UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Lead Case No. 1:11-cv-884

CATHERINE J. ZANG, et al.,

Plaintiffs

Dlott, J.
Bowman, M.J.

v.

JOSEPH ZANG, et al.,

Defendants

JAVIER LUIS,

Case No. 1:12-cv-629

Plaintiff,

Dlott, J.
Bowman, M.J.

v.

JOSEPH ZANG, et al.,

Defendants.

MEMORANDUM ORDER

I. Background

The background of the above two cases, set forth in prior orders, is repeated herein for the convenience of this Court. Both cases relate to underlying divorce and custody proceedings between Catherine Zang and Joseph Zang in the Hamilton County Ohio Court of Common Pleas. During the course of those state proceedings, Plaintiff Catherine Zang learned that her now ex-husband had installed audio and video surveillance equipment in the marital residence, and spyware on a home computer. In Case No. 1:11-cv-884, Plaintiff Catherine Zang and five additional individuals filed suit

against multiple corporate and individual defendants in this Court, asserting claims under the federal Wiretap Act as well as claims under state law.

During the underlying divorce proceedings, Mr. Zang produced emails and messages between Catherine Zang and a resident of Florida, Javier Luis. Although Mr. Luis did not join the Ohio federal litigation when it was first filed by Catherine Zang, he subsequently filed separate *pro se* actions against many of the same defendants in both federal and state court in Florida. After the defendants in the Florida state action removed that case to federal court, the federal court consolidated the two cases filed by Plaintiff Luis. (Doc. 17 in Case No. 1:11-cv-884). Thereafter, several Defendants in the Florida federal case moved to dismiss for lack of personal jurisdiction and improper venue. On August 20, 2012, the United States District Court for the Middle District of Florida granted Defendants' motions, agreeing that Mr. Luis's case should be transferred to Ohio based upon the lack of personal jurisdiction over the Defendants[1] and improper venue in Florida. (Docs. 63, 64 in Case No. 1:12-cv-629). Mr. Luis's case was thereafter consolidated for purposes of pretrial proceedings with the first filed case of *Catherine Zang, et al. v. Joseph Zang, et al*., Case No. 11-cv-884.

Non-dispositive motions in both cases have been referred to the undersigned magistrate judge, as have dispositive motions in Case No. 12-cv-629. Pursuant to prior Orders of the undersigned, Mr. Luis is scheduled to be deposed in Cincinnati on September 9 and 10, 2013. The timing and the logistics of Plaintiff's upcoming deposition have been the source of numerous disputes between the parties, resulting in several court rulings. Most recently, on August 29, 2013, the undersigned convened a

[1]The Florida Court noted that all named Defendants resided in Ohio, with the exception of Awareness Technologies, a California corporation. The undersigned has since recommended the dismissal of

telephonic hearing and denied Plaintiff Luis's oral request for defense counsel to provide him with typewritten questions during his deposition and/or for Plaintiff to be permitted to respond through typed answers. However, the Court permitted Plaintiff Luis to file a formal written motion for reconsideration of the Court's initial ruling on that issue. Therefore, on September 3, 2013, Plaintiff Luis filed a "motion for ADA accommodations" pertaining to his deposition. In his motion, Plaintiff seeks either real-time stenographic translation such as a Communication Access Real-time Translation ("CART"), or at a minimum, typewritten copies of oral deposition questions, and/or the capability of typing his responses in lieu of responding verbally.

II. Analysis of Motion Seeking ADA Accommodations

At the outset, the Court notes that the Americans with Disabilities Act ("ADA") cited by Plaintiff Luis generally prohibits discrimination in regard to "terms, conditions, and privileges of employment," and does not pertain to terms and conditions of a deposition between private civil litigants. 42 U.S.C. §12112. Thus, the ADA has no application to the issue at hand.

Plaintiff's citation to *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998) is also inopposite. In *Yeskey*, the Supreme Court held that Title II of the ADA prohibits a state prison from discriminating against a "qualified individual with a disability" who was refused admission to a "boot camp" that had the potential to shorten his sentence. In so holding, the Court held that under the ADA, "[s]tate prisons fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" *Id* at 210. None of the Defendants in this case is a covered "public entity"

Awareness Technologies; that Report and Recommendation remains pending. (Doc. 109).

under Title II of the ADA. Moreover, although separate statutes apply to the federal government, federal courts do not fall within the definition of a covered "public entity" under the ADA, and are exempt from its provisions. *See, e.g.*, 42 U.S.C. §§12131 (defining a public entity under the ADA); *Contrast, e.g.*, §501 of the Rehabilitation Act of 1973, as amended 29 U.S.C. §790 et seq. (providing a comparable remedy for federal employees alleging disability discrimination).

In limited contexts, persons with defined disabilities are provided accommodations during court proceedings, whether under the ADA to the extent that a state court may be a "public entity,"[2] or under separate federal rules applicable to federal courts. In the federal court, blindness or deafness is traditionally accommodated in proceedings that take place within the confines of the courthouse. *See, e.g.*, Rule 6(d), Fed. R. Crim. P. (providing for presence in grand jury deliberations of "any interpreter needed to assist a hearing-impaired or speech-impaired juror"); 28 U.S.C. §1827-1828 (Federal Court Interpreters Act, providing for interpreters for any party who exclusively or primarily speaks a language other than English, or who suffers from a hearing impairment that inhibits comprehension or communication).

Plaintiff Luis cites no relevant case law, statute, or other authority that would authorize or support the unique accommodations he would impose on the Defendants in the context of taking Plaintiff's deposition in a civil case initiated by Plaintiff himself. Likewise, this Court has discovered no authority that either would require the requested accommodations, or that would favor the exercise of judicial discretion in favor of Plaintiff's position.

[2]In contrast to the ADA, both state and federal courts fall within the purview of the

In addition to federal statutes and the Federal Rules of Civil Procedure, neither of which support the requested relief, federal courts are guided by Judicial Conference policies, which are advisory in nature. In 1995, the Judicial Conference of the United States adopted a policy that "all federal courts provide reasonable accommodations to persons with communications disabilities." Vol. 5, Guide to Judiciary Policies and Procedures, Chapter 2, Appointment and Payment Authorities, §255.10. Under that policy, a judge "**may** provide a sign language interpreter for a party, witness or other participant in a judicial proceeding, whether or not the proceeding is instituted by the United States." §255.10(c) (emphasis original). Of course, Plaintiff Luis is not seeking a "sign language interpreter," and his deposition does not appear to fall within the Guide's definition of a "judicial proceeding." Nevertheless, a few additional provisions of the Guide provide, by analogy, some guidance with which to consider Plaintiff's current motion.

For example, in addition to sign language interpreters, the Guide permits the use of "other appropriate auxiliary aids and services to participants in federal court proceedings who are deaf, hearing-impaired, or have other communications disabilities." *Id*. The term "auxiliary aids and services" is defined as "qualified interpreters; assistive listening devices or systems; or other effective methods of making aurally delivered materials available *to individuals with hearing impairments*." *Id.* at §255.30(c)(4)(emphasis added). Federal "court proceedings" are limited to "trials, hearings, ceremonies, and other public programs or activities conducted *by a court*." *Id.* at §255.20(c)(2)(emphasis added); *see also* Chapter 3, Court Management and

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Rehabilitation Act.

Responsibility, §370.20.10. Thus, as suggested, traditionally accommodations are limited to the context of in-court proceedings for individuals who suffer from blindness or deafness, or from communication disabilities that are equivalent to those limitations.

The Guide provides further interpretation of the circumstances under which the type of real-time reporting requested by Plaintiff Luis should be used. Real-time reporting is authorized only "[w]hen deemed appropriate by a court," and "solely in furtherance of the limited purposes for which the guidelines have been adopted." §255.20(b)(1). By way of example, the Guide explains that real-time reporting should be provided only for "the duration of a deaf witness's testimony" at trial, and "solely to assist in communication and … not …in lieu of conventional means of producing the official record." *Id.*

No separate funding is provided for implementing the Guide's policies, which allow for significant trial court discretion. While a court should "honor a[n impaired] participant's choice of auxiliary aid or service," the court need not do so if "it can show that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the nature of the court proceeding or an undue financial or administrative burden." §255.20(c)(3). Last, the Guide instructs that "[i]nterpreter services needed to assist parties to civil proceedings not instituted by the United States, both in court and out of court, are the responsibility of the parties to the action, except as noted above in § 210 through § 255." *Id*. at §260. The latter two provisions are particularly relevant to Plaintiff's request for accommodations in this case, insofar as the Defendants object to the accommodations both on the basis of cost (whether to them or this Court) and on the basis that the

requested accommodations would fundamentally alter the nature of the deposition.

Both at the hearing prior to filing his motion and in his written motion, Mr. Luis, a law school graduate, concedes that he has very "rarely" requested any accommodations for his ADHD in the past. For example, he stated at the hearing that he did not seek extra time for exams or similar accommodations while in law school. Although neither the ADA nor the Rehabilitation Act is directly applicable to Plaintiff's request, the undersigned notes that in general terms, courts have often found that persons with ADHD do not meet the definition of disability under those statutes when, with medications and/or other corrective measures, their academic performances and admissions on the record do not present significant limitations in a major life activity such as learning. *See e.g., Knapp v. City of Columbus*, 192 Fed. Appx. 323 (6th Cir. July 6, 2006).

On the record presented, which includes Plaintiff's verbal participation in several hearings before the undersigned, this Court has seen no evidence whatsoever that Plaintiff's alleged mental impairment "substantially limits" any major life activity in a way that is "central to most people's daily lives" including but not limited to his ability to communicate. From that perspective, even if the Rehabilitation Act did apply in this context, the undersigned would conclude that Plaintiff has not met his burden to show that he is disabled. Plaintiff does not assert, for example, that he is substantially limited in his ability to speak or communicate on a day-to-day basis and routinely requires accommodations by those with whom he communicates or speaks. His law school record alone, as well as his written and oral communications before this Court, would contradict any such assertion. Instead, Plaintiff argues that he would be unfairly

disadvantaged in the very narrow context of submitting to an oral deposition in a lawsuit that he initiated. Plaintiff asserted before the undersigned that he was able to communicate so effectively in its recent hearing on this issue only because he took medications which he considers to be dangerous, and/or which have adverse side effects. While this Court is not without sympathy for Plaintiff's position, the Court is unable to find any legal support for Plaintiff's request.

Apart from the lack of any case law, statutory authority, or even judicial policy to support the requested accommodations, the undersigned notes that the three exhibits attached to Plaintiff's motion also fail to support his motion. Those exhibits include: (1) a September 2013 two-sentence letter from his treating physician; (2) a November 2002 letter from a psychologist identified as the Director of Mental Health Services at the University of Florida Student Health Services Center, detailing Plaintiff's care through May 2000; and (3) a January 1994 letter from a Florida psychologist.

The first letter, presumed to be from Plaintiff's treating psychiatrist,[3] states only that Plaintiff has been under medical care for a "history" of "Attention Deficit Disorder Adult Type that requires medications and extra time to process verbal information."[4] (Doc. 121 at 12). The one-sentence letter neither opines nor suggests that Plaintiff's verbal communication abilities are so severely compromised in daily life that, even with prescribed medications and any other treatment previously provided, he would be unable to submit to an oral deposition without the specified accommodations. The

[3]The letter is signed by "Daisy DeGanuza, M.D., P.A." The "P.A." designation might refer to a physician's assistant to a medical doctor, but in this case appears more likely to denote the separate designations of "medical doctor" and "professional organization."

[4]The wording leaves some ambiguity as to whether the treating physician has confirmed a diagnosis of ADHD or ADD, or whether the history was obtained from records or self-reported.

second and third letters similarly fail to provide any support for Plaintiff's position. The second letter, dated more than a decade ago in 2002, simply summarizes Plaintiff's medical history as presenting "a mixed combination of symptoms that was difficult to place in one diagnostic category, having symptoms of ADHD and Bipolar Disorder as well as Cluster Headaches and evidence of some difficult characterlogic styling." (Doc. 121 at 14). The letter reflects a course of medication that (at least in 2002) had been "helpful" in alleviating Plaintiff's "ADHD-like symptoms." *Id.* In short, the second letter provides no support for the requested accommodations in the context of an oral deposition in 2013. The third letter is even less relevant, given that it is nearly two decades old, and does not refer to ADHD or any difficulty with verbal communication at all. Instead, it relates a physical history of headaches then "well under control with treatment," as well as a "neuropsychological evaluation [that] revealed intellectual function in the Superior range (93rd percentile) with even better functioning in higher order cognitive processes and reasoning." (Doc. 121 at 16).

This Court concludes that to require defense counsel to provide copies of its questions in writing to Mr. Luis, or to permit Mr. Luis to type his responses in lieu of answering orally, would result in a fundamental alteration in the nature of the deposition and in an undue financial or administrative burden to the Defendants in this case. That said, and understanding that it remains Plaintiff's position that he lacks the financial wherewithal to do so, the undersigned would permit Plaintiff to pay for his own real-time court reporting expenses, so long as a certified court reporter is used and the date, time, and location of the previously scheduled deposition are not compromised. Otherwise, the Court's prior ruling will stand.

III. Conclusion and Order

For the reasons discussed above, **IT IS ORDERED THAT**:

1. Plaintiff's motion for ADA accommodations (Doc. 121) is DENIED. The previously scheduled deposition of Plaintiff Luis shall proceed on September 9 and 10, 2013 under the terms and conditions previously stated by this Court;

2. The only alteration to those terms and conditions permitted by this order is, to the extent that Plaintiff is able to arrange for a certified court reporter to provide real-time transcription, at his own expense, without otherwise altering the date, time, and location of the scheduled deposition, he may do so.

s/ Stephanie K. Bowman
Stephanie K. Bowman
United States Magistrate Judge