officers' limited knowledge regarding Mr. Green's medical state when they first encountered him.

The Eleventh Circuit "has made clear that *some* use of force by a police officer when making a custodial arrest is necessary and altogether lawful, regardless of the severity of the alleged offense," Myers v. Bowman, 713 F.3d 1319, 1327 (11th Cir. 2013) (emphasis added), and has found the minimal use of force reasonable, even where the plaintiff was not resisting arrest. See, e.g., Nolin v. Isbell, 207 F.3d 1253, 1255 (11th Cir. 2000) (police officer who "grabbed [the plaintiff] from behind by the shoulder and wrist, threw him against a van three or four feet away, kned him in the back and pushed his

4 Notably, Plaintiff does not dispute Defendants' contention that Mr. Green's actions as alleged did in fact violate several laws.

5 "Although an unpublished opinion is not binding on this court, it is persuasive authority. See 11th Cir. R. 36-2." United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000).

head into the side of the van, searched his groin area in an uncomfortable manner, and handcuffed him” used only *di minimus* force); Jones v. City of Dothan, 121 F.3d 1456, 1460 (11th Cir. 1997) (finding the force used to be minor where officers slammed the plaintiff against a wall, kicked his legs apart, required him to put his arms above his head, and pulled his wallet from his pants pocket).

Considering the circumstances as alleged, the Court finds that some use of force was permissible to remove Mr. Green from his vehicle and to restrain him. However, the Court must also examine “the relationship between the need [for force] and amount of force used, and . . . the extent of the injury inflicted.” Lee, 284 F.3d at 1198. Here, the Court cannot say that the amount of force ultimately used during the course of restraining Mr. Green outweighed the objective need for the force as alleged in this case.

Plaintiff alleges that once Mr. Green was on the ground, Officer Portman pinned Mr. Green to the ground by placing weight on Mr. Green’s back with his chest and then knee until handcuffs were applied. Afterwards, Officer Portman continued to pin Mr. Green to the ground with his knee on Mr. Green’s back and his shin across Mr. Green’s neck. Officer Smith used his body weight to cross Mr. Green’s legs and push them up toward his buttocks—placing Mr. Green in a prone position. Plaintiff alleges that this manner of the restraint caused Mr. Green to be deprived of oxygen for two minutes. During the course of the restraint, Mr. Green became limp, unresponsive, stopped breathing, and a foam substance came out of his mouth. Plaintiff alleges that as a result of Mr. Green’s being restrained in a prone position and having force applied to him, he was severely deprived of oxygen and suffered from positional asphyxia, which caused or contributed to his death.

The Court finds that the force used after Mr. Green's removal from the vehicle was not excessive because the Officers were still attempting to restrain him. See Lee, 284 F.3d at 1199-1200 (11th Cir. 2002) (noting that force is more likely to be unlawful if it occurs after a suspect has been secured, arrested, and any danger vitiated, as opposed to force that occurred during the course of the officer's restraining the suspect). Although Plaintiff alleges that Officer Portman refused to get off of Mr. Green or remove the handcuffs from him after it was clear that Mr. Green was being deprived of oxygen, there is no specific allegation regarding how long Officer Portman continued to remain on top of Mr. Green. (Dkt. 24 at ¶ 103) Considering the allegations of the Amended Complaint regarding the timing of the entire incident, and construing them in the light most favorable to the Plaintiff, the Officers' restraint of Mr. Green ceased almost immediately after it became clear that he had stopped breathing. Specifically, the Amended Complaint alleges that the Officers forcibly removed Mr. Green from his vehicle at 4:42 P.M. and that he became unresponsive two minutes later at 4:44 P.M. (Dkt. 24 at ¶¶ 29-42) It is further alleged that a call for emergency medical support was placed at 4:45 P.M., within a minute of the dire nature of Mr. Green's circumstances becoming apparent. (Id. at ¶ 42) Even assuming the Officers' restraint in that two minute interim was more than necessary or grossly negligent, as it certainly appears that it was from the allegations of the Amended Complaint, it does not amount to the level of force that in character and substance meets the high threshold needed to sustain a claim of excessive force. Additionally, it is admitted that the Officers called for emergency support within a minute of Mr. Green becoming unresponsive. While Plaintiff alleges that the Officers did not begin CPR until three minutes after emergency personnel were requested, the alleged

delay in providing medical care following the restraint does not establish that excessive force was employed. Rather, this allegation relates more to the claim for deliberate indifference to a serious medical need, which is also a very difficult claim to sustain, and, as discussed above, is not sustainable on the facts alleged in this case.

Courts may also look to the extent of injury caused by the force to determine whether it was excessive. Lee, 284 F.3d at 1198. The extent of injury is not dispositive however, because reasonable or *di minimus* force does not become excessive merely because it causes injury. Id. at 1200. Conversely, objectively unreasonable force does not become reasonable or *de minimis* merely because the plaintiff only suffered minimal harm. Id. The Eleventh Circuit has observed that “the typical arrest involves some force and injury.” Mobley v. Palm Beach Cty. Sheriff Dep’t, 783 F.3d 1347, 1353 (11th Cir. 2015) (emphasis added) (citing Reese v. Herbert, 527 F.3d 1253, 1272 (11th Cir. 2008)).

Defendants argue that the injuries alleged to have been suffered by Mr. Green as a result of the Defendant Officers’ removing him from his vehicle and attempting to restrain him are the type of injuries that one would expect from such an encounter and are not the type of substantial injuries that would suggest that excessive force was used. While Plaintiff’s Amended Complaint alleges that Mr. Green sustained cuts and bruises and that a postpartum examination revealed that his brain was swollen, these alleged injuries do not establish that the Officers’ use of force in removing Mr. Green from his vehicle was excessive. The cuts and bruises are consistent with minimal force needed to remove and restrain Mr. Green. Construing the allegations of the Amended Complaint in Plaintiff’s favor and drawing an inference that the slight brain swelling was either caused by the impact of Mr. Green’s head to the ground when he was pulled from the vehicle and

thrown to the ground or from the deprivation of oxygen during the time of the forcible restraint, the Court cannot find that the Officers employed excessive force. As previously explained, the Defendant Officers were permitted to employ some use of force in effectuating the arrest. In the absence of any allegation that the Defendant Officers used gratuitous force, such as by slamming or viciously pounding Mr. Green's head into the ground after he was removed from his vehicle and while he was restrained and subdued, the allegations of the Amended Complaint do not suggest the resulting trauma was anything more than a horribly tragic and unintended consequence of the Defendant Officers' forcible removal of Mr. Green from his vehicle. See Lee, 284 F.3d at 1199-1200.

Furthermore, Plaintiff alleges that the use of force and manner of restraint also caused Mr. Green's hypoglycemic state to worsen. (Dkt. 24 at ¶¶ 105, 115) Mr. Green's hypoglycemic state was a pre-existing condition. Indeed, the allegations of the Amended Complaint suggest that Mr. Green's erratic driving prior to the Officers' encounter with him was caused by his already-existing hypoglycemic state. The factual allegations of Plaintiff's Amended Complaint establish that Officer Portman was informed that Mr. Green *might* have been suffering from a medical issue prior to the Officers' removal of him from the vehicle. However, the Court notes that the allegations of the Amended Complaint do not suggest that Officer Portman knew at that point in time the actual cause or extent of his condition or that his actions of removing and restraining Mr. Green would result in the aggravation of the condition. As noted, the evidence required in this Circuit to maintain such a claim is exceedingly high. See Rodriguez v. Farrell, 280 F.3d 1341, 1351 (11th Cir. 2002) (finding no excessive force violation even though

handcuffing ultimately led to amputation of plaintiff's arm due to a pre-existing shoulder injury because there was no evidence that the defendant officer knew of plaintiff's prior shoulder surgery "or, more important[ly] . . . that handcuffing [the] plaintiff would seriously aggravate [the] plaintiff's pre-existing condition.").

Accordingly, the Court does not find that the allegations of Plaintiff's Amended Complaint are sufficient to establish an excessive force violation against the Defendant Officers. However, even if the Court were to find that the allegations of the Amended Complaint sufficiently establish a constitutional violation, the Court finds that the Defendant Officers would nonetheless be entitled to qualified immunity because the Amended Complaint fails to allege a clearly-established excessive force violation.

In the context of excessive force claims, the Eleventh Circuit has previously stated that "generally no bright line exists for identifying when force is excessive." Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000). Therefore, "unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity." Id. However, a narrow exception also exists. Id. "To come within the narrow exception, a plaintiff must show that the official's conduct 'was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point.'" Id. (citing Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997)). Under this test, the Court must determine whether application of the excessive force standard "would inevitably lead every reasonable officer in [the defendant's] position to conclude that the force was unlawful." Id. at 926-27 (citations omitted). "Under both the general rule and its narrow exception, therefore, 'pre-existing law must dictate, that is, truly compel (not

just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances' for qualified immunity to be unavailable to a defendant." Id. at 927 (citing Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994)).

The Court finds that under prevailing law on excessive force claims, the Defendant Officers would not have been on notice that in dealing with a person with a diabetic condition their actions as alleged were unconstitutional. Although Eleventh Circuit case law established the general legal proposition that the "gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force," see, e.g., Hadley v. Guitierrez, 526 F.3d 1324, 1330 (11th Cir. 2008), the Court cannot say that application of this general rule applies "with obvious clarity to the specific conduct in question." Lanier, 520 U.S. at 271.

With full knowledge of the fact that Mr. Green's initial resistance was caused by his hypoglycemic state, it is now clear and obvious that no force was required to attend to the needs of Mr. Green. Hindsight, however, is insufficient to deny the Defendant Officers qualified immunity. It cannot be said in this case that every reasonable officer would have concluded under the circumstances as alleged that physically removing Mr. Green from his vehicle and attempting to restrain him in the manner that these Officers did was clearly unlawful. The entire incident as alleged occurred over only a matter of minutes, leaving little room for further reflection or evaluation of Mr. Green's medical condition. Courts are cautioned against sitting in the cool of chambers and second guessing the actions of officers on the scene over matters that are dynamically evolving over a matter of minutes or seconds. See Graham, 490 U.S. at 396. Therefore, the

Court does not find that the circumstances as alleged would *truly compel* every reasonable officer in the Defendant Officers' positions on the scene to conclude that the force allegedly employed was unlawful.

Accordingly, Counts VI & VII are subject to dismissal on qualified immunity grounds.

c. Count III: § 1983 Failure to Train (*Monell* Claim)

In Count III of the Amended Complaint, Plaintiff asserts a *Monell* claim against the City for its alleged failure to train its officers to recognize the symptoms of hypoglycemia. "Liability under § 1983 may not be based on the doctrine of respondeat superior." Craig v. Floyd County, Ga., 643 F.3d 1306, 1310 (11th Cir. 2011) (citations and quotations omitted). Therefore, a municipality may only be held liable under § 1983 "if the plaintiff shows that a 'custom' or 'policy' of the municipality was the 'moving force' behind the constitutional deprivation." Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (11th Cir. 1997) (citing Monell v. Dep't of Social Servs. Of New York, 436 U.S. 658, 690-694 (1978)). Thus, to impose liability upon a municipality under 42 U.S.C. § 1983, a plaintiff must establish: "(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004).

The Supreme Court has cautioned "that there are limited circumstances in which an allegation of a 'failure to train' can be the basis for [municipal] liability under § 1983." City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989). "To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees]

come into contact.” Connick v. Thompson, 563 U.S. 51, 60 (2011); see also City of Canton, 489 U.S. at 389 (“Only where a failure to train reflects a ‘deliberate’ or ‘conscious’ choice by a municipality—a ‘policy’ as defined by our prior cases—can a [municipality] be liable for such a failure under § 1983.”). “[D]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” Board of County Comm’rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 410 (1997).

“To establish a ‘deliberate or conscious choice’ or such ‘deliberate indifference,’ a plaintiff must present some evidence that the municipality knew of a need to train . . . in a particular area and the municipality made a deliberate choice not to take any action.” Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir. 1998). The Eleventh Circuit “repeatedly has held that without notice of a need to train . . . in a particular area, a municipality is not liable as a matter of law for any failure to train” Id. at 1351. “A pattern of similar constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes of failure to train.” Connick, 563 U.S. at 62 (quoting Brown, 520 U.S. at 409). However, the Supreme Court has “hypothesized” that “in a narrow range of circumstances,” a municipality may be liable under § 1983 when a single incident is the “obvious” consequence of a failure to provide specific training. Id.

Plaintiff’s Amended Complaint contains allegations regarding previous occasions during which Officers Portman and Smith encountered individuals experiencing diabetic incidents while on duty with the City of Tampa Police Department. (Dkt. 24 at ¶ 72) Plaintiff also alleges that, upon information and belief, “there have been numerous similar

incidents by other officers of the Tampa Police Department.” (Id.) However, Plaintiff does not allege that these prior incidents resulted in constitutional violations. In her Response, Plaintiff acknowledges that during the incidents alleged “the individuals were fortunate to not have been mistreated [in a similar manner as] Mr. Green.” (Dkt. 30 at P. 9) Therefore, Plaintiff’s allegations are insufficient to establish the existence of a pattern of similar *constitutional violations* by untrained officers involving the failure to recognize hypoglycemic incidents.

Alternatively, Plaintiff contends that the City is liable on the basis of “single incident liability” because the need for training in this area was obvious. The single incident liability theory was first hypothesized by the Supreme Court in *Canton* where the Court acknowledged that:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

489 U.S. at 390. As an example, the Court noted:

[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights.

Id. at n. 10 (citation omitted). In *Brown*, the Court clarified:

In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will

violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice-namely, a violation of a specific constitutional or statutory right.

520 U.S. at 409.

Plaintiff's Amended Complaint alleges that approximately 29 million Americans suffer from diabetes, that training materials which instruct on how to recognize the symptoms of hypoglycemia exist, and that such materials are utilized by police departments around the country. (Dkt. 24 at ¶¶ 69-70) Plaintiff therefore alleges that: "The prevalence and recurrence of diabetes and hypoglycemia in the general public and in Tampa, Florida, put Defendant City of Tampa on notice that its officers must be trained in recognizing the symptoms of hypoglycemia and low blood sugar." (*Id.* at ¶ 71) Plaintiff further alleges that the City provided the Defendant Officers "with no training on how to recognize or handle a person who is having a hypoglycemic incident," and that "[a]s a result, Defendant City of Tampa's officers are not prepared to handle predictable and non-aggressive encounters with persons suffering from hypoglycemia or a diabetic episode." (*Id.* at ¶ 73) By these failures, Plaintiff contends that "Defendant City of Tampa acted with deliberate indifference to a known risk of constitutional deprivation to [Mr. Green] and similarly situated citizens." (*Id.* at ¶ 74) The Court agrees that such training is important and should be a priority of the City. Perhaps if one good thing could come out of these tragic events it would be the development of heightened training in this crucial area, which obviously cannot save Mr. Green or his aggrieved family. But the absence of such training, if it is indeed absent as alleged, does not give rise to a *Monell* claim on these facts.

Plaintiff contends that the need for the City to train its officers to recognize the

symptoms of hypoglycemia is so obvious that the City's failure to provide training to its officers alone constitutes a deliberate indifference to the constitutional rights of individuals like Mr. Green. To the Court's knowledge, neither the Supreme Court nor the Eleventh Circuit has held that any set of circumstances—other than that hypothesized by the Supreme Court in *Canton*—could support a failure to train claim absent a pattern of prior constitutional violations. The Eleventh Circuit has repeatedly rejected attempts to extend failure to train liability for single incidents based on an “obvious need” to other law enforcement situations, such as: the use of “hobble” restraints, Lewis v. City of West Palm Beach, 561 F.3d 1288 (11th Cir. 2009); the response to complaints about the use of handcuffs, Gold, 151 F.3d 1346; and the identification and recognition of the symptoms of mentally ill inmates by jail staff in Young v. City of Augusta, Ga. Through DeVaney, 59 F.3d 1160, 1172 (11th Cir. 1995).

Although there are many areas in which enhanced police training would certainly be beneficial, the Court does not find that Plaintiff's factual allegations—that diabetes is prevalent among the American population, that training materials on how to recognize the symptoms of hypoglycemia exist, and that such materials are utilized by other police departments—are sufficient to establish that the need for training in this area is “obvious in the abstract” such that the absence of training could be found to be unconstitutional. Brown, 520 U.S. at 410-11.

Accordingly, the Court finds that the allegations of the Amended Complaint do not establish that the City had actual or constructive notice that any particular omission was substantially certain to result in the deprivation of the constitutional rights of citizens such as Mr. Green. See Young v. City of Augusta, 59 F.3d at 1172. Thus, the allegation of

this one single and isolated incident cannot be the basis of a viable action against the City under § 1983 because such an unusual occurrence does not demonstrate that the City exhibited a level of “deliberate indifference” necessary to succeed on the failure to train claim.

Therefore, the Court finds that Plaintiff’s *Monell* claim against the City must be dismissed for failure to state a cause of action upon which relief may be granted.

d. Count VIII: Violations of the ADA/RA

Count VIII is a claim asserted against the City for violations of the ADA and the RA.⁶ Plaintiff alleges that the City violated the ADA and RA because the Defendant Officers failed to reasonably accommodate Mr. Green’s disability by failing to immediately secure medical treatment for him.

Title II of the ADA prohibits a “public entity” from discriminating against “a qualified individual with a disability” on account of the individual’s disability, as follows:

[N]o 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.

42 U.S.C. § 12132. Additionally, the Department of Justice (“DOJ”) Regulations implementing Title II’s prohibition against discrimination require covered public entities to “make reasonable modifications in policies, practices, or procedures when modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of

⁶ The ADA and RA claims are considered together because, “cases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa.” Cash v. Smith, 231 F.3d 1301, 1305 n. 2 (11th Cir. 2000).

the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).⁷ The Parties do not dispute that the City is a “public entity” or that Mr. Green was a “qualified individual with a disability.”

The Eleventh Circuit has previously held that an arrestee may be able to state a claim under Title II of the ADA against a public entity based upon the conduct of its arresting officers. See Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1081-85 (11th Cir. 2007). In order to state a claim under Title II of the ADA, the plaintiff must prove: “(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability.” Id. at 1083. A plaintiff may proceed under theories of “intentional discrimination, disparate treatment, or failure to make reasonable accommodations.” Rylee v. Chapman, 316 F. App'x 901, 905-06 (11th Cir. 2009) (citing Schwarz v. City of Treasure Island, 544 F.3d 1201, 1212 n. 6 (11th Cir. 2008)). Here, Plaintiff proceeds under a theory of failure to make a reasonable accommodation or modification.

The Court finds that Plaintiff's Amended Complaint fails to allege a cognizable ADA or RA claim against the City. As discussed in detail above, Plaintiff's Amended Complaint essentially alleges that the Defendant Officers should have recognized Mr. Green's medical need and called for emergency medical assistance within the initial minutes of encountering Mr. Green. Specifically, Plaintiff alleges under this Count that

⁷ Like the Eleventh Circuit in Bircoll v. Miami-Dade Cnty., 480 F.3d 1072 (11th Cir. 2007), the Court notes that the City has not challenged the validity of the DOJ's regulation. Thus, although the Court interprets the regulation, it makes no determination as to its validity. Bircoll, 480 F.3d at 1082 n. 13.

the City and its officers “failed to respond to [Mr. Green]’s need for reasonable accommodation by *failing to facilitate immediate medical care. . . .*” (Dkt. 24 at ¶ 123 (emphasis added))

However, the allegation that a defendant failed to adequately attend to the medical needs of a disabled individual in its custody is insufficient to support that an ADA or RA violation occurred. See Jones v. Rutherford, 546 F. App’x 808, 811 (11th Cir. 2013) (citing Schiavo v. Schiavo, 403 F.3d 1289, 1294 (11th Cir. 2005) for the proposition that “the ADA is not a ‘remedy for medical malpractice’ and ‘would not be violated by a prison’s simply failing to attend to the medical needs of its disabled prisoners.’”); Finn v. Haddock, 459 F. App’x 833, 838 (11th Cir. 2012) (“[The] failure to provide adequate medical treatment does not violate the ADA or Rehabilitation Act.”); Burger v. Bloomberg, 418 F.3d 882, 883 (8th Cir. 2005) (same); Grzan v. Charter Hosp. of Northwest Indiana, 104 F.3d 116, 121-23 (7th Cir. 1997), abrogated on other grounds in Amundson ex rel. Amundson v. Wisconsin Dep’t of Health Servs., 721 F.3d 871 (7th Cir. 2013) (noting that the ADA and RA do not create federal causes of action for prisoners challenging the medical treatment provided for their underlying disabilities); Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (same); Vila v. Miami-Dade Cnty., 65 F. Supp. 3d 1371, 1383 (S.D. Fla. 2014) (dismissing ADA claim which alleged that defendants failed to reasonably accommodate disabled prisoner who passed away while in their custody by failing to facilitate necessary medical care); Loeber v. Dep’t of Corr. of Fla., No. 5:09-CV-402/RS-MD, 2010 WL 3272611, at *3 (N.D. Fla. Aug. 19, 2010) aff’d sub nom. Loeber v. Andem, 487 F. App’x 548 (11th Cir. 2012) (dismissing claims under the ADA and RA based on alleged improper medical treatment of prisoner).

Therefore, the allegations of Plaintiff's Amended Complaint fail to establish that the City is liable for a violation of either the ADA or RA, and as such Count VIII must be dismissed for failure to state a claim upon which relief may be granted.

e. Counts I & II: Wrongful Death

The remaining wrongful death claims asserted against the City arise under state law. Accordingly, the Court declines to consider the City's remaining challenges to these claims because no basis for subject matter jurisdiction continues to exist over this case absent the federal claims.

Under § 1367(c)(3), a district court has discretion to decline to exercise supplemental jurisdiction over an ancillary claim where it has dismissed all claims over which it has original jurisdiction. See 28 U.S.C. § 1367(c)(3); see also Palmer v. Hosp. Auth. of Randolph Cnty, 22 F.3d 1559, 1569 (11th Cir. 1994); S.S. v. Princeton House Charter Sch., Inc., 909 F. Supp. 2d 1348, 1355 (M.D. Fla. 2012); Jacoboni v. KPMG, 314 F. Supp. 2d 1172, 1180 (M.D. Fla. 2004). When deciding whether it should decline supplemental jurisdiction under any of the exceptions listed in § 1367(c), a district court should consider several factors including: "judicial economy, convenience, fairness to the parties, and whether all the claims would be expected to be tried together." Palmer, 22 F.3d at 1569. In considering these factors, courts generally find that where, as here, all federal claims are dismissed prior to trial "dismissal of supplemental state claims is strongly encouraged or even required." Jacoboni, 314 F. Supp. 2d at 1181 (internal quotations omitted).

The Court finds that the factors of "judicial economy, fairness, convenience, and comity" weigh in favor of having the remaining state law claims decided by the state

court.⁸ See Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1353 (11th Cir. 1997). Accordingly, Counts I and II are dismissed without prejudice, so that they may be pursued in state court.

IV. CONCLUSION

In accordance with the foregoing, it is hereby **ORDERED** that Defendants' Motion to Dismiss Amended Complaint (Dkt. 26) is **GRANTED**, as follows:

1. **Counts III and VIII** of the Amended Complaint are **DISMISSED** for failure to state a cause of action upon which relief may be granted;
2. **Counts IV through VII** of the Amended Complaint are **DISMISSED** on the basis of qualified immunity;
3. **Counts I and II** of the Amended Complaint are **DISMISSED without prejudice**, pursuant to 28 U.S.C. § 1367(c)(3), so that they may be pursued in state court.

DONE and **ORDERED** in Tampa, Florida, this 6th day of March, 2017.

Copies furnished to:
Counsel of Record
Any Unrepresented Person



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

⁸ The statute of limitations periods applicable to Plaintiff's state law claims are "tolled while the claim[s] are] pending [before this Court] and for a period of 30 days after [they are] dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d).

APPENDIX C

§ 701

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(a) Findings

Congress finds that—

- (1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;
- (2) individuals with disabilities constitute one of the most disadvantaged groups in society;
- (3) disability is a natural part of the human experience and in no way diminishes the right of individuals to—

(A) live independently;
 (B) enjoy self-determination;
 (C) make choices;
 (D) contribute to society;
 (E) pursue meaningful careers; and
 (F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;

(4) increased employment of individuals with disabilities can be achieved through implementation of statewide workforce investment systems under title I of the Workforce Investment Act of 1998 [29 U.S.C. 2801 et seq.] that provide meaningful and effective participation for individuals with disabilities in workforce investment activities and activities carried out under the vocational rehabilitation program established under subchapter I of this chapter, and through the provision of independent living services, support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to—

(A) make informed choices and decisions; and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

(b) Purpose

The purposes of this chapter are—

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through—

(A) statewide workforce investment systems implemented in accordance with title I of the Workforce Investment Act of 1998 [29 U.S.C. 2801 et seq.] that include, as integral components, comprehensive and coordinated state-of-the-art programs of vocational rehabilitation;

(B) independent living centers and services;

(C) research;

(D) training;

(E) demonstration projects; and

(F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

(c) Policy

It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of—

(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;

(2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals;

(3) inclusion, integration, and full participation of the individuals;

(4) support for the involvement of an individual's representative if an individual with a disability requests, desires, or needs such support; and

(5) support for individual and systemic advocacy and community involvement.

(Pub. L. 93-112, § 2, as added Pub. L. 105-220, title IV, § 403, Aug. 7, 1998, 112 Stat. 1095; amended Pub. L. 105-277, div. A, § 101(f) [title VIII, § 402(b)(2)], Oct. 21, 1998, 112 Stat. 2681-337, 2681-413.)

REFERENCES IN TEXT

The Workforce Investment Act of 1998, referred to in subsecs. (a)(4) and (b)(1)(A), is Pub. L. 105-220, Aug. 7, 1998, 112 Stat. 936. Title I of the Act is classified principally to chapter 30 (§ 2801 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 9201 of Title 20, Education, and Tables.

PRIOR PROVISIONS

A prior section 701, Pub. L. 93-112, § 2, Sept. 26, 1973, 87 Stat. 357; Pub. L. 95-602, title I, § 122(a)(1), Nov. 6, 1978, 92 Stat. 2984; Pub. L. 99-506, title I, § 101, Oct. 21, 1986, 100 Stat. 1808; Pub. L. 102-569, title I, § 101, Oct. 29, 1992, 106 Stat. 4346, related to findings, purpose, and policy, prior to repeal by Pub. L. 105-220, title IV, § 403, Aug. 7, 1998, 112 Stat. 1093.

AMENDMENTS

1998—Pub. L. 105-277 made technical amendment in original to section designation and catchline.

SHORT TITLE OF 2010 AMENDMENT

Pub. L. 111-213, § 1, July 29, 2010, 124 Stat. 2343, provided that: "This Act [enacting provisions set out as notes under sections 796f-1 and 796f-2 of this title] may be cited as the 'Independent Living Centers Technical Adjustment Act'."

SHORT TITLE OF 1998 AMENDMENT

Pub. L. 105-220, title IV, § 401, Aug. 7, 1998, 112 Stat. 1092, provided that: "This title [see Tables for classification] may be cited as the 'Rehabilitation Act Amendments of 1998'."

SHORT TITLE OF 1993 AMENDMENT

Pub. L. 103-73, § 1, Aug. 11, 1993, 107 Stat. 718, provided that: "This Act [enacting sections 753 and 753a of this title, amending sections 706, 718 to 718b, 721 to 723, 725, 730 to 732, 744, 761a, 762, 771a, 777, 777a, 777f, 783, 791, 792, 794e, 795f, 796, 796c, 796d to 796e-2, 796f to 796f-4, and 796k of this title, sections 1431, 4301 to 4305, 4331, 4332, 4351, 4353 to 4357, 4359, 4359a, and 4360 of Title 20, Education, and section 46 of Title 41, Public Contracts, enacting provisions set out as notes under section 725 of this title and section 4301 of Title 20, and amending provisions set out as a note under this section] may be cited as the 'Rehabilitation Act Amendments of 1993'."

SHORT TITLE OF 1992 AMENDMENT

Section 1(a) of Pub. L. 102-569 provided that: "This Act [see Tables for classification] may be cited as the 'Rehabilitation Act Amendments of 1992'."

SHORT TITLE OF 1991 AMENDMENT

Pub. L. 102-52, § 1, June 6, 1991, 105 Stat. 260, provided that: "This Act [amending sections 720, 732, 741, 761, 771, 772, 774, 775, 777, 777a, 777f, 785, 792, 795f, 795i, 795q, 796i, and 1904 of this title and section 1475 of Title 20, Education] may be cited as the 'Rehabilitation Act Amendments of 1991'."

SHORT TITLE OF 1986 AMENDMENT

Section 1(a) of Pub. L. 99-506 provided that: "This Act [enacting sections 716, 717, 752, 794d, 795j to 795q, and 796d-1 of this title and section 2000d-7 of Title 42, The Public Health and Welfare, amending this section and sections 702, 705, 706, 711 to 715, 720 to 724, 730 to 732, 740, 741, 750, 751, 760 to 761b, 762, 762a, 770 to 777b, 777f, 780, 781, 783, 785, 791 to 794, 794c, 795, 795d to 795i, 796a, 796b, 796d to 796i, and 1904 of this title, and section 155a of former Title 36, Patriotic Societies and Observances, repealing section 751 of this title, and enacting provisions set out as notes under this section and sections 706, 730, 761a, and 795m of this title and section 1414 of Title 20, Education] may be cited as the 'Rehabilitation Act Amendments of 1986'."

SHORT TITLE OF 1984 AMENDMENT

Pub. L. 98-221, § 1, Feb. 22, 1984, 98 Stat. 17, provided: "That this Act [enacting sections 780a and 1901 to 1906 of this title, amending sections 706, 712 to 714, 720 to 722, 730, 732, 741, 761 to 762a, 771, 772, 774, 775, 777, 777a, 777f, 780, 781, 783, 791, 792, 794c, 795a, 795c, 795f, 795g, 795i, 796e, and 796i of this title and sections 6001, 6012, 6033, 6061, and 6081 of Title 42, The Public Health and Welfare, repealing section 777c of this title, enacting provisions set out as a note under section 1901 of this title and amending provisions set out as a note under section 713 of this title] may be cited as the 'Rehabilitation Act Amendments of 1984'."

SHORT TITLE OF 1978 AMENDMENT

Section 1 of Pub. L. 95-602 provided that: "This Act [enacting sections 710 to 715, 751, 761a, 761b, 762a, 775, 777 to 777f, 780 to 785, 794a to 794c, 795 to 795i, and 796 to 796i of this title and section 6000 of Title 42, The Public Health and Welfare, amending this section, sections 702, 706, 709, 720 to 724, 730 to 732, 740, 741, 750, 760 to 762, 770 to 774, 776, and 792 to 794 of this title, section 1904 [now 3904] of Title 38, Veterans' Benefits, and sections 6001, 6008 to 6012, 6031 to 6033, 6061 to 6065, 6067, 6081, and 6862 of Title 42, repealing sections 764, 786, and 787 of this title and section 6007 of Title 42, omitting sections 6041 to 6043 of Title 42, enacting provisions set out as notes under sections 713 and 795 of this title and sections 6000 and 6001 of Title 42, and repealing a provision set out as a note under section 6001 of Title 42] may be cited as the 'Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978'."

SHORT TITLE OF 1976 AMENDMENT

Pub. L. 94-230, § 1, Mar. 15, 1976, 90 Stat. 211, provided that: "This Act [amending sections 720, 732, 741, 761, 771, 772, 774, 775, 783, 785, and 792 of this title and enacting provisions set out as a note under section 720 of this title] may be cited as the 'Rehabilitation Act Extension of 1976'."

SHORT TITLE OF 1974 AMENDMENT

Pub. L. 93-516, title I, § 100, Dec. 7, 1974, 88 Stat. 1617, provided that: "This title [amending sections 702, 706, 720 to 722, 732, 741, 750, 761, 762, 771, 772, 774 to 776, 783, 785, and 792 of this title and enacting provisions set out as a note under section 702 of this title] shall be known as the 'Rehabilitation Act Amendments of 1974'."

An identical provision is contained in Pub. L. 93-651, title I, § 100, Nov. 21, 1974, 89 Stat. 2-3.

SHORT TITLE

Pub. L. 93-112, § 1(a), as added by Pub. L. 105-220, title IV, § 403, Aug. 7, 1998, 112 Stat. 1093, and amended by Pub. L. 105-277, div. A, § 101(f) [title VIII, § 402(b)(1)], Oct. 21, 1998, 112 Stat. 2681 337, 2681-412, provided that: "This Act [enacting this chapter] may be cited as the 'Rehabilitation Act of 1973'."

Pub. L. 93-112, title VI, § 601, as added by Pub. L. 105-220, title IV, § 409, Aug. 7, 1998, 112 Stat. 1210, provided that: "This title [enacting subchapter VI of this chapter] may be cited as the 'Employment Opportunities for Individuals With Disabilities Act'."

Pub. L. 93-112, § 1, Sept. 26, 1973, 87 Stat. 355, provided in part that Pub. L. 93-112, which enacted this chapter and repealed sections 31 to 41c and 42-1 to 42b of this title, could be cited as the "Rehabilitation Act of 1973", prior to repeal by Pub. L. 105-220, title IV, § 403, Aug. 7, 1998, 112 Stat. 1093.

Pub. L. 93-112, title VI, § 601, as added by Pub. L. 95-602, title II, § 201, Nov. 6, 1978, 92 Stat. 2989, and amended by Pub. L. 102-569, title I, § 102(p)(34), Oct. 29, 1992, 106 Stat. 4360, provided that title VI of Pub. L. 93-112, enacting former subchapter VI of this chapter, could be cited as the "Employment Opportunities for Handicapped Individuals Act", prior to the general amendment of title VI of Pub. L. 93-112 by Pub. L. 105-220, title IV, § 409, Aug. 7, 1998, 112 Stat. 1210.

EX. ORD. NO. 11758. DELEGATION OF AUTHORITY OF THE PRESIDENT

Ex. Ord. No. 11758, Jan. 15, 1974, 39 F.R. 2075, as amended by Ex. Ord. No. 11784, May 30, 1974, 39 F.R. 19443; Ex. Ord. No. 11867, June 19, 1975, 40 F.R. 26253; Ex. Ord. No. 12608, Sept. 9, 1987, 52 F.R. 34617, provided:

By virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States of America, it is hereby ordered as follows:

SECTION 1. The Director of the Office of Management and Budget is hereby designated and empowered to exercise, without approval, ratification, or other action of the President, the authority of the President under section 500(a) of the Rehabilitation Act of 1973 (87 Stat. 390, 29 U.S.C. 790) with respect to the transfer of unexpended appropriations.

SEC. 2. The Secretary of Labor is hereby designated and empowered to exercise, without approval, ratification, or other action of the President, the authority of the President (1) under section 503(a) of the Rehabilitation Act of 1973 [29 U.S.C. 793(a)] to prescribe regulations, after consultation with the Secretary of Defense and the Administrator of General Services, with respect to the employment of qualified handicapped individuals under Federal procurement contracts, and (2) under section 503(c) of that act [29 U.S.C. 793(c)] with respect to prescribing, by regulation, guidelines for waiving the requirements of section 503 of the act [29 U.S.C. 793]. Changes in any regulations prescribed by the Secretary pursuant to the preceding sentence shall be made only after consultation with the Secretary of Defense and the Administrator of General Services.

SEC. 3. The head of a Federal agency may, in conformity with the provisions of section 503(c) of the Rehabilitation Act of 1973 [29 U.S.C. 793(c)], and regulations issued by the Secretary of Labor pursuant to section 2 of this order, exempt any contract and, following consultation with the Secretary of Labor, any class of contracts, from the requirements of section 503 of the act [29 U.S.C. 793].

SEC. 4. The Federal Acquisition Regulations and, to the extent necessary, any supplemental or comparable regulation issued by any agency of the executive branch shall, following consultation with the Secretary of Labor, be amended to require, as a condition of entering into, renewing or extending any contract subject to the provisions of section 503 of the Rehabilitation Act of 1973 [29 U.S.C. 793], inclusion of a provision requiring compliance with that section and regulations issued by the Secretary pursuant to section 2 of this order.

EX. ORD. NO. 13078. INCREASING EMPLOYMENT OF ADULTS WITH DISABILITIES

Ex. Ord. No. 13078, Mar. 13, 1998, 63 F.R. 13111, as amended by Ex. Ord. No. 13172, Oct. 25, 2000, 65 F.R. 64577; Ex. Ord. No. 13187, §4(b), Jan. 10, 2001, 66 F.R. 3858, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to increase the employment of adults with disabilities to a rate that is as close as possible to the employment rate of the general adult population and to support the goals articulated in the findings and purpose section of the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], it is hereby ordered as follows:

SECTION 1. Establishment of National Task Force on Employment of Adults with Disabilities.

(a) There is established the "National Task Force on Employment of Adults with Disabilities" ("Task Force"). The Task Force shall comprise the Secretary of Labor, Secretary of Education, Secretary of Veterans Affairs, Secretary of Health and Human Services, Commissioner of Social Security, Secretary of the Treasury, Secretary of Commerce, Secretary of Transportation, Director of the Office of Personnel Management, Administrator of the Small Business Administration, the Chair of the Equal Employment Opportunity Commission, the Chairperson of the National Council on Disability, the Chairperson of the President's Disability Employment Partnership Board, [sic] and such other senior executive branch officials as may be determined by the Chair of the Task Force.

(b) The Secretary of Labor shall be the Chair of the Task Force; the Chairperson of the President's Disability Employment Partnership Board, [sic] shall be the Vice Chair of the Task Force.

(c) The purpose of the Task Force is to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population. The Task Force shall develop and recommend to the President, through the Chair of the Task Force, a coordinated Federal policy to reduce employment barriers for persons with disabilities. Policy recommendations may cover such areas as discrimination, reasonable accommodations, inadequate access to health care, lack of consumer-driven, long-term supports and services, transportation, accessible and integrated housing, telecommunications, assistive technology, community services, child care, education, vocational rehabilitation, training services, job retention, on-the-job supports, and economic incentives to work. Specifically, the Task Force shall:

(1) analyze the existing programs and policies of Task Force member agencies to determine what changes, modifications, and innovations may be necessary to remove barriers to work faced by people with disabilities;

(2) develop and recommend options to address health insurance coverage as a barrier to employment for people with disabilities;

(3) subject to the availability of appropriations, analyze State and private disability systems (e.g., workers' compensation, unemployment insurance, private insurance, and State mental health and mental retardation systems) and their effect on Federal programs and employment of adults with disabilities;

(4) consider statistical and data analysis, cost data, research, and policy studies on public subsidies, employment, employment discrimination, and rates of return-to-work for individuals with disabilities;

(5) evaluate and, where appropriate, coordinate and collaborate on, research and demonstration priorities of Task Force member agencies related to employment of adults with disabilities;

(6) evaluate whether Federal studies related to employment and training can, and should, include a statistically significant sample of adults with disabilities;

(7) subject to the availability of appropriations, analyze youth programs related to employment (e.g., Employment and Training Administration programs, special education, vocational rehabilitation, school-to-work transition, vocational education, and Social Security Administration work incentives and other programs, as may be determined by the Chair and Vice Chair of the Task Force) and the outcomes of those programs for young people with disabilities;

(8) evaluate whether a single governmental entity or program should be established to provide computer and electronic accommodations for Federal employees with disabilities;

(9) consult with the President's Committee on Mental Retardation on policies to increase the employment of people with mental retardation and cognitive disabilities; and

(10) recommend to the President any additional steps that can be taken to advance the employment of adults with disabilities, including legislative proposals, regulatory changes, and program and budget initiatives.

(d)(1) The members of the Task Force shall make the activities and initiatives set forth in this order a high priority within their respective agencies within the levels provided in the President's budget.

(2) The Task Force shall issue its first report to the President by November 15, 1998. The Task Force shall issue a report to the President on November 15, 1999, November 15, 2000, and a final report on July 26, 2002, the 10th anniversary of the initial implementation of the employment provisions of the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.]. The reports shall describe the actions taken by, and progress of, each member of the Task Force in carrying out this order. The Task Force shall terminate 30 days after submitting its final report.

(e) As used herein, an adult with a disability is a person with a physical or mental impairment that substantially limits at least one major life activity.

SEC. 2. Specific activities by Task Force members and other agencies.

(a) To ensure that the Federal Government is a model employer of adults with disabilities, by November 15, 1998, the Office of Personnel Management, the Department of Labor, and the Equal Employment Opportunity Commission shall submit to the Task Force a review of Federal Government personnel laws, regulations, and policies and, as appropriate, shall recommend or implement changes necessary to improve Federal employment policy for adults with disabilities. This review shall include personnel practices and actions such as: hiring, promotion, benefits, retirement, workers' compensation, retention, accessible facilities, job accommodations, layoffs, and reductions in force.

(b) The Departments of Justice, Labor, Education, and Health and Human Services shall report to the Task Force by November 15, 1998, on their work with the States and others to ensure that the Personal Responsibility and Work Opportunity Reconciliation Act [probably means the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, see Tables for classification] is carried out in accordance with section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], as amended, and the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], so that individuals with disabilities and their families can realize the full promise of welfare reform by having an equal opportunity for employment.

(c) The Departments of Education, Labor, Commerce, and Health and Human Services, the Small Business Administration, and the President's Committee on Employment of People with Disabilities shall work together and report to the Task Force by November 15, 1998, on their work to develop small business and entrepreneurial opportunities for adults with disabilities and strategies for assisting low-income adults, including those with disabilities[,] to create small businesses and micro-enterprises. These same agencies, in consultation with the Committee for Purchase from Peo-

ple Who Are Blind or Severely Disabled, shall assess the impact of the Randolph-Sheppard Act [20 U.S.C. 107 et seq.] vending program and the Javits-Wagner-O'Day Act [now 41 U.S.C. 8501 et seq.] on employment and small business opportunities for people with disabilities.

(d) The Departments of Transportation and Housing and Urban Development shall report to the Task Force by November 15, 1998, on their examination of their programs to see if they can be used to create new work incentives and to remove barriers to work for adults with disabilities.

(e) The Departments of Justice, Education, and Labor, the Equal Employment Opportunity Commission, and the Social Security Administration shall work together and report to the Task Force by November 15, 1998, on their work to propose remedies to the prevention of people with disabilities from successfully exercising their employment rights under the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.] because of the receipt of monetary benefits based on their disability and lack of gainful employment.

(f) The Bureau of Labor Statistics of the Department of Labor and the Census Bureau of the Department of Commerce, in cooperation with the Departments of Education and Health and Human Services, the National Council on Disability, and the President's Committee on Employment of People with Disabilities shall design and implement a statistically reliable and accurate method to measure the employment rate of adults with disabilities as soon as possible, but no later than the date of termination of the Task Force. Data derived from this methodology shall be published on as frequent a basis as possible.

(g) All executive agencies that are not members of the Task Force shall: (1) coordinate and cooperate with the Task Force; and (2) review their programs and policies to ensure that they are being conducted and delivered in a manner that facilitates and promotes the employment of adults with disabilities. Each agency shall file a report with the Task Force on the results of its review on November 15, 1998.

(h) To improve employment outcomes for persons with disabilities by addressing, among other things, the education, transition, employment, health and rehabilitation, and independent living issues affecting young people with disabilities, executive departments and agencies shall coordinate and cooperate with the Task Force to: (1) strengthen interagency research, demonstration, and training activities relating to young people with disabilities; (2) create a public awareness campaign focused on access to equal opportunity for young people with disabilities; (3) promote the views of young people with disabilities through collaboration with the Youth Councils authorized under the Workforce Investment Act of 1998 [Pub. L. 105-220, see Short Title note set out under section 9201 of Title 20, Education]; (4) increase access to and utilization of health insurance and health care for young people with disabilities through the formalization of the Federal Healthy and Ready to Work Interagency Council; (5) increase participation by young people with disabilities in postsecondary education and training programs; and (6) create a nationally representative Youth Advisory Council, to be funded and chaired by the Department of Labor, to advise the Task Force in conducting these and other appropriate activities.

SEC. 3. Cooperation. All efforts taken by executive departments and agencies under sections 1 and 2 of this order shall, as appropriate, further partnerships and cooperation with public and private sector employers, organizations that represent people with disabilities, organized labor, veteran service organizations, and State and local governments whenever such partnerships and cooperation are possible and would promote the employment and gainful economic activities of individuals with disabilities.

SEC. 4. Judicial Review. This order does not create any right or benefit, substantive or procedural, enforce-

able at law by a party against the United States, its agencies, its officers, or any person.

WILLIAM J. CLINTON.

EX. ORD. No. 13187. THE PRESIDENT'S DISABILITY
EMPLOYMENT PARTNERSHIP BOARD

Ex. Ord. No. 13187, Jan. 10, 2001, 66 F.R. 3857, provided: By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and in order to promote the employment of people with disabilities, it is hereby ordered as follows:

SECTION 1. *Establishment and Composition of the Board.* (a) There is hereby established the President's Disability Employment Partnership Board (Board).

(b) The Board shall be composed of not more than 15 members who shall be appointed by the President for terms of 2 years. The membership shall include individuals who are representatives of business (including small business), labor organizations, State or local government, disabled veterans, people with disabilities, organizations serving people with disabilities, and researchers or academicians focusing on issues relating to the employment of people with disabilities, and may include other individuals representing entities involved in issues relating to the employment of people with disabilities as the President finds appropriate.

(c) The President shall designate a Chairperson from among the members of the Board to serve a term of two years.

(d) Members and the Chairperson may be reappointed for subsequent terms and may continue to serve until their successors have been appointed.

SEC. 2. *Functions.* (a) The Board shall provide advice and information to the President, the Vice President, the Secretary of Labor, and other appropriate Federal officials with respect to facilitating the employment of people with disabilities, and shall assist in other activities that promote the formation of public-private partnerships, the use of economic incentives, the provision of technical assistance regarding entrepreneurship, and other actions that may enhance employment opportunities for people with disabilities.

(b) In carrying out paragraph (a) of this section, the Board shall:

(i) develop and submit to the Office of Disability Employment Policy in the Department of Labor a comprehensive written plan for joint public-private efforts to promote employment opportunities for people with disabilities and improve their access to financial institutions and commercial and business enterprises;

(ii) identify strategies that may be used by employers, labor unions, national and international organizations, and Federal, State, and local officials to increase employment opportunities for people with disabilities; and

(iii) coordinate with the Office of Disability Employment Policy in the Department of Labor in promoting the collaborative use of public and private resources to assist people with disabilities in forming and expanding small business concerns and in enhancing their access to Federal procurement and other relevant business opportunities. Public resources include those of the Department of Labor, the Small Business Administration, the Department of Commerce, the Department of Education, the Department of Defense, the Department of Treasury, the Department of Veterans Affairs, the Federal Communications Commission, and of executive departments and agency offices responsible for small, disadvantaged businesses utilization.

(c) The Board shall submit annual written reports to the President, who may apprise the Congress and other interested organizations and individuals on its activities, progress, and problems relating to maximizing employment opportunities for people with disabilities.

(d) The Chairperson of the Board shall serve as a member and Vice Chair of the National Task Force on

Employment of Adults with Disabilities established under Executive Order 13078 of March 13, 1998 [set out above].

SEC. 3. *Administration.* (a) The Board shall meet when called by the Chairperson, at a time and place designated by the Chairperson. The Chairperson shall call at least two meetings per calendar year. The Chairperson may form subcommittees or working groups within the Board to address particular matters.

(b) The Chairperson may from time to time prescribe such rules, procedures, and policies relating to the activities of the Board as are not inconsistent with law or with the provisions of this order.

(c) Members of the Board shall serve without compensation but shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in Federal service (5 U.S.C. 5701-5707).

(d) The Department of Labor shall provide funding and appropriate support to assist the Board in carrying out the activities described in section 2 of this order, including necessary office space, equipment, supplies, services, and staff. The functions of the President under the Federal Advisory Committee Act, as amended, except that of reporting to the Congress, that are applicable to the Commission, shall be performed by the Department of Labor in accordance with guidelines that have been issued by the Administrator of General Services.

(e) The heads of executive departments and agencies shall, to the extent permitted by law, provide the Board such information as it may need for purposes of carrying out the functions described in section 2 of this order.

SEC. 4. *Prior Orders and Transition.* (a) Executive Order 12640 of May 10, 1988, as amended, relating to the establishment of the President's Committee on Employment of People with Disabilities, is hereby revoked. The employees, records, property, and funds of the Committee shall become the employees, records, property, and funds of the Department of Labor.

(b) Executive Order 13078 of March 13, 1998 [set out above], is amended in sections 1(a) and (b) by striking "Chair of the President's Committee on Employment of People with Disabilities" and inserting "Chairperson of the President's Disability Employment Partnership Board."

WILLIAM J. CLINTON.

§ 702. Rehabilitation Services Administration

(a) There is established in the Office of the Secretary a Rehabilitation Services Administration which shall be headed by a Commissioner (hereinafter in this chapter referred to as the "Commissioner") appointed by the President by and with the advice and consent of the Senate. Except for subchapters IV and V of this chapter and as otherwise specifically provided in this chapter, such Administration shall be the principal agency, and the Commissioner shall be the principal officer, of such Department for carrying out this chapter. The Commissioner shall be an individual with substantial experience in rehabilitation and in rehabilitation program management. In the performance of the functions of the office, the Commissioner shall be directly responsible to the Secretary or to the Under Secretary or an appropriate Assistant Secretary of such Department, as designated by the Secretary. The functions of the Commissioner shall not be delegated to any officer not directly responsible, both with respect to program operation and administration, to the Commissioner. Any reference in this chapter to duties to be carried out by the Commissioner shall be considered to be a reference to duties to be carried out

by the Secretary acting through the Commissioner. In carrying out any of the functions of the office under this chapter, the Commissioner shall be guided by general policies of the National Council on Disability established under subchapter IV of this chapter.

(b) The Secretary shall take whatever action is necessary to ensure that funds appropriated pursuant to this chapter are expended only for the programs, personnel, and administration of programs carried out under this chapter.

(Pub. L. 93-112, § 3, as added Pub. L. 105-220, title IV, § 403, Aug. 7, 1998, 112 Stat. 1096.)

PRIOR PROVISIONS

A prior section 702, Pub. L. 93-112, § 3, Sept. 26, 1973, 87 Stat. 357; Pub. L. 93-516, title I, § 101(a), Dec. 7, 1974, 88 Stat. 1617; Pub. L. 93-651, title I, § 101(a), Nov. 21, 1974, 89 Stat. 2-3; Pub. L. 95-602, title I, § 122(a)(2), (3), Nov. 6, 1978, 92 Stat. 2984; Pub. L. 99-506, title I, § 102, title X, § 1001(a)(1), Oct. 21, 1986, 100 Stat. 1808, 1841; Pub. L. 100-630, title II, § 201(a), Nov. 7, 1988, 102 Stat. 3303, related to the Rehabilitation Services Administration, prior to repeal by Pub. L. 105-220, title IV, § 403, Aug. 7, 1998, 112 Stat. 1093.

ADDITIONAL PERSONNEL FOR OFFICE FOR THE BLIND AND VISUALLY HANDICAPPED

Pub. L. 93-516, title II, § 208(a), Dec. 7, 1974, 88 Stat. 1629, provided that: "The Secretary of Health, Education, and Welfare [now Secretary of Education] is directed to assign to the Office for the Blind and Visually Handicapped of the Rehabilitation Services Administration of the Department of Health, Education, and Welfare [now Department of Education] ten additional full-time personnel (or their equivalent), five of whom shall be supportive personnel, to carry out duties related to the administration of the Randolph-Sheppard Act [section 107 et seq. of Title 20, Education]."

An identical provision is contained in Pub. L. 93-651, title II, § 208(a), Nov. 21, 1974, 89 Stat. 2-14.

PREFERENCE TO BLIND IN SELECTING PERSONNEL

Pub. L. 93-516, title II, § 208(c), Dec. 7, 1974, 88 Stat. 1629, provided that: "In selecting personnel to fill any position under this section [authorizing assignment of 11 additional full-time personnel to the Office for the Blind and Visually Handicapped of the Rehabilitation Service Administration of the Department of Health, Education, and Welfare under subsecs. (a) and (b) of Pub. L. 93-516], the Secretary of Health, Education, and Welfare [now Secretary of Education] shall give preference to blind individuals."

An identical provision is contained in Pub. L. 93-651, title II, § 208(c), Nov. 21, 1974, 89 Stat. 2-14.

§ 703. Advance funding

(a) For the purpose of affording adequate notice of funding available under this chapter, appropriations under this chapter are authorized to be included in the appropriation Act for the fiscal year preceding the fiscal year for which they are available for obligation.

(b) In order to effect a transition to the advance funding method of timing appropriation action, the authority provided by subsection (a) of this section shall apply notwithstanding that its initial application will result in the enactment in the same year (whether in the same appropriation Act or otherwise) of two separate appropriations, one for the then current fiscal year and one for the succeeding fiscal year.

(Pub. L. 93-112, § 4, as added Pub. L. 105-220, title IV, § 403, Aug. 7, 1998, 112 Stat. 1097.)

APPENDIX D

§ 794

TITLE 29—LABOR

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Subsec. (b). Pub. L. 99-506, §§103(d)(2)(B), (C), 1001(f)(2), substituted "individual with handicaps" for "handicapped individual", "individuals with handicaps" for "handicapped individuals", and "a contract" for "his contract".

Subsec. (c). Pub. L. 99-506, §1001(f)(3), substituted "The President" for "he" in two places and substituted "the reasons" for "his reasons".

1978—Subsec. (a). Pub. L. 95-602 substituted "section 706(7) of this title" for "section 706(6) of this title".

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

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 to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,¹ of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(Pub. L. 93-112, title V, §504, Sept. 26, 1973, 87 Stat. 394; Pub. L. 95-602, title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub. L. 99-506, title I, §103(d)(2)(B), title X, §1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub. L. 100-259, §4, Mar. 22, 1988, 102 Stat. 29; Pub. L. 100-630, title II, §206(d), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102-569, title I, §102(p)(32), title V, §506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub. L. 103-382, title III, §394(i)(2), Oct. 20, 1994, 108 Stat. 4029; Pub. L. 105-220, title IV, §408(a)(3), Aug. 7, 1998, 112 Stat. 1203; Pub. L. 107-110, title X, §1076(u)(2), Jan. 8, 2002, 115 Stat. 2093.)

REFERENCES IN TEXT

The amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, referred to in subsec. (a), mean the amendments made by Pub. L. 95-602. See 1978 Amendments note below.

The Americans with Disabilities Act of 1990, referred to in subsec. (d), is Pub. L. 101-336, July 26, 1990, 104 Stat. 327. Title I of the Act is classified generally to subchapter I (§12111 et seq.) of chapter 126 of Title 42, The Public Health and Welfare. Section 510 of the Act was renumbered section 511 by Pub. L. 110-325, §6(a)(2), Sept. 25, 2008, 122 Stat. 3558. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

AMENDMENTS

2002—Subsec. (b)(2)(B). Pub. L. 107-110 substituted "section 7801 of title 20" for "section 8801 of title 20".

1998—Subsec. (a). Pub. L. 105-220 substituted "section 705(20)" for "section 706(8)".

1994—Subsec. (b)(2)(B). Pub. L. 103-382 substituted "section 8801 of title 20" for "section 2891(12) of title 20".

1992—Subsec. (a). Pub. L. 102-569, §102(p)(32), substituted "a disability" for "handicaps" and "disability" for "handicap" in first sentence.

Subsec. (d). Pub. L. 102-569, §506, added subsec. (d). 1988—Subsec. (a). Pub. L. 100-630, §206(d)(1), substituted "her or his handicap" for "his handicap".

Pub. L. 100-259, §4(1), designated existing provisions as subsec. (a).

¹ See References in Text note below.

Subsec. (b). Pub. L. 100-259, §4(2), added subsec. (b).
 Subsec. (b)(2)(B). Pub. L. 100-630, §206(d)(2), substituted "section 2891(12) of title 20" for "section 2854(a)(10) of title 20".

Subsec. (c). Pub. L. 100-259, §4(2), added subsec. (c).
 1986—Pub. L. 99-506 substituted "individual with handicaps" for "handicapped individual" and "section 706(8) of this title" for "section 706(7) of this title".

1978—Pub. L. 95-602 substituted "section 706(7) of this title" for "section 706(6) of this title" and inserted provision prohibiting discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service and requiring the heads of these agencies to promulgate regulations prohibiting discrimination.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107-110, set out as an Effective Date note under section 6301 of Title 20, Education.

EXCLUSION FROM COVERAGE

Amendment by Pub. L. 100-259 not to be construed to extend application of this chapter to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see section 7 of Pub. L. 100-259, set out as a Construction note under section 1687 of Title 20, Education.

ABORTION NEUTRALITY

Amendment by Pub. L. 100-259 not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion, see section 8 of Pub. L. 100-259, set out as a note under section 1688 of Title 20, Education.

CONSTRUCTION OF PROHIBITION AGAINST DISCRIMINATION UNDER FEDERAL GRANTS

Rights or protections of this section not affected by any provision of Pub. L. 98-457, see section 127 of Pub. L. 98-457, set out as a note under section 5101 of Title 42, The Public Health and Welfare.

COORDINATION OF IMPLEMENTATION AND ENFORCEMENT OF PROVISIONS

For provisions relating to the coordination of implementation and enforcement of the provisions of this section by the Attorney General, see section 1-201 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

EXECUTIVE ORDER NO. 11914

Ex. Ord. No. 11914, Apr. 28, 1976, 41 F.R. 17871, which related to nondiscrimination in federally assisted programs, was revoked by Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy

under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub. L. 93-112, title V, §505, as added Pub. L. 95-602, title I, §120(a), Nov. 6, 1978, 92 Stat. 2982; amended Pub. L. 111-2, §5(c)(1), Jan. 29, 2009, 123 Stat. 6.)

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in subsec. (a)(2), is Pub. L. 88-352, July 2, 1964, 78 Stat. 241. Title VI of the Civil Rights Act of 1964 is classified generally to subchapter V (§2000d et seq.) of chapter 21 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of Title 42 and Tables.

AMENDMENTS

2009—Subsec. (a)(1). Pub. L. 111-2, §5(c)(1)(A), inserted "(and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation)" after "(42 U.S.C. 2000e-5(f) through (k))".

Subsec. (a)(2). Pub. L. 111-2, §5(c)(1)(B), inserted "(42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation)" after "1964".

EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by Pub. L. 111-2 effective as if enacted May 28, 2007, and applicable to certain claims of discrimination in compensation pending on or after that date, see section 6 of Pub. L. 111-2, set out as a note under section 2000e-5 of Title 42, The Public Health and Welfare.

§ 794b. Removal of architectural, transportation, or communication barriers; technical and financial assistance; compensation of experts or consultants; authorization of appropriations

(a) The Secretary may provide directly or by contract with State vocational rehabilitation agencies or experts or consultants or groups thereof, technical assistance—

(1) to persons operating community rehabilitation programs; and

(2) with the concurrence of the Access Board established by section 792 of this title, to any public or nonprofit agency, institution, or organization;

for the purpose of assisting such persons or entities in removing architectural, transportation, or communication barriers. Any concurrence of the Access Board under paragraph (2) shall re-