C. v. New York State and Local Retir Doc. 56

11-2215-CV

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MARY JO C.,

Appellee,

-against-

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM, et al.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE DISABILITY ADVOCATES, INC., DRVT, NATIONAL DISABILITY RIGHTS NETWORK, AND STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES IN SUPPORT OF PLAINTIFF-APPELLANT

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INTERESTS OF THE AMICUS CURIAE[1]

The National Disability Rights Network ("NDRN"), is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

The State of Connecticut Office of Protection and Advocacy for Persons with Disabilities ("OPA") was established by state statute in 1977. Conn. Gen. Stat. § 46a-7. The State of Connecticut recognized that it "has a special

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[1] The parties in this case have verbally consented to the filing of the *amici's* brief. Pursuant to Fed. R. App. Proc. § 29(c)(56), *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel contributed monetarily to the preparation or submission of this brief.

responsibility for the care, treatment, education, rehabilitation of and advocacy for its disabled citizens" and granted OPA the authority to "represent, appear, intervene in or bring an action on behalf of any person with disability…in any proceeding before any court…in this state in which matters related to this chapter are in issue…." Conn. Gen. Stat. §46a-11(7). Individuals with disabilities are traditionally discriminated against in the provision of services. In the case before this Court, OPA has an interest in protecting the rights of persons with disabilities who may be refused reasonable accommodations under the Americans with Disabilities Act ("ADA"). OPA also has an interest in assuring that the ADA, as a civil rights statute, is broadly construed. It is in furtherance of its statutory obligations that OPA appears as *amicus curiae*.

Since 1989, it has been Disability Advocates, Inc.'s mission to protect and advance the rights of adults and children who have disabilities so that they can freely exercise their own life choices, enforce their rights, and fully participate in community life. Disability Advocates' litigation has defeated efforts by municipalities to exclude housing for persons with disabilities, assured the accessibility of movie theaters and state operated community residences, established the right to counsel at public expense for indigent persons subject to guardianship proceedings, stopped dangerous experiments on patients in state

psychiatric hospitals, and obtained compensation for victims of unnecessary and unconsented prostate surgery. The Americans with Disabilities Act's comprehensive prohibition on disability discrimination is essential to ensure the rights of persons with disabilities.

Amicus Curiae DRVT, formerly Vermont Protection and Advocacy, Inc., was designated by Vermont's Governor as the Protection and Advocacy System for the State of Vermont in 1991 and is a public interest organization that provides protection and advocacy services to people with disabilities in Vermont. DRVT operates throughout Vermont to provide advocacy and legal representation to individuals with disabilities, including mental health-related disabilities, and litigates within the Second Circuit and Vermont Courts to redress discrimination against people with disabilities in areas including protection from abuse and neglect, access to accommodated services, and freedom from unlawful discrimination. DRVT often relies on federal statutory protections included in the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., and section 504 of the Rehabilitation Act, 29 U.S.C. § 701 et seq., when conducting its federally-mandated function of protection and advocacy for individuals with disabilities.

The lower court's interpretation of the ADA would insulate much State discriminatory conduct from the protections of the ADA, and leave persons with

disabilities defenseless against discrimination mandated by state statutes. Thus, *amici* urge the Court to reverse the errors below.

SUMMARY OF ARGUMENTS

The decision of the district court, Feuerstein, J., in this case would erroneously erect a barrier against the application of title II of the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*, (ADA) to programs, activities, benefits and services of state and local governmental agencies. It would stand for the proposition that a state, by creating even a protective statute, may nevertheless through strict enforcement of that statute create disability based obstacles to accessing such programs, activities, benefits or services.

The decision fails to give effect to the regulations and guidance of federal agencies charged with enforcement of the ADA which requires that state and local laws may not be strictly construed so as to have the effect of discriminating against individuals with disabilities.[2] Plaintiff-Appellant, an individual with mental illness, is among the many individuals whose disabilities are significant, episodic

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[2] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131 (2d Cir. 1995).

in their manifestation and/or might occur suddenly after a lifetime without disability. Many individuals with disabilities will need access a state's disability retirement benefits plan, and will also likely to be affected by the lower court's ruling because they, too, may not possess the wherewithal to apply within the state's application period. This would include not just individuals with mental illness but also, for example, those who have sustained heart attacks or stroke, developed Alzheimer's or Parkinson's disease, or been victims of traumatic incident, such as a motor vehicle accident or crime. For these reasons, this Court should hold that (1) federal disability rights law requires that state laws and regulations, including state statutes, may be modified so as to provide reasonable modifications pursuant to title II of the ADA, regardless of whether the program, activity, service or benefit is connected to an individual's employment, and (2) the decision of the district court in this case should be reversed.

ARGUMENTS

I. STRICT ENFORCEMENT OF STATUTORY FILING DEADLINES WHEN INDIVIDUALS' DISABILITIES HAVE PREVENTED THEM FROM TIMELY FILING AN APPLICATION, WOULD DENY SUCH INDIVIDUALS AN EQUAL OPPORTUNITY TO PARTICIPATE IN AND BENEFIT FROM THE STATE'S PROGRAM OR ACTIVITY AND FRUSTRATE CONGRESS' INTENT WHEN IT ENACTED THE AMERICANS WITH DISABILITIES ACT.

A. When Strict Enforcement of a Statutory Filing Deadline Acts As a Barrier to Programs, Services, or Activities of a State or Local Governmental Entity, it Violates the ADA.

In passing the ADA, Congress made clear that it intended that the ADA would be a "clear and comprehensive national mandate," freeing individuals with disabilities from discriminatory effects resulting from, *inter alia*, "communication barriers, overprotective rules and policies, [the] failure to make modifications to existing facilities and practices, exclusionary qualification and eligibility criteria, . . . and relegation to lesser services, programs and benefits." 42 U.S.C. §12101(a)(5). The ADA Amendments Act of 2008 reinstated Congress' original intent that "a broad scope of protection be available under the ADA." 42 U.S.C. § 12101(B)(1). In keeping with clear congressional intent, a state statutory filing deadline that constitutes a barrier to services because it excludes individuals with disabilities from benefitting from those programs and activities violates this national mandate, and is thus preempted by the ADA.

Specifically, enforcement of a statutory filing deadline in a situation where the nature of an individual's disability hampers or prevents submission of an application within the statutorily prescribed time period excludes on the basis of disability and is thus discriminatory and prohibited by the ADA. A public entity

must make reasonable modifications in policies, practices and procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that the modification would fundamentally alter the nature of the activity. 28 C.F.R. § 35.130(b)(7). Under any analysis, the statute allows for significant modification of the application deadline for certain individuals in connection with injuries sustained during the attacks on 9/11/01. N.Y. RSS. Law § 605(b)(2) (McKinney 2007) Thus, flexibility in filing for disability retirement cannot be found to be a fundamental alteration of the state's disability retirement benefit or the state's retirement system in general. In Borkowski, *supra*, a school district's failure to consider a proposed modification consisting of providing a library teacher with an aide to assist her in controlling certain classes of young children, violated the ADA. Id. at 143. *See also* Henrietta D. v. Bloomberg, 331 F.3d. 261(2d Cir 2003); Barber v. Colorado Dep't of Revenue, 562 F.3d 1222 (10th Cir. 2009) (in which the 10th Circuit held that "[a] discriminatory state law is not a defense to liability under federal law; it is a source of liability under federal law." (quoting Quinones v. City of Evanston, Ill., 58 F.3d 275, 277 (7th Cir. 1995) (citing Williams v. Gen. Foods Corp., 492 F.2d 399, 404 (7th Cir.1974)).

The United States Supreme Court has held that preemption will be found when the state statute at issue is an obstacle to the accomplishment and execution of the intent of Congress. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("state law is naturally preempted to the extent of any conflict with a federal statute"), *and* Hillsborough Cnty., Fla. v. Automated Med. Labs, Inc., 471 U.S. 707, 713 (1985) (applicable federal regulations will also preempt state law). The Court of Appeals for the Second Circuit has agreed. *See* Marsh v. Rosenbloom, 499 F.3d 165 (2d Cir. 2007).

In Marsh, the question before the court was whether the Comprehensive Environmental Response, Compensation, and Liability Act, a federal statute, preempted Delaware General Corporations Law. This Court has held that federal law preempts state law "where state law actually conflicts with federal law." Id at 177. *See also* Ass'n of Intern. Auto. Mfrs., Inc. v. Abrams, 84 F.3d 602, 607 (2d Cir. 1996) (preemption will be found where it is impossible to comply with both federal and state requirements); Cable Television Ass'n of N.Y., Inc. v. Finneran, 954 F.2d 91, 95 (2d Cir. 1992) (The Second Circuit, relying in part on Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95 (1983), held that "our task is to ascertain Congress' intent in enacting the federal statute at issue.").

The regulatory terrain on which the ADA was written was fraught with pervasive and invidious discrimination against individuals with disabilities. 42 U.S.C § 12101 (3).

B. Waiver Of A Statutory Filing Deadline Would Constitute A Reasonable Modification Under The Americans with Disabilities Act.

An individual has a disability within the meaning of the Americans with Disabilities Act of 1990 (hereinafter "ADA") if, *inter alia*, that individual has a physical or mental impairment that substantially limits one or more of major life activities. 42 U.S.C. § 12102(1). Major life activities include activities such as "reading, concentrating, thinking, and communicating," and major bodily functions, such as "brain function." 42 U.S.C. §12102(2)(A).[3] Under title II of the ADA, state and local governmental entities are prohibited from excluding individuals with disabilities from participating in, or benefitting from, their services, programs, and activities. 42 U.S.C. §12132.

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that

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[3] In 2008, Congress amended Section 12102 of the ADA to include a non-exhaustive list of major bodily functions that also constitute major life activities under the ADA. 42 U.S.C. §12102(2)(B).

> making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. Part 35, Section 35.130 (7). In Henrietta D. v. Bloomberg, 331 F.3d. at 276 (citation omitted), this Court quoted the district court in that case, finding that

> [a]lthough there are subtle differences between these disability acts, the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities.

Indeed, this Court found that

> unless one of those subtle distinctions is pertinent to a particular case, we treat claims under the two statutes identically. *See* Weixel v. Bd. of Educ., 287 F.3d 138, 146 n. 6 (2d Cir.2002). . . . Further, the statute itself does not literally require a showing of "discrimination." A plaintiff can prevail either by showing "discrimination" or by showing "deni[al of] the benefits" of public services. 42 U.S.C. § 12132.

Id. *Accord.*, Barden v. Sacramento, 292 F.3d 1073 (9th Cir. 2001) (construing the ADA's broad language as bringing within its scope "anything a public entity does…" (citing Lee v. City of Los Angeles , 250 F3d 668,691 (9th Cir. 2001) (quoting Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir.1997), *aff'd*, 524 U.S. 206 (1998))). In Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir.1998), the 6th Circuit found that "any normal function of a governmental entity suffices to make this showing."

Here, the court below noted that the NYS and local Retirement System filing deadline was enacted for a public purpose –to protect those retirees, who may not have realized their separation from service had occurred. Mary Jo C. v. N.Y.S. & Local Ret. Sys. & Islip Pub. Library, No. 09-CV 5635, 2011WL 1748572, at *8 (E.D.N.Y. May 5, 2010). Such statutory filing may nevertheless have the effect of discriminating against people with disabilities, including, but not limited to, people with mental illness, unexpected traumatic impairments or those which are episodic. 42 U.S.C. § 12101(4). Accordingly, a waiver, or extension, of a statutory filing deadline may constitute a reasonable modification for an individual with a disability. [4]

In Borkowski, *supra,*at 135, this Court held that a public school superintendent's exercise of discretion under state education law that denied Borkowski tenure because of disability-related difficulties violated Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. §794. Title II was intended to extend the disability prohibition of Section 504 to all state and local governmental entities, regardless of whether they receive federal financial assistance. Americans with

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[4] PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001) (*"the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shotmaking--using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible..."*)

Disabilities Act: Title II Technical Assistance Manual II-1.4100(1993) Thus, federal disability laws are violated if the public entity fails to accommodate the individual's known disabilities, even if State law authorizes the challenged conduct.

In the case at bar, the state defendants knew of Mary Jo C.'s disabilities. Indeed, her disabilities had become exacerbated to the extent that she could no longer perform the essential functions of her job to the extent that she needed a reasonable modification of the disability retirement benefits application procedure in order for her to access the disability retirement benefits for which she was eligible. Nevertheless, the State defendant refused to reasonably modify the application process. Similarly, the public employer defendant refused to make an application for disability benefits on plaintiff's behalf, even though it was authorized by state law N.Y. RSS. Law §605 (a) (McKinney 2007) to apply for disability benefits on her behalf. It failed to do so, or to offer any other reasonable modification that would give her access to the disability retirement benefits to which she was substantively entitled. Contrary to this Court's holding in Borkowski, the defendants herein utterly failed to consider any reasonable modification which would provide her with access to the benefit sought; instead its actions acted as a barrier to her securing the benefit.

In Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982), this Court held that Section 504 requires that state and local governments take "modest, affirmative steps" to accommodate an individual's disabilities. Judge Edwards, concurring, stated what individuals with disabilities know all too well to be true, that barriers to access are not mere abstractions. "[I]it is not enough to open the door for the handicapped ...; a ramp must be built so the door can be reached.'" Id. While the instant case does not involve transportation, it does concern physical barriers to participation – the completion and submission of a paper application within the state's statutorily prescribed filing deadline. The "ramp" required in connection with such circumstances is a modification of a rigid statutory filing deadline that would otherwise deny current and former state employees with disabilities to the benefits of a state disability retirement plan into which they have paid throughout the term of their employment. Rigidly applying state filing deadlines, such as the one challenged by Mary Jo C. excludes persons with disabilities the right to equal access to state programs and services.

Many people with disabilities will be negatively affected if state statutory filing deadlines, such as the one herein, are strictly enforced without regard to the impediments to timely filing that may be caused by an individual's disabilities. An individual experiencing an episode of serious depression, aggravated schizophrenia

or bipolar disorder, a heart attack or a stroke, brain aneurysm, or aggressive treatment for cancer, may not be able meet a statutory deadline because of the effects of their disability. Disabilities that anyone may experience at any given time can and do substantially limit an individual's ability to think, concentrate, read and understand directions, write and organize their affairs, and consequently, prevent their strict compliance with statutory filing deadlines. These deadlines must be modified when necessary to reasonably accommodate a disability.

C. Waivers of Statutory Filing Deadlines Are Not Per Se Fundamental Alterations

Waivers of rigid statutory filing deadlines such as the one before this Court are not *per se* fundamental alterations of public programs or services. Recently, in Henderson ex rel. Henderson v. Shinseki, 131 S.Ct. 1197, 1205 (2011), the Supreme Court held that the Veteran's Judicial Review Act's mandatory 120 day deadline on filing a notice of appeal of a denial for monthly disability benefits "clashed sharply with solicitude of Congress for veterans and the canon that provisions for veteran benefits are to be construed in the beneficiaries' favor." In Henderson, the petitioner's schizophrenia substantially limited his ability to think and concentrate, which prevented him from submitting his notice of appeal within the 120 day statutory filing deadline. The Court of Appeals of Veterans Claims

dismissed Henderson's appeal for failure to comply with the filing deadline even though it knew that his disability was the cause for his non-compliance. As the Supreme Court held, this late filing should have been excused in order to effectuate the intent of Congress in passing legislation that provided benefits to disabled veterans.

Just as in Henderson, strict enforcement of the statutory filing deadline at issue before this Court is at odds with the intent of both the U.S. Congress and the New York State legislature. As the court below acknowledged, "the State Legislature added the statutory filing deadline 'to alleviate hardships created when members of the [State] Retirement System mistakenly terminate their service prior to filing for benefits.'" Mary Jo C., *supra*, at 8, (quoting Matter of Grossman v. McCall, 262 A.D.2d 923, 924 (3d Dept. 1999). Strict enforcement of the filing deadline is in no way material to the state's distribution of retirement benefits, and undercuts the state's avowed desire to protect those to whom such benefits are available.

For many individuals with disabilities that temporarily or permanently render them incapable of filing for a state benefit, program or service within a certain timeframe, the enforcement of strict filing deadlines exacerbates, rather

than alleviates, hardships.[5] The state retirement system's rejection of Mary Jo C.'s application for disability retirement benefits is clearly counter to the intent of New York State, whose legislature created a disability retirement benefit so that state employees, whose disabilities made such an election necessary, might avoid undue financial hardships. Furthermore, enforcement of strict statutory filing deadlines such as the one before this Court is counter to Congress' intent that the scope of the protections afforded by the ADA be broad and inclusive. *See* COMM. ON EDUC. & LABOR REP., REP. ON THE ADA AMEND. ACT, 110-730, Part 1 (June 23, 2008).[6]

Within the federal statutory scheme -- much larger and more complex than any state's -- the Social Security program allows for deadline extensions when good cause may be shown. *See* 20 C.F.R. § 404.968. Good cause may be "any

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[5] As noted above, Mary Jo C.'s brother requested that an authorized supervisor submit her application on her behalf, a request which was within the statutory timeframe, within the scope of his authority under the law N.Y. RSS. Law § 605(a), and consistent with the ADA. *See* Taylor v. Phoenixville, 184 F.3d 296 (3d Cir. 1999) (a son's request for reasonable accommodations for his mother triggered the ADA's interactive process).

[6] The ADA Amendments Act "reestablishes the scope of protection of the Americans with Disabilities Act to be generous and inclusive. This bill restores the proper focus on whether discrimination occurred…" 2 CONG.REC. H 8286, 8288 (Sept. 17, 2008) (Remarks by Rep. George Miller upon the passage of the ADA Amendments Act).

physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review." 20 C.F.R. § 404.911 (a)(4). The "good cause" filing extension pursuant to Social Security regulations essentially codifies the reasonable modification requested herein so as to prevent an individual's disabilities from baring her access to a state program or activity because her disability prevents filing a timely request.

D. Strict Enforcement of Statutory Filing Deadlines in these Circumstances Also Frustrates State Law and Public Policy.

Any New York State statutory filing deadline that, when strictly enforced, discriminates against individuals on the basis of disability is also inconsistent with the public policy of New York State as embodied by the New York State Human Rights Law in which the legislature declared its responsibility to

> assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and [recognize] that the failure to provide such equal opportunity . . . menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

N. Y. Exec. L. § 290(3) (McKinney 2001).

The state legislature's intent in passing the Human Rights Law is congruent with the United States Congress' that state actors have a responsibility to take affirmative steps to ensure that individuals with disabilities are afforded an equal opportunity to enjoy "a full and productive life." Id. *See* Shannon v. N.Y.C.Transit Auth., 332 F.3d 95, 104 n.2 (2d Cir. 2003) (New York State Human Rights Law extends broader protections than the ADA). Disability retirement benefits, such as those sought by Mary Jo C. and countless other public employees with disabilities, are post-employment fringe benefits. In Castellano v. City of N.Y., 142 F.3d 58, 68 (2d Cir. 1998), this Court held that

> Where the alleged discrimination relates to the provision of post-employment benefits. . . Congress's expressed concern about qualifications is no longer implicated. . . Provided that retired employees. . . became entitled to post-employment benefits, the purpose of the "essential functions" requirement has been met. . . As evidenced by the ADA's language and legislative history, it is inconceivable to us that Congress would in the same breath expressly prohibit discrimination in fringe benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be "qualified" at or after their retirement, although they had earned those fringe benefits through years of service in which they performed the essential functions of their employment.

1. Modifications to Permit Equal Access to Disability Rights Benefits are not a Fundamental Alteration.

Access to disability retirements is a right reserved for retirees whose retirement was occasioned by disability; it would be the height of circular reasoning for disability impacts so significant as to prevent compliance with a filing deadline to "fundamentally alter" a disability retirement or similar benefit. The use of the word "fundamental" implies that a characteristic is essential. In PGA Tour, *supra*, fn5, the Supreme Court disagreed with the PGA Tour's argument that the use of a golf cart at the nation's highest level of play would fundamentally alter the game of golf. As the Supreme Court noted, the 9th Circuit and the district court had got it right.

> [T]he issue [is]not . . . "whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so." That issue turned on "an intensively fact-based inquiry," and, "[a]ll that the cart does is permit Martin access . . . in which he otherwise could not engage because of his disability.

Id. at 673 (internal citations omitted).

As noted above, the NYS Disability Retirement statute involved contains significant leeway for other people: (1) a "vested member incapacitated as a result of a qualifying World Trade Center condition", who according to the statute may apply "at any time;" or (2) a member of the New York State Teachers Retirement program. N.Y. RSS. Law §605 (b)(2) (McKinney 2007).

While the legislature is free to provide preferences to the above referenced groups, it may not refuse to provide similar flexibility in filing periods as a reasonable accommodation to individuals whose disabilities are obstacles to otherwise timely filing. Indeed, denying public employees with disabilities who are not among the preferred groups above and who have also paid into the state retirement system, an opportunity to even be considered for disability retirement benefits is counter to Congressional intent and would violate of title II of the ADA.

E. Strict Enforcement of a Statutory Filing Deadline is Likely to Cause Thousands of Individuals with Disabilities to Live Under Economically Depressed Circumstances.

Individuals with disabilities have historically suffered from poverty at greater levels than the general population. 135 CONG. REC. 8506, 8506 (1989) (statement of Sen. Thomas Harkin). *See also* 42 U.S.C. § 12001(A)(6). Strict enforcement of state statutory guidelines affecting the distribution of economic resources would only perpetuate this inequity. The ADA was passed to eliminate barriers that have been unfairly erected, either intentionally or unintentionally, against individuals with disabilities that have hindered, among other things, their economic wellbeing. *See* Findings and Purposes of the ADA, 42 U.S.C. §

12101(1990).[7]

In 2008, approximately 25.3% of non-institutionalized individuals possessing disabilities (and of those, 32.4% with cognitive disabilities) were living below the poverty line, and it may be assumed that many more were living on the cusp, still unable to meet their daily financial obligations. *Disability Statistics from the 2008 American Community Survey (ACS)*, www.disabilitystatistics.org (last visited August 17, 2011). In that same year, approximately 60.1% of all individuals with disabilities were unemployed, and approximately 71.8% of individuals with cognitive disabilities were unemployed. Id.

It goes without saying that subsequent to the calculation of the 2008 statistics cited above, the United States economy has suffered tremendously, and as a rule of thumb, individuals with disabilities tend to feel any economic downturn more intensely than the general population. Amanda Ruggeri, *Recession's Bite Hits Americans with Disabilities Extra Hard*, U.S. News, December 5, 2008, http://www.usnews.com/news/national/articles/2008/12/05/recessions-bite-hits-americans-with-disabilities-extra-hard ("Losing a job is difficult for anyone. But for workers with disabilities, the effects can be particularly acute. In 2007,

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[7] Nothing in the ADA Amendments Act of 2008 is at variance with these purposes.

nearly one in 4 working-age individuals with disabilities were below the poverty line. But fewer than one in 10 people without disabilities were.").

Additionally, a host of other benefit programs of employers, service providers, and government entities that have deadlines set by statute or administrative rules. This includes, for example, open enrollment periods to sign up for health, dental, and vision insurance. If individuals with disabilities are deprived of access to state programs and benefits, such as the disability retirement benefits in controversy before this Court,[8] simply because their disability makes it impossible to comply with filing deadlines, they and their families will succumb to greater levels of impoverishment.

II. DISCRIMINATION ON THE BASIS OF DISABILITY THAT IS A RESULT OF A PUBLIC EMPLOYER'S MANAGEMENT OF A RETIREMENT BENEFITS PROGRAM IS INCLUDED AMONG THE ACTIONS PROHIBITED UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

[8] In stands to reason that disability retirement benefits exist for the purpose of protecting state and local government workers from succumbing to exigent disabling circumstances.

Congress was quite clear in its intent that title II of the ADA was to provide at least as much protection as Section 504 and fill in the gaps where Section 504 might not have reached state or local governments.

> Title II extends the protections of Section 504 of the Rehabilitation Act to cover all programs of state or local governments, regardless of the receipt of federal financial assistance. By prohibiting discrimination against persons with disabilities in programs and activities of the federal government and by recipients of federal financial assistance, Section 504 of the Rehabilitation Act has served not only to open up public services and programs to people with disabilities but has also been used to end segregation. The purpose of title II is to continue to break down barriers to the integrated . . . participation of people with disabilities in all aspects of community life. The Committee intends that title II work in the same manner as Section 504. . . The general prohibitions set forth in the Section 504 regulations, are applicable to all programs and activities in title II.

H.R. REP. 101-485, pt. 3, at 25 (1990). In pertinent part, the House report also states clearly, "In the area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a "reasonable accommodation" that does not constitute an 'undue hardship.'" Id. "In the area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a "reasonable accommodation" that does not constitute an 'undue hardship.'" Id.

Courts have agreed "[t]he ADA prohibits discrimination in the administration of programs. 28 C.F.R. § 35.130(b)(6). Title II covers all programs, services, and activities of public entities 'without any exception,' and 'prohibits all discrimination by a public entity, regardless of the context.'" Pa. Dep't of Corrections v. Yeskey, 524 U.S. 206, 209 (1998). S*ee also* Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir.1997) (noting that "programs, services, or activities" is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context."), *overruled on other grounds by* Zervos v. Verizon N.Y., 252 F.3d 163 (2d Cir.2001); Barden v. Sacramento, 292 F.3d. at 1076. *See also* H.R. REP. 101-485, pt. 3, at 25 (1990), (1990) (the House Committee on Education and Labor stated that title II of the ADA "extends the protections of Section 504 of the Rehabilitation Act to cover all programs of state or local governments"). Moreover, as this Court held in Henrietta D., 331 F.3d at 277, "the statute itself does not literally require a showing of 'discrimination.' A plaintiff can prevail either by showing 'discrimination' or by showing 'deni[al of] the benefits' of public services. 42 U.S.C. § 12132.'"

Title II of the ADA does not contain a list of prohibited discriminatory actions. Congress expressly charged the United. States Department of Justice with the task of promulgating regulations to interpret and implement Title II of the

ADA. 42 U.S.C. §12134. *See also* H.R. REP. 101-485, pt. 3, at 52 (1990) ("Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section [§ 12134] is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited."). The Department of Justice has interpreted title II to prohibit discrimination in "all services, programs, and activities provided or made available by public entities," 28 CF.R. § 35.102, and invalidate State and local laws that provide lesser protections of the rights for individuals with disabilities. 28 CF.R. § 35.103 (b). *See also* Americans with Disabilities Act of 1990: title II Technical Assistance Manual, II-1.4200 (stating that title II will "prevail over any conflicting state laws.").

Additionally, the Department has also interpreted title II of the ADA to provide protections that are at least equal to those provided under Section 504, including those under 28 C.F.R. 42.510 (b)(8) which state that the prohibition against discrimination apples to "any other term, condition, or privilege of employment." Accordingly, title II's protections extend to state managed

disability retirement systems, such as the one at issue before this Court, which are a fringe benefit of New York State and local governmental employment.[9]

The U.S. Department of Justice regulations in this regard should control. The Supreme Court has held "it is enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 139-140 (1944). *See also* Olmstead v. Zimring, 527 U.S. 581, 598-99 (1999); Bragdon v. Abbott, 524 U.S. 624, 642 (1998). Moreover, numerous courts have agreed with the Department of Justice's finding that title II covers employment discrimination actions.

For example, several circuit courts have held that title II applies to employment discrimination by state and local governments. *See* Currie v. Grp. Insurance Comm'n, 290 F.3d 1, 6-7 (1st Cir. 2002) (the words "public services, programs, or activities" do not necessarily exclude employment, and the "subjected

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[9] In Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 n.1 (2001), the Supreme Court expressly took no position on whether title II also covers employment actions, and acknowledged that the Courts of Appeal were divided on the issue. Subsequent to Garrett, the Second Circuit found that an action for monetary damages under Title II would be permitted under certain circumstances. *See* Bolmer v. Oliveira, 594 F.3d 134 (2d Cir.2010). However, the instant case involves access to disability retirement benefits; no monetary damages are sought.

to discrimination" clause may broaden the scope of coverage further); Bledsoe v. Palm Beach Cnty. Soil & Water Conservation Dist., 133 F.3d 816, 820 (11th Cir. 1998) ("[o]ur review of the statutory language of title II, the Department of Justice's . . . regulations, our circuit's reference to the issue, and other courts' resolution of the issue, persuade us that title II of the ADA does encompass public employment discrimination"); Doe v. Univ. of Md. Med. Sys. Corp, 50 F.3d 1261, 1264-1265 (4th Cir. 1995) (title II claim dismissed on other grounds).

Within the Second Circuit, several district courts have also found that an employment discrimination cause of action exists under title II of the ADA. *See* Olson v. New York, No. 2:04cv00419, 2007 WL 1029021 (E.D.N.Y. March 30, 2005); Transp. Workers Union v. NYC Transit Auth., 342 F.Supp.2d 160, 173 (S.D.N.Y. 2004) ("Given this broad congressional mandate, it is certainly at least a *plausible* reading of title II that it covers employment discrimination"); Bloom v. N.Y.C. Bd. of Educ. Teachers Ret. Sys., No. 1:00cv02728, 2003 WL 1740528, at *10 (S.D.N.Y. April 2, 2003) ("The issue is whether an employee of a public entity may bring an employment discrimination claim under title II. Apparently, the Second Circuit has not yet resolved this issue. However, district courts in this circuit have concluded that such a claim is permitted under title II"); Winokur v. Office of Ct. Admin, 190 F.Supp.2d 444 (E.D.N.Y. 2002) (finding that the

Supreme Court's holding in Garrett, supra did not bar title II employment actions). This Court should hold that title II protects individuals with disabilities in connection with programs, activities and services related to employment.

CONCLUSION

For all the foregoing reasons, the lower court's holding that Plaintiff - Appellant Mary Jo C. is not a qualified individual with a disability by virtue of her inability to independently file for disability retirement benefits within the state statutory timeframe should be reversed.

Dated: Brooklyn, NY
August 27, 2011

Respectfully submitted,

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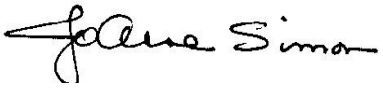
By: 
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CERTIFICATE OF COMPLIANCE

Jo Anne Simon, the attorney for the amici, certifies pursuant to Fed.R.App.P. 32(a)(7)(C)(i):

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5, 424 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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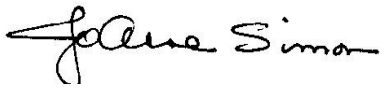
August 27, 2011



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