SUMMARY
March 28, 2024

2024COA29

No. 23CA0311, *Stalder v. Colorado Mesa University* — Colorado Anti-Discrimination Act — Americans with Disabilities Act — Rights of Individuals with Service Animals — Legitimate Suspicions Doctrine

As a matter of first impression, a division of the court of appeals rejects the "legitimate suspicions" doctrine, under which some jurisdictions permit more extensive inquiry than explicitly permitted by ADA regulations into the nature of a person's disability and the scope of a purported service animal's training and tasks.

COLORADO COURT OF APPEALS **2024COA29**

Court of Appeals No. 23CA0311
Mesa County District Court No. 21CV30141
Honorable Matthew D. Barrett, Judge

Dustin Stalder,

Plaintiff-Appellant,

v.

Colorado Mesa University, Lynn Nordine, and Bob Lang,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE TOW
Lipinsky and Grove, JJ., concur

Announced March 28, 2024

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¶ 1 Plaintiff, Dustin Stalder, appeals the district court's order granting summary judgment in favor of defendants, Colorado Mesa University (CMU), Lynn Nordine, and Bob Lang, on his claims under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12182, and the Colorado Anti-Discrimination Act (CADA), § 24-34-803, C.R.S. 2023, as well as his intentional infliction of emotional distress (IIED) claim. Stalder contends that genuine disputed issues of material fact necessarily precluded the grant of summary judgment in defendants' favor on any of his claims. We reverse the grant of summary judgment on the ADA and CADA claims. In doing so, we address — and reject — the application of the "legitimate suspicions" doctrine for the first time in a Colorado appellate case. We affirm the judgment as to the IIED claim.

I. Background

¶ 2 Stalder attended CMU, a public university, from the fall of 2019 through the summer of 2022. Stalder testified that he has post-traumatic stress disorder (PTSD), anxiety, and depression. In November 2020, Stalder's parents purchased a dog, Ruger, for Stalder because they knew he wanted a dog for mental health

reasons. Ruger's previous owner told Stalder that Ruger was an emotional support animal at that time.

¶ 3 Stalder testified at his deposition that he personally trained Ruger, and that by the last week of January 2021, Ruger was trained as a service animal. Stalder testified that he watched online videos to learn how to train Ruger. And he testified that Ruger is trained to remove him from situations that cause him to have PTSD, anxiety, or depressional episodes. Stalder said that Ruger is also trained to provide pressure therapy and remind Stalder when to take his medications.[1]

¶ 4 On February 9, 2021, Stalder entered the gym at CMU with Ruger. Lynn Nordine, the Director of Campus Recreation at CMU, stopped Stalder and asked him about Ruger. Stalder told Nordine that Ruger was an emotional support animal. Stalder later testified at his deposition that he was initially confused about the terminology used to distinguish between emotional support animals and service animals.

[1] Stalder concedes that he was not taking any medications during the relevant time.

¶ 5 Nordine wrote an email to student services asking for assistance. She said that Stalder "brings his 'therapy' dog with him to the Rec Center. His vest even says therapy as opposed to service." She said Stalder's dog was "clearly not trained as a true service dog would be. Wants petted [sic], wants to sniff everyone." Nordine also wrote that, when she asked Stalder "what service his dog provided, he could only offer that [Ruger] is registered and he can bring whatever papers I need to see."

¶ 6 On February 10, Bob Lang, Director of Advocacy and Health at CMU, emailed Stalder a link to CMU's service animal policy and told Stalder that only service animals were allowed in campus buildings and that Stalder's "Therapy Dog is not allowed in any campus buildings including the Mav Rec Center." Lang and Stalder also discussed the issue on the phone that same day. Lang explained to Stalder the difference between therapy and service animals. Lang noted that Stalder told him that Ruger was not trained as a service dog.

¶ 7 The next day, Stalder went to USAServiceDogRegistration.com and "registered" Ruger as a service animal. Stalder did not need to provide any supporting documents or prove that his dog was

trained as a service animal to complete the registration. Through the website, Stalder paid $200 for a service animal certification and a service dog identification badge. Stalder's service animal expert, Frank Griggs, testified at his deposition that Ruger's identification badge was not proof that he was a service animal. Griggs also testified that only therapy dogs, not service dogs, need to be registered and that websites like the one Stalder used — which are not regulated under the ADA — allow anyone to represent, truthfully or not, that their dog is a service animal.

¶ 8 On February 12, Stalder went to the gym, said Ruger was a service animal, and presented Ruger's badge. The gym staff let Stalder and Ruger inside. That same day, Nordine asked Lang for updates regarding the situation involving Ruger. Nordine reported that Stalder had returned to the gym with Ruger and had said that Ruger was a registered service animal. Lang responded that there was no registry for service animals under the ADA and that the badge did not make Ruger a service animal. Nordine later emailed Stalder that she had learned he "arrived at the Rec Friday with your therapy dog"; she reiterated that "[s]ervice dogs only are permitted

in campus buildings," and his dog was still not permitted at the gym.

¶ 9 Stalder and Ruger returned to the gym another day. Stalder again presented Ruger's badge, and staff let them inside. The gym manager later asked Stalder to remove Ruger from the gym, which he did.

¶ 10 At Nordine's request, Stalder met with Pua Utu, the Director of Campus Safety and Student Conduct at CMU. Stalder presented Ruger's badge and service animal certification to Utu, who wrote that Stalder appeared "legit based on docs provided." Stalder told Utu that his dog "is trained to warn him or to remind him on when to take his medication." Stalder also said he was still "working on Ruger" after Ruger failed to sit after multiple commands to do so.

¶ 11 Lang and Stalder discussed on the phone that Stalder provided conflicting documentation and information regarding both his disability and Ruger's designation as a service animal. Lang requested more information and that Stalder grant him permission to talk to Stalder's medical provider. Lang then emailed Stalder and said that he needed to confirm with Stalder's health care providers that Stalder has a disability and attached a consent form. Stalder

responded that Ruger was being kept off campus in violation of the ADA and that he was seeking legal advice. Stalder also wrote that Ruger "provides me with a service in direct support of my disability, again which is documented heavily."

¶ 12 Stalder later went to Lang's office and provided Lang with a letter that Stalder had obtained online from Brandy Roggentien, a California social worker, who wrote that she was "prescrib[ing] Mr. Stalder to obtain a psychiatric service dog." Stalder recorded most of his conversation with Lang.

¶ 13 Lang explained his concern that Stalder had said Ruger was "not trained as a service animal." Stalder said that, at the time, his dog was an emotional support animal, so it would have been fraudulent for him to say Ruger was a service animal, but that the dog provided a service. Stalder also said that Ruger is "a service animal, he provides a service, I showed you [the Roggentien letter]." Stalder tried to say what services Ruger provided but Lang interrupted him.

¶ 14 Lang told Stalder that he could not bring Ruger on campus unless Stalder provided documentation that Ruger was a trained service animal and later told Stalder that Ruger could come on

campus only if Stalder took Ruger to an obedience class and provided documentation of the dog's attendance. Stalder responded that he was taking Lang's statements as a denial of his ability to take his service dog onto campus, in violation of the ADA, and that he would get legal representation. Lang offered to have Stalder talk to someone else at CMU. Stalder said, "[W]e are done here Mr. Lang. I have said everything I need to say." Stalder asked if Lang was blocking the door out of his office. Lang said, "No, I'm not," and Stalder left Lang's office.

¶ 15 Stalder then sued CMU, bringing claims under the ADA and CADA, as well as an IIED claim. Both parties filed motions for summary judgment on all claims. The district court granted summary judgment in favor of defendants on all claims.

¶ 16 Stalder appeals, contending there are genuine disputes of material fact on all claims. We conclude that the court should have allowed Stalder's ADA and CADA claims to go to a jury, but that the court did not err by granting summary judgment to defendants on the IIED claim.

II. Standard of Review

¶ 17 We review de novo the grant of a summary judgment motion. *W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002).

¶ 18 Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007).

¶ 19 The moving party has the initial burden to show that there is no genuine issue of material fact. Once this burden of production is satisfied, the burden then shifts to the nonmoving party to establish a triable issue of fact. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987). Failure to meet this burden will result in the entry of summary judgment in favor of the moving party. *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365, 366 (Colo. App. 1996).

¶ 20 In reviewing a motion for summary judgment, the court must afford the nonmoving party all favorable inferences that may be drawn from the undisputed facts. *Churchey v. Adolph Coors Co.*,

759 P.2d 1336, 1340 (Colo. 1988). Similarly, all doubts as to the existence of genuine issues of material fact are resolved in favor of the nonmoving party. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1276 (Colo. 1985).

III. Analysis

A. ADA and CADA Claims

¶ 21 Stalder contends that the district court erred by granting summary judgment on his ADA and CADA claims. We agree.

1. Service Animal

¶ 22 Stalder contends that there is a genuine dispute of fact as to whether Ruger was a service animal for purposes of the ADA and CADA.[2] We agree.

a. Applicable Service Animal Law

¶ 23 Under CADA, "[a] qualified individual with a disability has the right to be accompanied by a service animal individually trained for that individual" in any place of public accommodation, which includes educational institutions. § 24-34-803(1)(a);

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[2] We do not address if there is a dispute of fact as to whether Ruger was a service animal *in training* as of February 2021 because Stalder asserts that Ruger was fully trained as to all relevant tasks by the last week of January 2021. We therefore only address whether there was a dispute of fact on that point.

§ 24-34-601(1), C.R.S. 2023. CADA defines "service animal" by reference to the "implementing regulations" of the ADA. § 24-34-301(23), C.R.S. 2023.

¶ 24 The ADA regulations provide that "*[s]ervice animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." 28 C.F.R. § 35.104 (2023). "The work or tasks performed by a service animal must be directly related to the individual's disability." *Id.* "Examples of work or tasks include, but are not limited to, . . . helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors." *Id.* "The . . . provision of emotional support, well-being, comfort, or companionship do[es] not constitute work or tasks for the purposes of this definition." *Id.*

¶ 25 CADA is "substantially equivalent" to the ADA and, whenever possible, CADA should be interpreted consistently with the ADA. *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006) (quoting Civ. Rights Comm'n Rule 60.1(B), 3 Code Colo. Regs. 708-1 (2006)). Thus, as did the district court, we look to

federal case law concerning "service animals" within the context of the ADA. *See* § 24-34-802(4), C.R.S. 2023 (CADA applies the same standards and defenses as those under the ADA).[3]

¶ 26 A plaintiff must point to evidence of individual training to set a service animal apart from an ordinary pet. *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1256 (D. Haw. 2003), *aff'd sub nom. Dubois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175 (9th Cir. 2006). "This is not a taxing requirement, however, and there are no federally-mandated animal training standards." *Id.* There is no requirement as to the amount or type of training that a service animal must undergo, and there is no requirement as to the amount or type of work a service animal must provide for the benefit of the disabled person. *Green v. Hous. Auth.*, 994 F. Supp. 1253, 1256 (D. Or. 1998). Given this case-by-case approach, a dog's owner can be its trainer. *See, e.g.*, *Miller v. Ladd*, No. CV 08-05595 NJV, 2010 WL 2867808, at *4-5 (N.D. Cal. July 20, 2010); *Vaughn v. Rent-A-Center, Inc.*, No. 2:06-

[3] One difference between the ADA and CADA with respect to service dogs is that CADA, but not the ADA, applies to service animals in training. § 24-34-803(2), C.R.S. 2023.

cv-1027, 2009 WL 723166, at *10-11 (S.D. Ohio Mar. 16, 2009). In other words, it is not necessary to show the dog was trained by a "certified trainer." *Green*, 994 F. Supp. at 1256. In fact, a service dog may be trained at home. *See id.*

¶ 27 The bar for demonstrating a genuine issue of fact regarding a dog's status as a service animal is not a high one. *Cordoves v. Miami-Dade County*, 92 F. Supp. 3d 1221, 1230 (S.D. Fla. 2015). Nonetheless, "courts have granted summary judgment if a plaintiff cannot show with any specificity a genuine issue of fact regarding a dog's training or status as a service animal." *Id.* at 1230-31.

b. Application

¶ 28 CMU contends that (1) Stalder was unable to identify any service tasks that Ruger could perform; (2) any tasks Ruger could perform were not related to Stalder's disability; and (3) Stalder could not detail how he trained Ruger, when such training occurred, or how Stalder learned to train service animals. We disagree with each contention.

¶ 29 Stalder testified at his deposition that he adopted Ruger at the end of November 2020 and trained him, and as of the last week of January 2021, Ruger was trained as a service dog. Stalder also

testified that he watched videos online to learn how to train Ruger. And he testified that Ruger is trained to remove him from situations that cause him to have PTSD, anxiety, or depressional episodes. For example, Stalder said that when he touches his face or is upset or crying, Ruger will remove, distract, bark, or do "anything" to get Stalder out of that situation. Stalder testified that Ruger knows how to do this because he is trained to recognize Stalder's different mental states and can smell Stalder's pheromones.[4] And he testified that Ruger is also trained to provide pressure therapy.[5]

¶ 30 CMU does not contest that an individual may self-train a service animal under the ADA. And Stalder is not required to present any documentary evidence showing the amount or type of training Ruger underwent. *See Green*, 994 F. Supp. at 1253. Nor do defendants cite any support for their contention that, to demonstrate a material factual dispute, Stalder needed to submit

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[4] The parties do not address whether Stalder is qualified to testify regarding the significance of pheromones and how service animals respond to them.

[5] Griggs testified that deep pressure therapy — which a dog performs either by lying between the person's legs or by pressing into the person — tactilely grounds individuals with PTSD and interrupts their thought processes.

supporting affidavits in addition to his deposition testimony. Indeed, while depositions and affidavits that contain "mere conclusions" are insufficient to create a genuine issue of material fact, *Smith v. Mehaffy*, 30 P.3d 727, 730 (Colo. App. 2000), Stalder's deposition testimony consisted of more than merely conclusory assertions of the ultimate fact. He did not simply say, "Ruger is a service animal"; he asserted that he had trained the dog and explained what tasks the dog could perform.

¶ 31 As to those tasks, we agree with Stalder that they go beyond merely providing Stalder with emotional support, well-being, comfort, or companionship. *See* 28 C.F.R. § 35.104; *C.G. v. Saucon Valley Sch. Dist.*, 571 F. Supp. 3d 430, 442 (E.D. Pa. 2021) (concluding that deep pressure therapy and detecting changes in cortisol levels and responding to such changes are not things that an ordinary pet can do and go beyond providing comfort and companionship).

¶ 32 Defendants also contend that Stalder's deposition testimony was contrary to his actions and statements in 2021, focusing on the video of the meeting between Stalder and Lang. But Stalder explained why he told Lang that it would have been fraudulent for

him to represent Ruger as a service animal. He testified that, when he initially got Ruger, he had a letter saying that Ruger was an emotional support animal, which meant Ruger was a service animal in training. Stalder said that, after adopting Ruger, he trained Ruger to become a service animal. He testified that, before he "registered" Ruger as a service animal, he was confused about the service animal and emotional support animal terminology.[6]

¶ 33 While it is a close call, we conclude that Stalder's deposition testimony about Ruger's training and what tasks Ruger could perform is sufficient to demonstrate a genuine dispute of fact as to whether Ruger was a service animal in February 2021.[7] *See Bronk v. Ineichen*, 54 F.3d 425, 431 (7th Cir. 1995) (stating that a jury should be allowed to evaluate an animal's abilities and assign its

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[6] We stress that the issue at trial will be whether Ruger was a service animal in February 2021, not at some later date.

[7] "Summary judgment . . . 'is not a substitute for [a] trial.'" *People in Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 15 (quoting *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984)). "For it is only at a trial that the court can 'assess the weight of the evidence or credibility of [the] witnesses.'" *Id.* (quoting *Kaiser Found. Health Plan of Colo. v. Sharp*, 741 P.2d 714, 718 (Colo. 1987)); *see also Andersen v. Lindenbaum*, 160 P.3d 237, 242 (Colo. 2007) ("The fact that a jury might ultimately choose not to credit that explanation cannot alter the fact that it creates a genuine issue of material fact to be resolved by the jury.").

own weight to the animal's lack of formal schooling). The district court's grant of summary judgment was therefore improper.[8]

2. Legitimate Suspicions

¶ 34 Stalder also contends that there is a genuine dispute of fact as to whether defendants engaged in impermissible inquiry by asking him to release his medical records and show proof of Ruger's training before granting him an accommodation. CMU argues that several federal courts have held that a public entity may engage in further appropriate inquiries when it has "legitimate suspicions" about the dog being a service animal and when the additional inquiry is not being used to harass. In response, Stalder contends that the legitimate suspicions doctrine does not apply. We agree with Stalder that the legitimate suspicions doctrine is inconsistent with the ADA regulations and that the district court erred by relying on it.

¶ 35 The ADA regulations provide generally that

> [a] public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an

[8] To the extent CMU contends that Stalder does not have a disability, it is an undeveloped contention, and we decline to address it.

> animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

28 C.F.R. § 35.136(f) (2023). By its terms, this regulation permits public entities to make only two specific inquiries: Is the animal required because of a disability and what task is the animal trained to perform? This regulation became effective on March 15, 2011. Nondiscrimination of the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,178 (Sept. 15, 2010).[9]

¶ 36 Significantly, the cases on which CMU relies to support the legitimate suspicions doctrine — *Dilorenzo v. Costco Wholesale Corp.*, 515 F. Supp. 2d 1187, 1194 (W.D. Wash. 2007), and *Prindable* — pre-date the promulgation of the regulation containing this language. True, CMU also relies on a third case, *C.G.*, which

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[9] There is a parallel regulation governing inquiries by entities that offer public accommodations, with the same effective date. 28 C.F.R. § 36.302(c)(6) (2023); Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,251 (Sept. 15, 2010).

post-dates the regulation. In that case, the district court stated, "It is true that under some circumstances a public entity may request additional, appropriate information to verify a service animal so long as the additional inquiry is not being used to harass or discourage the individual with disabilities 'from availing themselves of public accommodation.'" *C.G.*, 571 F. Supp. 3d at 443. But that case relies solely on *Dilorenzo* and *Prindable* to support this statement. Thus, none of the cases that CMU cites in support of the legitimate suspicions doctrine provides CMU with safe harbor. Moreover, we are not convinced that an entity's "legitimate suspicions" permit any inquiry beyond the narrow questions permitted by the regulation.[10] The district court's reliance on this doctrine was, therefore, erroneous.[11]

¶ 37 In sum, Stalder has established genuine disputes of material fact as to whether Ruger was a service animal at the time CMU

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[10] CMU does not attack the validity of the regulation itself.

[11] Because we reach this conclusion, we do not need to address CMU's argument that summary judgment was properly granted because Ruger was not under Stalder's control. We also note that Stalder does not cross-appeal the denial of his motion for summary judgment.

prohibited Stalder from taking Ruger into the gym and whether CMU engaged in prohibited inquiries.

B. IIED Claim

¶ 38 Stalder also contends that the district court erred by entering summary judgment for defendants on his IIED claim because it only considered the video of the interaction between him and Lang. Specifically, he contends that Lang also solicited complaints about Ruger, threatened Stalder by telling him that misrepresenting Ruger as a service animal was a crime, forced Stalder to meet with Utu, did not disclose Utu's conclusion that Ruger was a service animal to other CMU employees, blocked Stalder from leaving Lang's office, and told Stalder that he would be excluded from campus until he released his medical records to Lang. We discern no reversible error.

¶ 39 The elements of a Colorado claim for IIED are (1) the defendant engaged in extreme and outrageous conduct; (2) the defendant did so recklessly or with the intent of causing the plaintiff severe emotional distress; and (3) the conduct actually caused the plaintiff severe emotional distress. *Zueger v. Goss*, 2014 COA 61, ¶ 37. Before presenting a claim of IIED to the jury, the district

court must rule on the threshold issue of whether the plaintiff has alleged conduct that is extreme and outrageous as a matter of law. *Green v. Qwest Servs. Corp.*, 155 P.3d 383, 385 (Colo. App. 2006). "In making that determination, the totality of the defendant's conduct must be evaluated." *Id.*

¶ 40 Liability can be sustained only when the defendant's conduct toward the plaintiff was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting *Destefano v. Grabrian*, 763 P.2d 275, 286 (Colo. 1988)). Outrageous conduct is a very narrow type of conduct. *Id.* Indeed, the level of outrageousness required is "extremely high," and "[m]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient." *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 990 (Colo. App. 2011) (quoting *Pearson v. Kancilia*, 70 P.3d 594, 597 (Colo. App. 2003)).

¶ 41 The contents of the video and Stalder's additional allegations are insufficient as a matter of law to rise to the level of extreme and outrageous conduct that goes "beyond all possible bounds of decency, and [can] be regarded as atrocious, and utterly intolerable

in a civilized community." *Qwest Servs. Corp.*, 155 P.3d at 385 (quoting *Destefano*, 763 P.2d at 286); *see, e.g.*, *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665-66 (Colo. 1999) (employer's alleged conduct of instructing employee to conduct illegal undercover narcotics investigation, laundering money to fund investigation, and firing employee as scapegoat to cover up involvement in criminal activity was not sufficiently outrageous to support employee's outrageous conduct claim).

¶ 42 Moreover, we agree with the district court that Stalder's argument mostly rehashes and repackages his discrimination claims against CMU, and even assuming Lang violated the ADA by requesting training documentation, this conduct would still not rise to the level of extreme and outrageous conduct necessary to support an IIED claim. *See Grandchamp v. United Air Lines, Inc.*, 854 F.2d 381, 385 (10th Cir. 1988) (concluding that, if plaintiffs were allowed to recover under a theory of outrageous conduct for the defendant's actions, then every discrimination claim would also state a claim for outrageous conduct). Thus, the district court correctly granted summary judgment on this claim.

IV. Disposition

¶ 43 The judgment is affirmed as to the grant of summary judgment on the IIED claim. The judgment is reversed in all other respects. The case is remanded for further proceedings.

JUDGE LIPINSKY and JUDGE GROVE concur.