

App. 1

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

TAYLOR CHRISTIAN PROFITA,
Plaintiff-Appellant,

v.

THE REGENTS OF THE
UNIVERSITY OF COLORADO;
THE UNIVERSITY OF COLO-
RADO HEALTH SCIENCES
CENTER, a/k/a University of
Colorado Denver/Anschutz Medical
Campus; JOHN J. REILLY, JR.,
M.D., in his official capacity as
Dean of the University of Colorado
Health Sciences Center,
Defendants-Appellees.

No. 17-1127
(D.C. No. 1:16-
CV-03032-RBJ)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ, McKAY**, and **MATHESON**, Circuit
Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not

App. 2

After twice failing clinical rotations at the University of Colorado Health Sciences Center (the Medical School), Taylor Christian Profita was dismissed from the University's M.D. program in January 2013. He attributes his failures to his disabling physical and mental conditions. He later obtained treatment for these conditions, then sought to be readmitted to the M.D. program with full credit for the work he had performed before the rotations. The defendants denied him readmission, telling him he must reapply as a new student.

Mr. Profita brought this suit against the defendants under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, seeking readmission to the M.D. program as a reasonable accommodation for his disability.¹ The district court dismissed the action with prejudice, relying on cases from this circuit holding, in the employment context, that a request for “retroactive leniency for . . . past misconduct . . . is not a request for a reasonable accommodation as a matter of law.” *Aplt. App.* at 44 (internal quotation marks omitted). In this appeal Mr. Profita argues that the district

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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

¹ This case is governed by the ADA Amendments Act of 2008, commonly known as the ADAAA. *See Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1303 & n.1 (10th Cir. 2017). We refer to Mr. Profita's claim, as the parties do, as an ADA claim, except where he specifically invokes the ADAAA's amendments.

App. 3

court's rationale was flawed because he was not dismissed for misconduct; he is a student, not an employee; and the accommodation he sought was prospective, not retrospective. But because the district court properly determined that his proposed accommodation – readmission to the medical school program with full credit for work previously performed, after his dismissal on academic grounds – was not a reasonable accommodation required by the ADA, we affirm the order of dismissal.

I.

In his complaint Mr. Profita alleges that he is an “otherwise qualified individual with a disability protected by the ADA.” Aplt. App. at 6 (internal quotation marks omitted). He identifies his disabling conditions as “Major Depressive Disorder, moderate to severe” and “Unspecified Anxiety Disorder, mild to severe,” along with “complications of chronic insomnia/sleep apnea and hypothyroidism.” *Id.* at 7. Despite these conditions, he was able to commence his studies at the Medical School in 2008 and he successfully completed his first three years there, including the “first five of seven third year block clinical rotations.” *Id.* at 8. But in 2011 and 2012 he failed the last two third-year clinical rotations, Hospitalized Adult Care and Women’s Care. He attributes these failures to “outside pressures, worsening depression, anxiety, and sleep disturbance.” *Id.*

App. 4

As a result of failing these last two clinical rotations, Mr. Profita was placed on academic probation and put on a leave of absence for the 2012 spring semester. The Medical School's Student Promotions Committee notified him that to regain good academic status he would need to successfully remediate the two clinical rotations. The Committee also required him to obtain an evaluation from the Colorado Physicians Health Program.

The psychiatrist who conducted that evaluation indicated that Mr. Profita's symptoms "would suggest a mood syndrome . . . disabling anxiety disorder . . . psychotic disorder." *Id.* at 9 (internal quotation marks omitted; ellipses in original). Mr. Profita denied these symptoms. He asserts that the psychiatrist "made a critically inaccurate diagnosis of maladaptive personality traits, not recognizing [his Major Depressive Disorder] and anxiety disorders." *Id.* (internal quotation marks omitted).²

Mr. Profita was later permitted to retake the Women's Care rotation, which he again failed. He claims that by the time of the repeated Women's Care rotation his depressive symptoms had worsened. Because of his lack of success in the Women's Care

² The complaint also asserts that the psychiatrist's inaccurate diagnosis "misled the University Promotions Committee and allowed that University Committee to avoid the issue of accommodating Mr. Profita's illness." *Aplt. App.* at 10 (internal quotation marks omitted). But he does not explain why the alleged misdiagnosis would excuse his failure to make a timely request for accommodation or otherwise be relevant to his claim.

App. 5

rotation, he was not provided an opportunity to remediate the other rotation, Hospitalized Adult Care.

Acting on the Promotions Committee's recommendation, the Dean of the Medical School sent Mr. Profita a letter dismissing him from the M.D. program for unsatisfactory academic performance. Mr. Profita then obtained medical care for his psychological conditions, and nearly nine months after his dismissal he delivered a letter to the defendants asserting that "his medical/psychological issues were now under control, well managed, and treated through therapy and correct medication." *Id.* at 12. The letter requested the defendants to reasonably accommodate his disability by

readmitting me to the M.D. program at the point where these issues first began to have significant impact upon my performance [and] being granted credit for those courses and clerkships that I have completed successfully, with reinsertion into the program at the point of entering the Internal Medicine and Women's Care clinical clerkships.

Id. at 11 (ellipsis and internal quotation marks omitted).

The defendants responded that "the School of Medicine does not have a retroactive obligation under the [ADA] to readmit you to the School of Medicine as an accommodation." *Id.* at 13 (internal quotation marks omitted). They informed Mr. Profita that to obtain readmission their policy required him to reapply

App. 6

as a new student. Rather than reapply, Mr. Profita filed this action.

II.

A.

This court reviews de novo a dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017). “We accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the plaintiff.” *Id.* (internal quotation marks omitted). “We then determine whether the plaintiff has provided enough facts to state a claim to relief that is plausible on its face.” *Id.* (internal quotation marks omitted). But to the extent the complaint relies on legal conclusions, we review those conclusions de novo, affording them no presumption of correctness. *See id.*

B.

Title II of the ADA prohibits public entities from excluding qualified individuals with disabilities from participation in, or from enjoying the benefits of, an entity’s services, programs, or activities, or from subjecting such individuals to discrimination. 42 U.S.C. § 12132. To assert a viable Title II claim, a plaintiff must allege:

- (1) that he or she is a qualified individual with a disability;

App. 7

- (2) that he or she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and
- (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

J.V. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1295 (10th Cir. 2016). A “qualified individual with a disability” is one “who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements” for participation in a program or activity. 42 U.S.C. § 12131(2).

Mr. Profita asserts that the defendants discriminated against him by failing to reasonably accommodate his disability. “A public entity must provide a reasonable accommodation under the ADA when it knows that the individual is disabled and requires an accommodation of some kind to participate in or receive the benefits of its services.” *J.V.*, 813 F.3d at 1299 (internal quotation marks omitted).³ A reasonable accommodation is one designed “to avoid discrimination based on a disability” by permitting a qualified

³ The language of Title II is “reasonable modifications,” *see* 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.130(b)(7)(i) (agency regulation implementing Title II), which we have stated is essentially equivalent to Title I’s term “reasonable accommodation.” *See Robertson v. Las Animas Cty. Sheriff’s Dep’t*, 500 F.3d 1185, 1195 & n.8 (10th Cir. 2007). “In Title II cases, this Court has used the terms interchangeably. . . .” *Id.* at 1195 n.8.

App. 8

individual with a disability to “obtain the same benefits made available to nondisabled individuals.” *Taylor v. Colo. Dep’t of Health Care Policy & Fin.*, 811 F.3d 1230, 1236 (10th Cir. 2016). The accommodation must provide *meaningful* access to the program or service. See *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 857 (10th Cir. 2003), *overruled on other grounds as recognized by Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 n.4 (10th Cir. 2012). “Whether an accommodation is reasonable under the ADA is a mixed question of law and fact.” *Punt v. Kelly Servs.*, 862 F.3d 1040, 1050-51 (10th Cir. 2017) (internal quotation marks omitted).

III.

Mr. Profita seeks the opportunity to “complet[e] . . . the last year of medical school given his now well managed disability.” Apl’t. Opening Br. at 8. He asserts that reinstatement at the point he left off is necessary for him to receive meaningful access to the M.D. program. But to provide this requested accommodation, the defendants would be required to ignore, override, or reverse his previous dismissal for unsatisfactory academic performance.

Under Title I of the ADA, which guides our determination of what constitutes a reasonable accommodation for purposes of Mr. Profita’s Title II claim, an employer is not required to reasonably accommodate an employee’s disability by overlooking his previous misconduct, even if that misconduct resulted from his

App. 9

disability. *See, e.g., Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1316 (10th Cir. 2017). In *Dewitt* a diabetic customer-service representative who had been placed on a last-chance agreement because of a prior disciplinary incident suffered a severe drop in blood sugar while at work. *See id.* at 1305. During this incident she “experienced lethargy, disorientation, and confusion,” and she committed further workplace misconduct by dropping two calls from customers. *Id.* Her employer terminated her employment for hanging up on the customers. *See id.* at 1306. She later alleged that her termination violated the ADA because the employer had failed to reasonably accommodate her disability by excusing the disconnected calls, which she claimed were caused by her disability. *See id.* at 1315. We rejected that argument:

Ms. DeWitt’s accommodation claim fails because she did not request a reasonable accommodation to address concerns regarding the possibility of dropped calls; instead, she requested retroactive leniency for her misconduct. Specifically, Ms. DeWitt requested that [her employer] overlook that she hung up on at least two customers while on a Last Chance Agreement. Such retroactive leniency is not a “reasonable accommodation” as defined by the ADAAA. . . .

The ADAAA does not require employers to reasonably accommodate an employee’s disability by overlooking past misconduct – irrespective of whether the misconduct resulted from the employee’s disability. The Equal

Employment Opportunity Commission [EEOC]’s . . . Enforcement Guidance makes clear that the requirement to provide reasonable accommodations under the ADAAA is always prospective, and that an employer is not required to excuse past misconduct even if it is the result of the individual’s disability.

Id. at 1316 (internal quotation marks omitted).

The question here is whether the rule applied in *Dewitt* – which excludes retroactive leniency from the “reasonable accommodation” that employers must provide – applies to Mr. Profita, a student who was dismissed from a university program for unsatisfactory academic performance. Mr. Profita offers several reasons to distinguish *Dewitt*. First, he argues that *Dewitt*’s rule is limited to workplace misconduct. Second, he contends that the rule applies only when future adequate performance by the plaintiff could not be assured. Third, he claims that he seeks prospective, not retrospective, relief because the defendants’ refusal to reinstate him continues to deny him meaningful access to the M.D. program. Finally, he asserts that decisions in other courts and the remedial purposes of the ADA and its 2008 amendments support his claim that reinstatement of a dismissed medical student may be required as a reasonable accommodation. Rejecting these arguments, we conclude that the district court properly applied the rule in *Dewitt* in dismissing this action.

IV.

A.

Mr. Profita faults the district court for expanding what he characterizes as a narrow rule designed to avoid excusing employee misconduct into a “broad performance-based ‘no second chance’ rule” applicable to all reasonable-accommodation claims. Aplt. Opening Br. at 9. He attacks the expansion of this rule on two grounds: that it should be limited to affirmative misconduct, not including poor performance; and that it should apply only in the employment context.

Mr. Profita provides no good reason for limiting the rule to affirmative misconduct. In *Dewitt* we held that an employer is not required to accommodate *either* past misconduct *or* past poor performance. In response to the argument that the plaintiff had not violated a conduct rule but merely a performance standard, we said that “[a]ccording to the EEOC, . . . the basic rule that an employer is not required to excuse past poor performance . . . holds with respect to [violations of] performance standards.” *Dewitt*, 845 F.3d at 1317 (brackets and internal quotation marks omitted). This only makes sense. The purpose of the reasonable-accommodation requirement is not to exempt disabled employees from the consequences of past poor performance at work, but to enable them through reasonable accommodation to perform the essential functions of their job. *See id.* (“Performance standards relate to the quantitative and qualitative requirements for performance of essential functions of a

particular job. . . . [T]he ADAAA permits an employer to apply the same performance standards to an employee with a disability that it applies to employees without disabilities.” (brackets and internal quotation marks omitted)).

Mr. Profita also provides no good reason why the rule should be applied only to *employee* claims. Although he argues that the “doctrine emerges primarily in employment contexts,” *Aplt. Opening Br.* at 11, he concedes that in at least one case it was applied to a dismissed medical student’s unprofessional behavior. In *Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454 (4th Cir. 2012), the Fourth Circuit characterized a medical student’s proposed accommodation – “which included ongoing psychiatric treatment, participation in a program for distressed physicians, and continuing in the Medical School on strict probation” – as unreasonable because, among other things,

[b]y the time [the student] requested that the Medical School implement his special remediation plan, he had already engaged in numerous unprofessional acts that warranted his dismissal, including acting abusively towards staff, multiple unexcused absences, repeated failure to meet deadlines, and tardiness. Thus, [he] sought not a disability accommodation, but a second chance to better control his treatable medical condition.

Id. at 465 (brackets and internal quotation marks omitted).

Halpern is persuasive. Mr. Profita attempts to distinguish it on the basis that “[u]nprofessional behavior obviously falls within the misconduct milieu.” Aplt. Opening Br. at 11. But we have already explained that we do not distinguish between affirmative misconduct and deficient performance (including deficient academic performance) when either is a sufficient ground for termination.

Mr. Profita also argues that in the education context the “no second chance” rule is overbroad and inconsistent with the ADA’s purposes because, for example, a student “may not know if ADA accommodation is needed prior to examination” yet the rule would not require an opportunity to retake the exam even if the student’s disability caused the failing grade. *Id.* at 12-13. But *Dewitt* addressed this concern as well. The EEOC argued that “sometimes, an employee may not know or be willing to acknowledge that there is a problem requiring accommodation until the employer points out deficiencies in performance.” *Dewitt*, 845 F.3d at 1317 (brackets and internal quotation marks omitted). We responded that “an employer is not obliged to apply the brakes on an ongoing disciplinary process based on past performance deficiencies simply because an employee requests an accommodation.” *Id.* at 1317-18. Similarly, Mr. Profita’s accommodation request, which came months after he had twice failed rotations and had been dismissed from the M.D. program, did not obligate the defendants to reinstate him “simply because [he] purported to request, at the eleventh hour, an accommodation.” *Id.* at 1318.

B.

Mr. Profita next argues that the rule should be applied only in cases where the plaintiff's future performance could not be assured. He relies on language in an unpublished district-court housing-discrimination decision, which said that a mentally ill tenant could be entitled to a "second chance" after committing a crime that disqualified her from a federal housing subsidy. *Super v. J.D'Amelia & Assocs., LLC*, No. 3:09CV831 (SRU), 2010 WL 3926887, at *6-8 (D. Conn. Sept. 30, 2010). But the district court's reasoning in *Super* is not binding on us and we do not find it persuasive, particularly given the analysis in *Dewitt*. Also, Mr. Profita's argument that decisions in second-chance accommodation cases "do not turn on [the] timing of the requested accommodation" but on the "effectiveness of the accommodation," Aplt. Reply Br. at 1, is contrary to *Dewitt*, which stated that the employer was "not . . . obligated to stay its disciplinary hand," 845 F.3d at 1318, merely because the employee requested a last-minute accommodation.

C.

Mr. Profita also argues that the rule against retroactive leniency should not apply to him because he in fact seeks a prospective accommodation: the opportunity to complete his medical degree now that he has obtained treatment for his disabling conditions. He contends that so long as "the offending policy forbidding reinstatement back into his last year of medical

school remains firmly in place” he is denied “meaningful public entity access *currently and prospectively* [as] a person with a disability.” Aplt. Opening Br. at 19 (emphasis added) (footnote omitted).

He relies primarily on *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299 (1st Cir. 2003). In that ADA Title III case the disabled plaintiff sued a retailer whose cashier refused to sell him alcoholic beverages when he displayed symptoms mimicking intoxication, even after he explained to the store’s manager that his symptoms were due to his disabling condition. *See id.* at 301-02. The manager told him that the store had a policy that he could not revisit the cashier’s decision to refuse to sell alcoholic beverages to a customer. *See id.* at 302. The district court determined that the store’s actions violated the ADA, and it enjoined the retailer from enforcing what it referred to as its “refusal to reconsider” policy at the store. *Id.* at 303. The First Circuit upheld this injunctive relief. *See id.* at 310-11.

The type of prospective relief *Dudley* authorized is easily distinguished from the relief Mr. Profita seeks here. In *Dudley* the plaintiff did not leave the store, then return nine months later insisting that he had been disabled during the earlier transaction and asking that the earlier transaction now be completed at the original price and on the original terms. Rather, the plaintiff was still in the store, attempting to purchase alcohol, when he disclosed to the manager that his disability had caused his inebriation-like symptoms; and the retailer unreasonably refused to consider his disability-based explanation. And the court approved only

App. 16

prospective injunctive relief applicable to *future transactions* at the store.

Nor has Mr. Profita convinced us of his broader point, that he seeks only a prospective accommodation. To permit this characterization of “prospective accommodation” would eviscerate *Dewitt’s* “no retroactive leniency” rule. For example, a terminated employee who had never requested accommodation during his employment but who later obtained medical treatment that made him capable of performing his former job could always claim to be requesting only *prospective* relief when seeking to be rehired and even given seniority-based benefits he had earned at the time he was fired. That is not the purpose of a reasonable accommodation under the ADA. The disability statutes do not require that a disabled person properly terminated from a job or program be given a greater opportunity for reinstatement than that given to a terminated person who is not disabled. In this case all terminated medical students must apply for readmission; Mr. Profita was not treated differently.

D.

Mr. Profita also argues that cases from other courts support his claim. But we do not find those cases persuasive because none addressed the issue before us. Either the accommodation was requested before termination or the defendant had agreed to consider reinstatement.

App. 17

E.

Finally, Mr. Profita argues that both the ADA and the ADAAA were enacted with a remedial purpose, to eliminate discrimination against people with disabilities. He contends that a “no leniency” rule violates the congressional mandate reflected in these statutes. But such broad policy arguments cannot override statutory language or our precedents.

V.

We affirm the district court’s order dismissing Mr. Profita’s complaint for failure to state a claim.

Entered for the Court

Harris L Hartz
Circuit Judge

App. 18

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 16-cv-03032-RBJ

TAYLOR CHRISTIAN PROFITA,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY
OF COLORADO,
THE UNIVERSITY OF COLORADO HEALTH
SCIENCES CENTER, a/k/a University of Colorado
Denver/Anschutz Medical Campus,
JOHN J. REILLY, JR, M.D. in his official capacity
as Dean of the University of Colorado Health
Sciences Center,

Defendants.

ORDER

(Filed Mar. 15, 2017)

This matter is before the Court on defendants' motion to dismiss. ECF No. 18. For the reasons below, the Court GRANTS that motion and dismisses plaintiff Taylor Profita's suit with prejudice.

I. FACTS

Plaintiff Taylor Profita is a former student at the University of Colorado School of Medicine (“the University”). Compl., ECF No. 13, at ¶13. By all indications, prior to the events giving rise to this suit, Mr. Profita was a successful student. *Id.* at ¶¶14-15. However, in the fall of 2011 plaintiff was placed on academic probation after failing two clinical rotations in what was his fourth year of study.¹ *Id.* at ¶¶18-20. He alleges that the reason for his failing these two courses was worsening depression, anxiety, and sleep disturbances. *Id.* at ¶17. These conditions appear to be a result of what plaintiff alleges is underlying Major Depressive Disorder (“MDD”), Unspecified Anxiety Disorder (“UAD”), chronic insomnia/sleep apnea, and hypothyroidism. *Id.* at ¶9.

After failing those rotations, plaintiff received a letter from the University explaining to him that he could return to the school in academic good standing if he retook and passed those courses. *Id.* at ¶21. However, the letter also notified plaintiff that the school’s Student Promotions Committee had voted to require him to undergo an evaluation by the Colorado Physicians Health Program prior to his return. *Id.* at ¶24. Plaintiff subsequently received a psychiatric evaluation per the University’s request, which found that plaintiff has “symptoms that would suggest a mood

¹ The clinics plaintiff failed were the last two third-year clinical rotations he had to complete. ECF No. 1, at ¶18. Allegedly due to scheduling conflicts, plaintiff began these clinics in what was his fourth year at the University. *See id.*

syndrome . . . disabling anxiety disorder . . . [and] psychotic disorder.” *Id.* at ¶25.

Plaintiff denies these symptoms. *See, e.g., id.* at ¶¶27, 29. Instead, he explains that the doctor who evaluated him did not recognize or understand his previous diagnoses, including those for MDD and UAD. *Id.* at ¶27. In any event, after his psychiatric evaluation plaintiff resumed his studies, reenrolling in one of the two clinical rotations he had earlier failed. *Id.* at ¶29. He subsequently failed again. *Id.* After this second failure, the University dismissed plaintiff from the school for “unsatisfactory academic performance” per the school’s dismissal policy. *Id.* at ¶33. That policy allegedly states, however, that while the final decision of dismissal for this reason resides with the Dean of the University, “exceptions may be made on the basis of particular circumstances.” *Id.* at ¶37.

Plaintiff alleges that after his dismissal from school he began working on his psychological issues with professional help. *Id.* at ¶38. He contends that he has improved his symptoms greatly. *See id.* at ¶44. Desiring the opportunity to return to school to finish his degree, plaintiff sent the University a letter in September of 2016 requesting that he be readmitted and granted credits for the work he already successfully completed. *Id.* at ¶39. The University denied his request. *Id.* at ¶52. It nevertheless notified plaintiff that it was also University policy to allow dismissed students to reapply as new students to start school afresh as first-year medical students. *Id.* at ¶54.

Procedural History

Plaintiff rejected the University's offer to reapply as a new student, choosing instead to file suit against the school, Dr. John Reilly (the school's dean), and the University regents in this Court on December 12, 2016. *See generally id.* In his complaint, plaintiff alleges that by denying him the opportunity to reenroll at the University where he left off, defendants failed to "reasonably accommodate" his "disability" in violation of several provisions of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, *et seq.* *See id.* at §§55-92.² He asks that this Court declare that defendants violated Title II by refusing to readmit him, and subsequently enjoin them from continuing to deny him that opportunity. *See id.* A few weeks after plaintiff filed suit, defendants moved to dismiss plaintiff's complaint on January 26, 2017. ECF No. 18. Defendants' motion has been fully briefed and is ripe for review.

II. STANDARD OF REVIEW

To survive a 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to

² Plaintiff also cites portions of Title I and Title III of the ADA. *See, e.g., id.* at §91(citing 42 U.S.C. § 12112(b)(5)(A) (Title I discrimination) and 42 U.S.C. § 12182(b)(2)(A)(ii) (Title III discrimination)). The Court assumes that plaintiff cites these provisions as a means of conveying that he seeks to hold defendants liable for discrimination by failing to make a reasonable accommodation, rather than as separate claims in of themselves since plaintiff is not an employee of defendants (Title I) and defendants are not private entities (Title III).

relief that is plausible on its face.” *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim is a claim that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), conclusory allegations are not entitled to be presumed true, *Iqbal*, 556 U.S. at 681. However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See, e.g., Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

III. ANALYSIS

Defendants contend that by requesting that the University readmit him as a fourth-year medical student, the relief plaintiff requested and now seeks here amounts to “excusal” for his prior poor academic performance. ECF No. 18 at 4. They subsequently argue that his claim for readmission must be dismissed because a request for such relief has been rejected as a “reasonable accommodation” by the Tenth Circuit in other ADA contexts. *Id.* Plaintiff responds that he is not asking for defendants to retroactively excuse his past performance. Pl.’s Resp., ECF No. 20, at 2. Rather,

he argues that his request was for defendants to grant him a variance per the terms of University's dismissal policy and that, framed in this way, his relief is prospective. *Id.* I agree with defendants. Accordingly, the Court GRANTS defendants' motion to dismiss and dismisses the entirety of plaintiff's suit with prejudice.

A. Title II of the ADA.

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; see *Guttman v. Khalsa*, 669 F.3d 1101, 1108 (10th Cir. 2012). As the Tenth Circuit has explained, to have a viable claim under Title II a plaintiff must establish:

- (1) that he or she is a qualified individual with a disability;
- (2) that he or she was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and
- (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.³

³ Defendants do not appear to dispute the first element of whether plaintiff is a "qualified individual with a disability" for purposes of their motion to dismiss. See *generally* ECF No. 18.

J.V. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1295 (10th Cir. 2016) (quoting *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir.1999)). “Based on the second element, courts have recognized two types of claims (1) exclusion from or denial of benefits and (2) discrimination.” *Id.* (citation omitted).

Although he does not explicitly label his claim as such, plaintiff alleges that defendants “discriminated” against him in violation of Title II because defendants failed to reasonably accommodate his disabilities. *See id.* (explaining that there are three ways to establish discrimination in violation of Title II, one of which is by showing that a defendant failed to make a reasonable accommodation for one’s disability) (citations omitted).⁴ Thus, to have a viable claim and survive dismissal, plaintiff must establish that he requested a reasonable accommodation that was denied, or that the need for a reasonable accommodation “was obvious” and defendants subsequently failed to provide one. *See id.* at 1299.

What constitutes a request for a “reasonable accommodation” is a mixed question of law and fact. *See Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260,

Instead, their arguments focus on whether or not plaintiff was “discriminated against” when defendants denied plaintiff’s request for readmission.

⁴ Title II technically uses the phrase “reasonable modification” instead of “reasonable accommodation,” but the Tenth Circuit has explained that these two standards are identical. *See Robertson v. Las Animas Cnty. Sheriff’s Dep’t*, 500 F.3d 1185, 1195 n.8 (10th Cir. 2007).

1267 (10th Cir. 2015). However, the Tenth Circuit has explained that, at least in the employer-employee context, a request for relief that amounts to “retroactive leniency” for an employee’s past misconduct, even if that misconduct resulted from the employee’s alleged disability, is not a request for a reasonable accommodation as a matter of law. *See Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1316 (10th Cir. 2017) (citing *Davila v. Quest Corp., Inc.*, 113 F. App’x 849, 854 (10th Cir. 2004)); *see also, e.g., Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 465-466 (4th Cir. 2012) (concluding that a request for readmission after a student was dismissed for unprofessional acts was “not a disability accommodation, but a second chance” and that denial of such a request was “not a cause of action under the ADA”) (internal quotation marks omitted).

Thus, in *Dewitt*, the Tenth Circuit rejected a diabetic employee’s claim against her employer under the Americans with Disabilities Amendments Act of 2008 (“ADAAA”) because it found that the “accommodation” the employee requested – reinstatement after being fired – was really a request to require the employer to excuse the plaintiff’s prior misconduct – i.e., dropping calls as an operator at a call center. *Dewitt*, 845 F.3d at 1316. Even though the Tenth Circuit recognized that the employee’s “misconduct” may very well have been caused by her disability (e.g., missing calls when suffering from drops in blood sugar), the court nevertheless explained that her request for reinstatement failed because it was not a request for her employer to “accommodate concerns regarding the *possibility* of

dropped calls” caused by her disability. *Id.* (emphasis added). Instead, it was merely a claim for “retroactive leniency” that could not amount to a reasonable accommodation under the ADAAA because such relief must always be “prospective.” *Id.* at 1316; *see also Dewitt v. Sw. Bell Tel. Co.*, 41 F. Supp. 3d 1012, 1021 (D. Kan. 2014), *aff’d*, 845 F.3d 1299 (10th Cir. 2017) (collecting decisions by other circuits coming out the same way).

B. A Request to Excuse Past Poor Academic Performance, Even When that Poor Performance was Caused by a Disability, is not a Request for a “Reasonable Accommodation” Under the ADA.

Here, I find that the reasoning behind the Tenth Circuit’s employment “misconduct” precedent should apply, and that plaintiff’s suit must therefore be dismissed. While plaintiff is not a former employee seeking reinstatement after being fired for misconduct, the relief he requested – readmission as a fourth-year medical student after being dismissed for poor performance – nevertheless amounted to a request for the same thing: “excusal” for past events and a second (or here, third) chance to do it over again. *See* ECF No. 1 at ¶¶21, 30. Because such a request was necessarily for “retroactive” relief rather than for “prospective” relief, it was not a request for an accommodation. *See Dewitt*, 845 F.3d at 1316. Defendants’ denial of it cannot therefore serve as a basis for a discrimination suit under the ADA as a matter of law. *See id.* (“Ms. DeWitt’s accommodation claim fails because she did not request a

reasonable accommodation to address concerns regarding the possibility of dropped calls; instead, she requested retroactive leniency for her misconduct.”); *Davila*, 113 F.App’x at 854 (“[E]xcusing workplace misconduct to provide a fresh start/second chance to an employee whose disability could be offered as an after-the-fact excuse is not a required accommodation under the ADA.”).

A comparison of what plaintiff *might* have requested as an “accommodation” versus what he did in fact request further proves the point. It was not as if plaintiff, while a student at the University, requested that the school, for example, allow him to take classes offered later in the day because of his insomnia, or that it give him access to quieter study rooms because of his anxiety. Those requests are “accommodations,” the reasonableness of which might be a fact question. By contrast, here, after he was already given a second chance to retake the clinical courses, plaintiff claims that he requested that the University ignore his past poor academic performance and reinstate him as a student, *id.* at ¶39. Such a request, however, is not so much an *accommodation* of a disability as it is an *absolution* for problems caused by one.⁵

⁵ If a request for readmission constituted a request for a reasonable accommodation, it is unclear to me how a university, or an employer for that matter, could ever terminate someone for poor performance or misconduct allegedly caused by his or her disability without facing an ADA lawsuit. A disabled individual would always be able to make a request to retake an exam he or she failed, arguing that his or her disability caused the failing grade, and that a retest was therefore necessary to

Reaching that conclusion, I find plaintiff's attempts to side-step this outcome semantically by recasting his claim as one for "prospective" relief unpersuasive.⁶ No matter how you slice it, the relief plaintiff requested and now seeks through this action is retrospective in nature. Plaintiff wants the University to give him another chance by readmitting him as a fourth-year student, thereby excusing the failing grades he received during his clinical courses several years ago. Thus, while plaintiff now claims that his relief is prospective because he sought to compel the University to grant him a variance from its dismissal policy going forward, his claim necessarily relies on events that occurred in the past and requires that the University overturn decisions it made previously. His

"accommodate" his or her disability. The ADA in my and the Tenth Circuit's estimation, however, was not designed to give disabled individuals a "second" or "third" chance. *See, e.g., Davila*, 113 F. App'x at 854. Rather, it was meant to give disabled individuals a fair shot at a *first* chance.

⁶ Although the bulk of plaintiff's complaint alleges that defendants failed to reasonably accommodate his disabilities by denying his request for readmission, plaintiff vaguely asserts at one point in his complaint that defendants' actions denied him "meaningful access to the benefit" of readmission. ECF No. 1 at ¶84. To the extent plaintiff argues that the University denied him the benefit of readmission because of his disability, which would be a separate cause of action, see *J.V.* 813 F.3d at 1295, I find that plaintiff fails to state a claim upon which relief could be granted. As plaintiff's complaint makes clear, the University denied him this "benefit" because of his poor performance, not because of his disability. *See, e.g.,* ECF No. 1 at ¶¶33, 55; *JL*, 165 F. Supp. 3d at 1073 (explaining that, to state a claim under Title II, "a plaintiff must allege that . . . (3) such . . . denial of benefits . . . was by reason of a disability").

argument on this point is therefore no more persuasive than would be a similar argument by a terminated employee that reinstatement is also somehow prospective because it amounts to a “variance” from an employer’s termination procedures or its decision to fire that employee. *See, e.g., Dewitt*, 845 F.3d at 1316.

Similarly, I do not find the cases from outside this jurisdiction that plaintiff cites to in his brief should dictate a different outcome here. Those cases did not decide the central issue presented in this case: can a request for readmission by a student dismissed for poor academic performance constitute a request for a “reasonable accommodation?” *See, e.g., Garcia v. State Univ. of NY. Health Scis. Ctr. at Brooklyn*, No. CV 97-4189 (RR), 2000 WL 1469551, at *8 (E.D.N.Y. Aug. 21, 2000), *aff’d sub nom. Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001) (deciding whether the conditions within a school’s offer of readmission were “a subterfuge for discrimination”); *see Doe v. New York Univ.*, 666 F.2d 761, 767-68 (2nd Cir. 1981) (deciding at the summary judgment stage whether a former student had been denied readmission “solely” because of her disability). By all indications, Tenth Circuit precedent strongly suggests the answer to that question is “no.” *See Dewitt*, 845 F.3d at 1316; *Davila*, 113 F. App’x at 854. Accordingly, I find that dismissal of plaintiff’s suit under Title II of the ADA is warranted.

App. 30

ORDER

For the reasons above, the Court GRANTS defendants' motion to dismiss [ECF No. 18] and dismisses plaintiff's suit with prejudice. As the prevailing party, defendants are awarded their reasonable costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

DATED this 15th day of March, 2017.

BY THE COURT:

/s/ Brooke Jackson
R. Brooke Jackson
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-03032-RBJ

TAYLOR CHRISTIAN PROFITA,
Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY
OF COLORADO
THE UNIVERSITY OF COLORADO HEALTH
SCIENCES CENTER, also known as University of
Colorado Denver/Anschutz Medical Campus, and
JOHN J. REILLY, JR., M.D., in his official capacity
as Dean of the University of Colorado Health
Sciences Center,
Defendants.

FINAL JUDGMENT

(Filed Mar. 15, 2017)

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the ORDER [ECF No. 22] of Judge R. Brooke Jackson entered on March 15, 2017, it is

ORDERED that Defendants' Motion to Dismiss [ECF No. 18] is GRANTED. It is

App. 32

FURTHER ORDERED that this case is DIS-
MISSED WITH PREJUDICE. It is

FURTHER ORDERED that as the prevailing
party, the defendants are AWARDED their reasonable
costs pursuant to Fed. R. Civ. P. 54(d)(1) and
D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 15th day of March,
2017.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ J. Dynes
J. Dynes Deputy Clerk

App. 33

CASE No. 17-1127

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TAYLOR CHRISTIAN PROFITA,
Plaintiff-Appellant,

v.

THE REGENTS OF THE UNIVERSITY
OF COLORADO, THE UNIVERSITY OF
COLORADO HEALTH SCIENCES CENTER, a/k/a
University of Colorado Denver/Anschutz Medical
Campus, and JOHN J. REILLY, JR., M.D.,
in his official capacity as Dean of the
University of Colorado Health Sciences Center,
Defendants-Appellees.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge R. Brooke Jackson
D.C. No. 16-cv-03032

APPELLANT'S OPENING BRIEF

Dated: June 9, 2017 Respectfully submitted,

/s/ John B. Roesler
JOHN B. ROESLER, ESQ.
899 Logan Street, Suite 200
Denver, Colorado 80203

App. 34

Tel: (303) 832-1282

E-mail: jroesler@lawyer.com

ATTORNEY FOR APPELLANT

ORAL ARGUMENT IS REQUESTED

* * *

STATEMENT OF THE FACTS

Taylor Profita was admitted to the University of Colorado School of Medicine based upon extensive interviews, nearly perfect undergraduate grades, and a superior MCAT score. (Aplt. App. at 7). He commenced his medical studies in the Fall of 2008. Taylor's performance for the first three academic years was very successful with grades of "pass" and "high pass", passage of Step 1 of the National Board of Medical Examiners, and exemplary completion of the first five of seven clinical rotations, which included acknowledgements from his clinical professors such as, "For his level of training, Taylor possessed knowledge above expectations, he was a pleasure to have on service." (Aplt. App. at 8).

* * *

Then in the Fall of 2011, the last year of medical school, came a tipping point with outside family pressures, worsening depression and anxiety not in remission. (Aplt. App. at 8). This episode was not adequately treated or controlled by the medical school's Student Health Services psychiatrist, Lynn Fenton, M.D. (Aplt. App. at 8). During this period, the last two clinical rotations were taken, and they were failed due to the uncontrolled disability. (Aplt. App. at 8, 9).

Taylor was then placed on academic probation, as well as leave of absence for the Spring semester of 2012 when he was to be evaluated by the Colorado Physicians Health Program (CPHP) so that the Promotions Committee could determine “next steps”. (Aplt. App. at 9).

The CPHP psychiatrist, Scott Humphries, M.D., at first stated that symptoms suggested a disabling anxiety disorder, but because Taylor denied this, due to lack of recognition and understanding as the “patient”, Dr. Humphries went on to make a critically inaccurate diagnosis of “maladaptive personality traits”, not recognizing MDD and UA. This incorrect diagnosis misled the medical school Promotions Committee (as well as Taylor) to avoid the issue of ADA accommodation when he was enrolled as a student. (Aplt. App. at 9, 10). Taylor was inserted into remediation of the Women’s Care rotation which he promptly failed due to his condition. He never got to the other rotation remediation. (Aplt. App. at 10).

Based upon recommendation of the Promotions Committee, on January 3, 2013, Dean Richard Krugman, M.D., dismissed Taylor “for unsatisfactory academic performance”, premised upon the two failed rotations. (Aplt. App. at 10).

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TAYLOR CHRISTIAN PROFITA,
Plaintiff-Appellant,

v.

THE REGENTS OF THE UNIVERSITY
OF COLORADO, THE UNIVERSITY OF
COLORADO HEALTH SCIENCES CENTER, a/k/a
University of Colorado Denver/Anschutz Medical
Campus, and JOHN J. REILLY, JR., M.D.,
in his official capacity as Dean of the
University of Colorado Health Sciences Center,
Defendants-Appellees.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge R. Brooke Jackson
D.C. No. 16-cv-03032

APPELLANT'S APPENDIX

Respectfully submitted,

Dated: June 9, 2017

/s/ John B. Roesler

JOHN B. ROESLER, ESQ.
899 Logan Street, Suite 200
Denver, Colorado 80203

App. 37

Tel: (303) 832-1282

E-mail: jroesler@lawyer.com

ATTORNEY FOR APPELLANT

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

TAYLOR CHRISTIAN PROFITA,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY
OF COLORADO; the UNIVERSITY OF COLORADO
HEALTH SCIENCES CENTER, a/k/a University
of Colorado Denver/Anschutz Medical Campus; and
JOHN J. REILLY, JR., M.D., in his official capacity
as Dean of the University of Colorado Health
Sciences Center,

Defendants.

COMPLAINT

(Filed Dec. 12, 2016)

COMES NOW Plaintiff by and through his attorney, John B. Roesler, and for his cause of action against Defendants states and alleges, as follows:

INTRODUCTION

1. This case arises under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq., in particular violation of § 1232 of Subchapter II, Part A (Title II), discrimination by a public entity for refusal to make reasonable accommodation to an otherwise qualified individual with a disability.

* * *

13. Plaintiff commenced his studies at the SOM in the fall of 2008, and matriculated there during the academic years of 2008-2009, 2009-2010, 2010-2011, and 2011-2012.

14. Plaintiff's performance for the first three academic years, through the spring and summer of 2011, was successful with grades of "pass" and "high pass", passage of Step 1 of the NBME, and successful completion of the first five of seven third year block clinical rotations.

15. Reviews of Plaintiff's performance in these five rotations include: "Taylor did exceptionally well with this rotation," "skills were appropriate for someone at this stage," "Taylor was a pleasure to have on the rotation," "impressed our team with very precise and organized patient presentations," "for his level of training . . . possessed knowledge above expectations . . . a pleasure to have on service."

16. Notwithstanding his impairments described in ¶ 9, Plaintiff was able to adequately perform at the SOM for three years.

17. Then in the fall of 2011 came a tipping point, with additional outside pressures, worsening depression, anxiety, and sleep disturbance, which were not adequately treated or controlled by the treating physician, Lynn Fenton, M.D., psychiatrist at the SOM Student Health Service.

18. Due to scheduling, the last two of the third year seven clinical rotations, Hospitalized Adult Care (HAC) and Women's Care, were taken in this period, the fourth academic year of 2011-2012.

19. HAC commenced on August 15, 2011, continuing until November 9, 2011, and Women's Care commenced November 11, 2011, ending January 27, 2012.

20. Plaintiff failed these two rotations and was placed on academic probation, as well as leave of absence for the spring semester of 2012.

21. A May 21, 2012 letter from the SOM's Student Promotions Committee informed Plaintiff of the above, advising that he would be returned to good academic status if he successfully remediated the HAC and Women's Care blocks.

22. The May 21st letter also expressed "major concerns" about Plaintiff's "personal wellness."

23. A November 11, 2011 email between professors stated, "I really did have concerns about him."

24. The May 21st letter also stated "the Committee voted to require an evaluation from CPHP [Colorado Physicians Health Program]. They will review a

final report from CPHP and based on this consider the next steps.”

25. Plaintiff was then evaluated by CPHP’s Scott Humphreys, M.D., psychiatrist, who in his July 20, 2012 report stated, “We have reviewed symptoms that would suggest a mood syndrome . . . disabling anxiety disorder . . . psychotic disorder.”

26. Plaintiff denied symptoms of the above because of lack of recognition/understanding.

27. According to Dr. Matthews, Dr. Humphreys then made a critically inaccurate diagnosis of “maladaptive personality traits,” not recognizing Plaintiff’s MDD and anxiety disorders, despite Dr. Fenton’s input and medical records documenting MDD with symptoms not in remission at that time as well as before and after the CPHP evaluation.

28. “Having a major depressive disorder and an anxiety disorder that is inadequately treated . . . can [as it did in this case in 2011-2012] radically negatively impact one’s ability to learn and retain complicated medical information.” Dr. Matthews’ Evaluation.

29. Dr. Humphreys’ “obviously incorrect diagnosis when compared to Mr. Profita’s psychiatric treatment records and information that CPHP itself obtained . . . misled the University Promotions Committee and allowed that University Committee to avoid the issue of accommodating Mr. Profita’s illness.” Dr. Matthews’ Evaluation.

30. Plaintiff was reinserted back into remediation of the Women's Care rotation which he promptly failed due to his uncontrolled MDD and anxiety disorder, compounded by his unmanaged sleep disorder and hypothyroidism.

31. Since Plaintiff needed to pass both HAC and Women's Care remediations, he never got to the HAC remediation.

32. "According to Dr. Fenton's notes, Mr. Profita's symptoms of major depressive disorder worsened [further] after the evaluation of Dr. Humphreys and during his repeated OB/Gyn rotation in the fall of 2012." Dr. Matthews' Evaluation.

33. Upon recommendation of the Promotions Committee, on January 3, 2013, Richard D Krugman, M.D., then Dean of School of Medicine, sent Plaintiff a letter of dismissal "for unsatisfactory academic performance."

34. Pursuant to Section 3.2.5 "Dismissal" in the University of Colorado School of Medicine Policies and Procedures M.D. Program (Policies), for the academic year of 2012-2013, "The final decision for dismissal resides with the Dean of the School of Medicine."

* * *

42. Plaintiff's September 26th letter explained that the extent and impact of his medical/psychological issues, under which he was laboring in the 2011-2012 academic year, has only been learned since his dismissal.

43. Plaintiff attached Dr. Matthews' Evaluation to his September 26th letter, which report (along with Dr. Casement's Evaluation) was specifically referenced and incorporated in the letter.

44. In the September 26th letter, Plaintiff further explained that his medical/psychological issues were now under control, well managed, and treated through therapy and correct medication.

45. Dr. Matthews' and Dr. Casement's reports substantiated this with detailed and thorough medical/psychological evaluations.

46. "With more active and aggressive medication management and supportive psychotherapy it is likely that Mr. Profita would have been and would be successful in medical school." Dr. Matthews' Evaluation.

47. "Mr. Profita's major depressive disorder is currently in remission. . . . His prognosis is excellent with continued medications and supportive psychotherapy." Dr. Matthews' Evaluation.

48. "[T]here is no significant or appreciable risk of recurrence of symptoms which would interfere with completion of Mr. Profita's medical studies . . . [, his conditions] now in remission and well managed." Dr. Casement's Evaluation.

49. "Mr. Profita's current IQ [133] and memory are clearly within the range necessary for doing well in medical school. . . ." Dr. Matthews' Evaluation.

* * *

App. 43

Case No. 17-1127

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TAYLOR CHRISTIAN PROFITA,
Plaintiff-Appellant,

v.

THE REGENTS OF THE UNIVERSITY
OF COLORADO, THE UNIVERSITY OF
COLORADO HEALTH SCIENCES CENTER, a/k/a
University of Colorado Denver/Anschutz Medical
Campus, and JOHN J. REILLY, JR., M.D.,
in his official capacity as Dean of the
University of Colorado Health Sciences Center,
Defendants-Appellees.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge R. Brooke Jackson
D.C. No. 16-cv-03032

APPELLANT'S REPLY BRIEF

Dated: July 24, 2017 Respectfully submitted,

/s/ John B. Roesler
JOHN B. ROESLER, ESQ.
899 Logan Street, Suite 200
Denver, Colorado 80203

App. 44

Tel:(303) 832-1282

E-mail: jroesler@lawyer.com

ATTORNEY FOR APPELLANT

ORAL ARGUMENT IS REQUESTED

* * *

The SOM, Ans. Br., 17,18, argues that Taylor could have just reapplied as a new student. As alleged in the Complaint, “having to start over in medical school . . . would not be a reasonable accommodation” or alternative . . . , and “*if* accepted after dismissal” it would mean “incurring an additional \$300,000 in student debt.” (Aplt. Appx. at 11). The “if” is a BIG IF, really an impossibility. For one thing, the exclusion order prohibiting contact with SOM faculty and staff as mentioned in the statement of Prior or Related Appeals, preliminary p. iii herein, makes it difficult, if not impossible, for Taylor to even contact prior professors at the SOM to obtain letters of recommendation. (It is reiterated here that Taylor was not dismissed because of any misconduct or unprofessional behavior, Aplt. Appx. at 10.) Furthermore, insofar as application to another medical school, *see e.g.*, Keck School of Medicine of USC, “[i]ndividuals who have discontinued studies in medical school for academic reasons are not eligible to apply . . . ” Keck School of Medicine of USC/Education/MD Program/Admissions. And the court in *Dean*, 804 F. 3d at 185, found that “[b]ecause Dean was dismissed from UB-MED he is ineligible to transfer to another American medical school.” The idea that Taylor would be

App. 45

accepted at the SOM or another medical program really tests credibility and common sense in this case.

* * *
