

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARY JO C.,

Plaintiff-Appellant,

Docket No.: 11-2215-cv

-against-

NEW YORK STATE AND LOCAL RETIRMENT
SYSTEM, CENTRAL ISLIP PUBLIC LIBRARY,

**DECLARATION IN
OPPOSITION TO
PLAINTIFF'S-APPELLANT'S
MOTION TO FILE A
SUPPLMENTAL APPENDIX**

Defendants-Appellees.
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HARRIS J. ZAKARIN, declares, pursuant to 28 U.S.C. § 1746, the following to be true under penalties of perjury:

1. I am a partner with the law firm of Rivkin Radler, LLP, attorneys for defendant-appellee Central Islip Public Library (the "Library"). As such, I am fully familiar with the facts and circumstances herein.

2. This affirmation is submitted in opposition to the motion of plaintiff-appellant Mary Jo C. ("plaintiff") to supplement the appendix to include the minutes of a state administrative proceeding.

3. Plaintiff commenced this action pursuant to Title II of the Americans with Disabilities Act ("ADA") against the Library and against defendant-appellee New York State and Local Retirement System (the "State Defendant"). Plaintiff

also asserted claims against the Library premised on New York State Executive Law § 296.

4. As against the Library, plaintiff alleged that it failed to provide her with a requested reasonable accommodation by refusing to file a disability retirement application on her behalf and by denying her request to reclassify the termination of her employment as a leave of absence.

5. As against the State Defendant, plaintiff alleged that, despite the fact that her disability retirement application was statutorily late, the State Defendant should have provided her a reasonable accommodation by waiving the statutory deadline.

6. By notice of motion dated May 28, 2010, the Library moved, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, to dismiss plaintiff's complaint based on her failure to state a claim upon which relief could be granted. The State Defendant similarly moved.

7. By opinion and order dated May 5, 2011, the District Court dismissed plaintiff's complaint.

8. In reaching its conclusion, the District Court found that, in the first instance, plaintiff's complaint failed to sufficiently allege that she has a "disability" within the meaning of the ADA and, as a result, her complaint failed to state a cognizable claim under Title II of the ADA.

9. Recognizing that it would be possible for the plaintiff to amend her Title II claims to sufficiently allege this element and also acknowledging that the Library assumed that she was disabled for purposes of the motion, the District Court addressed the merits of the motion and analyzed the issue substantively.

10. After analyzing the issue, the District Court determined that Title I of the ADA is the exclusive remedy for plaintiff's claims of discrimination against the Library. As a result, plaintiff's claims, which were premised on violations of Title II of the ADA, failed to state a claim upon which relief could be granted and were dismissed. As against the State Defendant, the District Court concluded that the complaint as against it required dismissal as it was barred by the doctrine of sovereign immunity.

11. Following the entry of judgment dismissing plaintiff's complaint, she appealed to this Court.

12. Plaintiff now seeks to supplement the joint appendix to include the minutes of a state administrative proceeding.

**THERE IS NO BASIS TO PERMIT THE FILING
OF A SUPPLEMENTAL APPENDIX CONTAINING
MATTERS THAT ARE OUTSIDE THE RECORD
ON APPEAL**

13. Plaintiff seeks to file a supplemental appendix to include the minutes of a state administrative proceeding, maintaining that the minutes are subject to

judicial notice and, therefore, may properly be included in a supplemental appendix.

14. Plaintiff's motion must be denied for several reasons.

15. Initially, the minutes of the state administrative proceeding are not part of the record on appeal. Pursuant to the Rules of this Court, "[t]he contents of an appendix are limited to the materials set forth in FRAP 30(a)(1), except that the appendix must also include the notice of appeal or petition for review." Local Rule 30.1 (a) (emphasis added).

16. Pursuant to FRAP 30 (a) (1), the contents of the appendix include:

- (A) the relevant docket entries in the proceeding below;
- (B) the relevant portions of the pleadings, charge, findings, or opinion;
- (C) the judgment, order, or decision in question; and
- (D) other parts of the record to which the parties wish to direct the court's attention.

17. Thus, pursuant to Local Rule 30.1 (a) and FRAP 30 (a) (1), the minutes of the state administrative proceeding do not fit within any category of permissible contents of the appendix. As a result, plaintiff's motion to supplement the appendix with this material should be denied.

18. In addition, plaintiff impermissibly seeks to attach the minutes of the state administrative hearing in an attempt to establish that she was disabled within the meaning of the ADA. According to plaintiff, this Court can take judicial notice of those minutes. As a general matter, a court "may rely on matters of public

record in deciding a motion to dismiss under Rule 12 (b) (6).” Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (1998), cert. denied, 525 U.S. 1103 (1999).

The rule regarding judicial notice, however, is not without its limitations.

19. While a court may take judicial notice regarding the fact that proceedings took place before another court or in a state administrative body, it may not do so to establish “the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” Global Network Communications, Inc. v. City of New York, 458 F.3d 150, 157 (2d Cir. 2006).

20. Here, plaintiff seeks to have this Court take judicial notice of the state administrative minutes not to establish the fact that the proceedings took place, but rather in an attempt to utilize the testimony contained therein to establish that she is disabled within the meaning of the ADA. Judicial notice is not permitted under these circumstances and, as a result, the motion to file a supplemental appendix containing the material sought to be judicially noticed should be denied.

21. In any event, even assuming that this Court can take judicial notice of the minutes of the state administrative proceedings, such a circumstance does not otherwise permit the filing of a supplemental appendix. In fact, plaintiff has failed to cite to a single precedent that would permit the filing of a supplemental appendix for judicially noticed material.

22. Given the foregoing, plaintiff's motion should be denied in its entirety.

WHEREFORE, it is respectfully requested that this Court deny plaintiff's motion to file a supplemental appendix, together with such other, further and different relief as this Court may deem just and proper.

Dated: Uniondale, New York
September 9, 2011

Harris J. Zakarin
HARRIS J. ZAKARIN (HJZ-8742)