

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JEREMY JOSEPH DURRENBERGER,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION NO. 4:09-CV-00786
	§	
TEXAS DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
<i>Defendant.</i>	§	

**TDCJ'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER
GRANTING DURRENBERGER'S MOTION FOR SUMMARY JUDGMENT**

TO UNITED STATES DISTRICT JUDGE SIM LAKE:

Pursuant to Rule 60 of the FEDERAL RULES OF CIVIL PROCEDURE, TDCJ, by counsel, the Texas Attorney General, submits this Motion requesting the Court reconsider Its Order granting Durrenberger's Motion for Summary Judgment.

NATURE AND STAGE OF PROCEEDINGS

Durrenberger filed suit claiming disability discrimination under the Americans with Disabilities Act and the Rehabilitation Act. Durrenberger complained his hearing loss prevented him from participation in visitation with an inmate. The Court has determined Durrenberger is hearing impaired and that TDCJ discriminated against Durrenberger by failing to accommodate Durrenberger's disability with an auxiliary hearing device or an attorney-client booth visit. TDCJ seeks reconsideration of the Court's ruling because: 1) Durrenberger's admission that he has not used or carried an auxiliary device set against his claim he is entitled to an auxiliary aid at TDCJ presents a factual issue for the jury as to whether he has a disability and whether TDCJ reasonably accommodated any disability and 2) a factual dispute remains regarding the Rehabilitation Act

causation factor necessary to a determination of intentional discrimination.

ARGUMENT AND AUTHORITY

I. Durrenberger's acknowledgment that he has not used or carried an auxiliary hearing device presents a fact issue as to his disability and the reasonableness of TDCJ's accommodation to the disability.

TDCJ asserts a factual issue remains as to whether Durrenberger's hearing disability substantially limits his ability to hear when using a phone and whether TDCJ's accommodations were reasonable. The court relies on Durrenberger's statement of his personal experience that he could not hear and finds that a reasonable fact-finder could conclude Durrenberger's impairment substantially limits his ability to hear when using a phone. However, Durrenberger has also stated in his interrogatory responses that he has not used or carried an auxiliary device.¹ (Exhibit A). TDCJ asserts a reasonable fact-finder could conclude Durrenberger's failure to carry or use a device in the past as evidence his hearing impairment is not substantially limiting. That is, if Durrenberger in his daily life has not provided himself with an auxiliary device, particularly as he claims such a device is low cost and easily attainable, then a fact issue is presented as to Durrenberger's disability. The same evidentiary conflict presents a second fact issue in relation to the reasonableness of TDCJ's proffered accommodations. That is, in light of the fact Durrenberger has not provided himself with an auxiliary device it is a jury issue whether TDCJ's accommodation in declining to provide an auxiliary device while at the same time providing alternatives in pen and paper, an end booth and use of the day room phones is reasonable. Finally, TDCJ asserts Durrenberger may not on the one hand object to TDCJ's inquiry about use of auxiliary devices while on the other hand

¹ In Its Order, the Court stated Durrenberger objected to the Interrogatory inquiring about his use of auxiliary devices. Durrenberger did object but he also answered, 'None'. Both the objection and his answer were submitted in TDCJ's summary judgment evidence attached herein to this Motion as Exhibit A.

submit an affidavit relating to auxiliary devices yet claim an absence of a factual dispute relating to auxiliary devices. This is particularly true when, as here, his Interrogatory response that he has not used an auxiliary device is inconsistent with his affidavit testimony. *Cole v. Frank's Casing Crew & Rental Tools*, 2005 WL 2647966 (S.D. Tex. 2005)(unpublished). TDCJ asserts Durrenberger's failure to use an auxiliary device regardless of the reason, presents a fact issue for a jury as to the existence of his disability and as to the reasonableness of TDCJ's accommodation.

II. The Rehabilitation Act causation standard is relevant to a determination of discrimination, based on disability.

In Its Order, the Court relied on the case of *Bennett-Nelson v. Louisiana Board of Regents*, 431 F.3d 448 (5th Cir. 2005) finding the causation standard irrelevant if an accommodation is required and denied. However, the *Bennett-Nelson* court also noted that the causation standard was not material in that appeal but may later become so and noted the failure to accommodate was the *sole* cause. *Bennett-Nelson* at 455. TDCJ asserts the Rehabilitation Act causation requirement is a necessary element in the present case because other factors such as the security concerns motivated the denial of an auxiliary device. TDCJ asserts that because the Rehabilitation Act, like other anti-discrimination statutes, imposes remedies for intentional discrimination, the plaintiff bears the ultimate burden of demonstrating discrimination. *Pinkerton v. Spellings*, 529 F.3d 513, 516-517 (5th Cir. 2008)(§ 504 of Rehabilitation Act causation standard of "solely" consistent with Title VI);*Alexander v. Sandoval*, 121 S.Ct. 1511, 1516 (2001)(Title VI prohibits intentional discrimination). Intentional discrimination is usually examined under the McDonnell-Douglas paradigm which requires a plaintiff ultimately prove discrimination. *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973); *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2746 (1993);

Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089, 1094 (1981). *L. Lewis v. City of Chicago, Illinois*, 130 S.Ct. 2191, 2199-2200 (2010). Recently the court has considered causation as a *prima facie* element necessary to prove intentional discrimination under the Rehabilitation Act. *Stewart v. City of Houston Police Dept.*, 372 Fed Appx 475, 477 (5th Cir. 2010). TDCJ asserts, unlike the *Bennett-Nelson* case where the accommodation was the only issue, causation is relevant to the present case. Also, at the time of *Bennett-Nelson* case, Eleventh Amendment immunity under the ADA had not been established in the Fifth Circuit.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, TDCJ prays the Court will reconsider Its Order Granting Durrenberger's Summary Judgment Motion and permit a trial on the merits.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

DAVID C. MATTAX
Director of Defense Litigation

DAVID A. TALBOT, JR.
Assistant Attorney General
Chief, Law Enforcement Defense Division

/s/ Susan E. Werner
SUSAN E. WERNER
Assistant Attorney General
Attorney-in-Charge
State Bar No. 21190350
Southern District Fed. I.D. No. 9852

P. O. Box 12548, Capitol Station
Austin, Texas 78711
512-463-2080 / 512-495-9139 (fax)

ATTORNEYS FOR DEFENDANTS

NOTICE OF ELECTRONIC FILING

I, SUSAN E. WERNER, Assistant Attorney General of Texas, certify that I have electronically submitted for filing, a copy of the above and foregoing **TDCJ's Motion for Reconsideration of the Court's Order Granting Durrenberger's Motion for Summary Judgment** in accordance with the Electronic Case Files system of the Southern District of Texas, on this the 4th day of January 2011.

/s/ Susan E. Werner
SUSAN E. WERNER
Assistant Attorney General

CERTIFICATE OF SERVICE

I, SUSAN E. WERNER, Assistant Attorney General of Texas, certify that a copy of **TDCJ's Motion for Reconsideration of the Court's Order Granting Durrenberger's Motion for Summary Judgment** has been served by placing same in the United States Postal Service, postage prepaid, certified return receipt requested, on this 4th day of January 2011 addressed to:

Scott Medlock *Via CM/RRR# 7004 2510 0004 1673 1148*
James Harrington
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, Texas 78741-3438
Counsel for Plaintiff

/s/ Susan E. Werner
SUSAN E. WERNER
Assistant Attorney General