UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Trinity Term, 2008)

Docket No. 01-3795
Case No. 01-141414

NORMAN AUGUSTUS SMITHIES,

APPELLANT,

-against-

CAPRINE ACADEMY,

APPELLEE.

On appeal from the
United States District Court
Eastern District of Michigan

BRIEF FOR THE APPELLANT

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. . .

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STANDARD OF REVIEW

The standard of review from an order granting summary judgment is *de novo*. *Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996).

STATEMENT OF FACTS

This case is about the unjust termination of a loyal and dedicated employee in violation of the Americans with Disabilities Act. Norman Augustus Smithies is a disabled employee who suffers from paranoid schizophrenia. He was hired by Caprine Academy through its headmaster, Dr. Seleye. Caprine Academy and Dr. Seleye were fully aware of Mr. Smithies' disability at the time he was hired. Mr. Smithies worked at Caprine Academy for five years and received good to excellent job ratings. (Deposition of Dr. Wilford Seleye, 01/05/05, 6; Deposition of Agatha Cryptic, 01/05/06, 3.) Mr. Smithies requested an accommodation for his disability to help him continue to perform the essential functions of his job. His request was initially approved and then withdrawn by Dr. Seleye without review and without engaging in an interactive process of discussion with Mr. Smithies in violation of the Americans with Disabilities Act.

As headmaster of Caprine Academy Dr. Seleye oversees approximately 2,000 students and 150 teachers. Dr. Seleye is a highly educated man and considers himself to be "fortunate or gifted." (Seleye, dep., 3.) After performing a full background check, Dr. Seleye was aware of Mr. Smithies' disability and was "well aware [of] Norman's history of institutionalizations and arrests" when he hired him. (Seleye, dep., 4.) In fact, Dr. Seleye claims that he "knew more about Norman than Norman was – or probably is –

aware of." (Seleye, dep., 4.)

After being hired at the Academy Mr. Smithies worked for about five years as a data entry clerk and performed other jobs around the office if help was needed. Mr. Smithies' disability had previously caused him to become delusional and led to his institutionalization on three separate occasions before he was hired at the Academy. He was also arrested for kidnapping two different women on separate occasions because he believed he was an FBI agent assigned to protect them. (Deposition of Norman A. Smithies, 01/04/06, 3.) Because of his disability, Mr. Smithies visits his psychiatrist and psychologist regularly. He requires help paying his bills, taking his medication, and cleaning his apartment – almost everything – several times a week. (Smithies, dep., 4.) Mr. Smithies also has difficulty concentrating at times and just wants to be normal. (Deposition of Dr. Morland Swain, 01/05/06, 2.)

Despite his disability Mr. Smithies has been described by his colleagues as a reliable and good worker. (Deposition of Marsupial Bouvier, 01/05/06, 3; Deposition of Hansel Deppe, 01/04/06, 1.) Mr. Smithies' performance evaluations were consistently very good to excellent. (Cryptic, dep., 3; Seleye, dep., 6.) However, his colleagues did notice that Mr. Smithies had some social problems and sometimes had problems interacting with others in a normal way; he was a little strange. (Cryptic, dep., 2; Bouvier, dep., 3; Deppe, dep., 2.)

Every year Dr. Seleye took a two-week meditation retreat. While he was on this retreat the assistant headmaster, Hansel Deppe, was left in charge of the Academy. About two days after Dr. Seleye had gone Mr. Smithies approached Mr. Deppe with a

prescription from his psychiatrist, Dr. Morland Swain, M.D., for a therapy pet – a dog named Coy. Mr. Smithies requested an accommodation to keep the dog at work so he could cope with his disability and continue performing his duties. (Deppe, dep., 2.)

According to Dr. Swain Mr. Smithies' medications were once again becoming less effective. Knowing that therapy pets have worked for other patients, Dr. Swain paired Mr. Smithies with a dog and observed them together for a few months. When Dr. Swain noticed that the dog greatly helped Mr. Smithies cope better with his disability, he gave him a prescription to have it at work. (Dr. Swain, dep., 2.) Mr. Deppe verified this information with Dr. Swain and did some research of his own on the subject. He asked Mr. Smithies to bring the dog to work where he could observe the two interacting. After determining that there were no problems and that the dog was well behaved, Mr. Deppe considered Mr. Smithies' request for accommodation to be reasonable and approved it. (Deppe, dep., 2.) After Mr. Smithies brought his dog to work his performance improved. (Cryptic, dep., 7.)

When Dr. Seleye returned from his retreat he walked into the main area of the Academy and saw Mr. Smithies' dog. Immediately there was a problem. Dr. Seleye interrupted a meeting between Mr. Deppe and the Academy psychologist, Dr. Kale, to question Mr. Deppe about the dog. Mr. Deppe explained about Dr. Swain's prescription for the dog as well as his own research on the matter. Dr. Seleye spoke with Mr. Deppe and Dr. Kale and determined that having a dog on campus was “totally unreasonable” and “there was simply no justification for Norman to have his pet with him.” (Seleye, dep., 7.)

Dr. Seleye then asked Mr. Smithies if he could speak with him alone in the conference room. Mr. Smithies went into the small conference room, and the door was closed. (Deppe, dep., 3.) Dr. Seleye was very direct with Mr. Smithies and told him that having a dog at work was unreasonable and inappropriate. Mr. Smithies became noticeably agitated. Dr. Seleye told Mr. Smithies that he could return to work if he took his dog home. (Seleye, dep., 7.) Mr. Smithies then pounded his fist on the table a few times and said, "You're a dictator. . . . You're like . . . Saddam Hussein." (Seleye, dep., 7.) He also said that Dr. Seleye was a criminal and he would stop him and not let him hurt anyone again. (Seleye, dep., 7; Smithies, dep., 6.)

Mr. Smithies explained that he has difficulty expressing himself and that he was pounding his fist on the table to get Dr. Seleye's attention. Because of his disability, Mr. Smithies has trouble organizing his thoughts when he is upset. (Smithies, dep., 5.) Mr. Smithies never intended to frighten or hurt Dr. Seleye. (Smithies, dep., 6.) However, Dr. Seleye stated that he felt threatened and "afraid for [his] life." (Seleye, dep., 10.) He then told Norman – very calmly – to go home and not come back. Dr. Seleye did not call for help or notify the police. Dr. Seleye then fired Mr. Smithies on the spot. (Seleye, dep., 9.)

Mr. Smithies filed suit in district court for the Eastern District of Michigan against Caprine Academy claiming violations of the Americans with Disabilities Act. (Opinion and Order, Judge Curtis J. Rohan III, 12/20/07, 1.) The district court held that Mr. Smithies failed to establish a prima facie case, posed a direct threat to Caprine Academy, and quit his job. (Opinion and Order, 1.) Furthermore, the court determined that his

request and accommodation was unreasonable and would have imposed an undue hardship on Caprine Academy. (Opinion and Order, 1-2.) The district court granted Caprine Academy's motion for summary judgment and dismissed the case. (Opinion and Order, 2.) Mr. Smithies appeals the decision of the district court.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act of 1990 (ADA) was enacted by congress to help eliminate discrimination against people with disabilities. In order to state a cause of action against an employer for disability discrimination, the employee must first establish a prima facie case.

Norman Augustus Smithies was diagnosed with a mental disability – paranoid schizophrenia – which significantly impaired his ability to engage in normal life activities. However, despite his disability Mr. Smithies was able to perform his job at Caprine Academy for five years. Caprine Academy hired Mr. Smithies with full knowledge of his history and disability, then fired him shortly after he requested a reasonable accommodation. Caprine Academy did not replace Mr. Smithies, and his position remained open. Mr. Smithies has established the essential criteria for establishing a prima facie case against Caprine Academy. The district court erred when it held that Mr. Smithies did not establish a prima facie case. The district court further erred when it held that Mr. Smithies posed a direct threat.

Mr. Smithies did not pose a threat or risk to the staff, students, patrons, or anyone else at Caprine Academy. He worked at Caprine Academy for five years without

incident. He was a well-liked, valued, and productive employee. Mr. Smithies may have briefly acted inappropriately during one isolated incident with Dr. Seleye, but his actions did not pose a threat. Even assuming Mr. Smithies did pose a threat, Caprine Academy could have eliminated it through a reasonable accommodation.

Mr. Smithies had earlier requested a reasonable accommodation which was granted, then arbitrarily withdrawn by Caprine Academy. Moreover, Caprine Academy failed to engage Mr. Smithies in an interactive process – as required by the ADA – to discuss his request for a reasonable accommodation. Had Caprine Academy engaged in this interactive process it would have discovered that Mr. Smithies' dog was in fact a reasonable accommodation. In addition to being reasonable, Mr. Smithies' request would not have imposed an undue hardship on Caprine Academy.

Mr. Smithies' dog was already fully trained, certified, and medically prescribed at no expense to Caprine Academy. Moreover, Mr. Smithies would continue to pay for his dog, placing no future financial burden on Caprine Academy. Caprine Academy has offered no objective evidence that Mr. Smithies' dog would impose an undue hardship.

ARGUMENT

I. MR. SMITHIES HAS ESTABLISHED ALL THE ESSENTIAL ELEMENTS OF A PRIMA FACIE CASE IN ORDER TO BRING A CAUSE OF ACTION AGAINST CAPRINE ACADEMY FOR DISABILITY DISCRIMINATION UNDER THE ADA.

Congress realized that this nation's treatment of individuals with disabilities was a serious and continuing problem. Because of discrimination and prejudice, people with

disabilities were denied "the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(9) (1990). Responding to this problem Congress enacted the Americans with Disabilities Act of 1990 (ADA). The purpose of the ADA is to enable congress and various enforcement agencies to eliminate discrimination against people with disabilities. 42 U.S.C.§ 12101(b).

In order for Mr. Smithies to bring a cause of action for disability discrimination under the ADA, he must establish a prima facie case. Mr. Smithies must have been disabled; qualified for his job, with or without reasonable accommodation; have suffered an adverse employment decision; show that Caprine Academy knew of his disability; and show that his position remained open or that he was replaced. *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996). Mr. Smithies has established all the essential elements of a prima facie case to bring a cause of action against Caprine Academy under the ADA.

A. Mr. Smithies was qualified for his position, and after he was fired his position remained open.

The ADA protects qualified disabled employees from discrimination. Under the ADA an employee is qualified if that employee can perform the essential functions required by the position either with or without reasonable accommodation. 42 U.S.C. § 12111(8). The federal ADA regulations (regulations) provide courts and employers guidance in determining if an employee with a disability is a qualified employee under

the ADA. A person is qualified if that person "possess[es] the appropriate . . . employment experience [and] skills . . . [and] can perform the essential functions of the position held or desired, with or without reasonable accommodation." 29 app. C.F.R. § 1630.2(m) (1991). The regulations go on to define essential functions as "those functions that the individual who holds the position must be able to perform unaided or *with the assistance of a reasonable accommodation*." 29 app. C.F.R. § 1630.2(n). (Emphasis added).

Mr. Smithies possesses the appropriate employment experience and skills to perform his job. His experience is evidenced by the five years he had worked for Caprine Academy. His skill is evidenced by the *good to excellent* performance reviews he consistently received. Moreover, Mr. Smithies has shown that he can perform the essential functions of his job when he is reasonably accommodated.

The sixth circuit has determined that "what functions are 'essential' to a particular position is a question of fact . . . and must be 'made on a case-by-case basis'" *Brumbalough v. Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1005 (6th Cir. Tenn. 2005) (citing in part 29 app. C.F.R. § 1630). In *Brumbalough*, the district court found no genuine issues of material fact as to whether the appellant could perform the essential functions of her job and granted summary judgment in favor of the employer on this issue. However, the appellant had presented evidence that the court of appeals concluded did raise issues of material fact. The court ultimately held that "further findings . . . [were] necessary to determine what constitutes the essential functions of the job and whether [the appellant] was able to perform such functions." *Brumbalough*, 427 F.3d at 1006.

Mr. Smithies has performed his duties in the past, and he continued to do so with reasonable accommodation until he was fired. Mr. Smithies had consistently received good to excellent performance reviews. It had even been remarked that his performance was improving after he brought his dog to work with him. Furthermore, Caprine Academy has offered no objective evidence that Mr. Smithies could not perform the essential functions of his job when reasonably accommodated.

In addition to being a qualified employee, it has been established that Mr. Smithies was not replaced after he was fired, and his position remained open. Both parties have stipulated to this fact.

Mr. Smithies consistently performed the essential functions of his job and was a qualified employee under the ADA. This case should be remanded to the district court for further proceedings on this element of Mr. Smithies' prima facie case.

B. Mr. Smithies was disabled within the meaning of the ADA.

Qualified disabled employees are afforded protection from discrimination under the ADA. Under the ADA an individual is disabled if that individual "[has] a physical or *mental impairment* that substantially limits one or more of the major life activities; [or has] (B) a record of such an impairment." 42 U.S.C. § 12102(2)(A). (Emphasis added). The regulations go on to define a mental impairment as "[a]ny mental or psychological disorder, . . . emotional or *mental illness*, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2) (1991). (Emphasis added). Schizophrenia is specifically listed among the

examples classified as mental impairments by the Equal Employment Opportunity Commission (EEOC). *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, Notice No. 915.002(1) (Mar. 25, 1997). However, an impairment does not necessarily rise to the level of a disability unless it substantially limits a major life activity. *EEOC Enforcement Guidance*, Notice No. 915.002(1).

Major life activities include "functions such as caring for oneself, performing manual tasks, . . . and working." 29 C.F.R. § 1630.2(h)(2)(i). The regulations have further determined that a person is substantially limited if that person is unable to perform, or is significantly restricted in performing, a major life activity that the average person could perform. 29 C.F.R. § 1630.2(j)(1). The regulations then provide courts and employers with several factors to consider in determining whether a person is substantially limited: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2).

Caring for oneself and working are major life activities that the regulations have *specifically* recognized. The sixth circuit has followed *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) with respect to major life activities within the meaning of the ADA. *McKay v. Toyota Motor Mfg. U.S.A.*, 110 F.3d 369, 373 (6th Cir. Ky. 1997). The court in *Dutcher* characterized caring for oneself as anything from eating and grooming to cleaning one's living quarters. *Dutcher*, 53 F.3d at 726.

The appellant in *Dutcher* sustained a gunshot injury to her arm. However, the

court found that her injury did not substantially limit her major life activities. The appellant admitted that she had trained herself to do everything she needed to do to take care of herself. The court specifically found – and was *undisputed* – that the appellant could "feed herself, drive a car, attend her grooming, carry groceries, wash dishes, vacuum, and pick up trash with her impaired hand." *Dutcher*, 53 F.3d at 726. The court of appeals affirmed the district court's order for summary judgment in favor of the employer because the appellant was not significantly limited in a major life activity.

Unlike the appellant in *Dutcher*, Mr. Smithies never claimed he could do all the things he needed to do. On the contrary, Mr. Smithies knows he is severely and substantially limited in performing everyday life activities. He has difficulty working and concentrating when the voices increase. Although he tries, Mr. Smithies needs help several times a week just to make sure he is eating, taking his medication, and cleaning his apartment.

In contrast, summary judgment is inappropriate if there is a genuine issue of material fact regarding whether a disability substantially limits a major life activity. Fed. R. Civ. P. 56(c). In *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998), the appellant suffered from psoriasis. She experienced pain and received weekly medication and treatment even when her psoriasis was in its dormant stage. The appellant in *Cehrs* asserted that "the major life activities of caring for herself and working [were] affected." *Cehrs*, 155 F.3d at 781. The court of appeals held that because the appellant identified major life activities that were specifically listed in the regulations, she had raised genuine issues of material fact and summary judgment on her ADA claim

was error.

Like the appellant in *Cehrs*, Mr. Smithies' disability substantially limits him in performing major life activities that are specifically covered in the regulations. He has difficulty caring for himself – keeping his apartment clean, eating, and taking his medications. A social worker stopped by Mr. Smithies' house several times a week to ensure he was eating properly, taking his medications, and cleaning his apartment. Furthermore, Mr. Smithies has difficulty working when his delusions cannot be controlled. When Mr. Smithies' delusions are not controlled they become real; he is unable to separate the delusions from reality.

In addition to the cases, when the regulation's guiding factors are applied it is clear that Mr. Smithies has a mental disability within the meaning of the ADA. Mr. Smithies has suffered from his disability for eighteen years – more than half his life – and there is no indication that his disability will ever go away. He needs help several times a week just caring for himself, and there is no indication that he will not need this care for the rest of his life. Mr. Smithies' mental disability severely limits his major life activities and is continuous and permanent. Moreover, Mr. Smithies mental disability is well documented.

Even if Mr. Smithies was found not to be substantially limited in a major life activity, he was both considered to be mentally impaired by his coworkers and has a long record of being mentally impaired that was relied upon by Dr. Seleye when Mr. Smithies was hired. The regulations provide that an individual is disabled if "a record relied on by an employer indicates that the individual *has* or *has had* a substantially limiting

impairment" 29 C.F.R. app. § 1630.2(k). (Emphasis added). Because he was regarded as having a mental impairment and because Dr. Seleye relied on Mr. Smithies' long record of impairment, Mr. Smithies was disabled within the meaning of the ADA.

In *Lloyd v. Cleveland City Sch. Dist.*, 232 F. Supp. 2d 806 (N.D. Ohio 2002), the district court held that summary judgment on the plaintiff's record of impairment argument could not be granted. The plaintiff in *Lloyd* was injured in a car accident. The district court found that the plaintiff's injuries were not long-term, and the severity of his injuries were uncertain in the medical records. However, the court concluded that "to establish a record of disability, the plaintiff does not have to demonstrate that the impairment is permanent or long-term." *Lloyd*, 232 F. Supp. 2d at 812. The plaintiff in *Lloyd* presented several medical records that raised a genuine issue of material fact as to whether he demonstrated a record of impairment that substantially limited a major life activity.

Unlike the plaintiff in *Lloyd*, Mr. Smithies' disability is not short-term; it is a life-long disability. The severity of his disability was evident by his multiple institutionalizations and arrests caused by his delusions and his ongoing reliance on others to aid him in major life activities. However, Mr. Smithies is similar to the plaintiff in *Lloyd* because he has demonstrated a long record of impairment that Dr. Seleye was well aware of and relied on in his decision to hire Mr. Smithies.

Mr. Smithies has an identified mental disability defined under the ADA and specifically recognized by the EEOC. Furthermore, there has been a long history of Mr. Smithies' mental disability that has been well documented. Mr. Smithies is disabled

within the meaning of the ADA. This case should be remanded to the district court for further proceedings on this element of Mr. Smithies' prima facie case.

C. Mr. Smithies was regarded by his coworkers as being disabled, was hired by Caprine Academy after full disclosure of his medical records, and Dr. Seleye had knowledge of his disability.

An employer cannot discriminate against a disabled employee because of a disability "if [the employer] has no knowledge of the disability." *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 884 (6th Cir. Ohio 1996). In *Kocsis*, when the appellant began working she provided her employer copies of her medical records which indicated that she had no serious illness. Some time later the appellant began experiencing health problems and was diagnosed with Multiple Sclerosis. The appellant's work began to suffer, and she was eventually reassigned. The appellant claimed that her reassignment was actually a demotion as a result of her disability. However, the court found no evidence suggesting that the appellant's employer knew of her disability at the time the reassignment occurred. The court held for the employer on this issue.

Unlike the employer in *Kocsis*, Caprine Academy knew of Mr. Smithies' disability when he was hired. Dr. Seleye had knowledge of Mr. Smithies' previous institutionalizations, specifically stated that he knew of Mr. Smithies' disability, and regarded Mr. Smithies as being disabled. Moreover, Dr. Seleye conducted a full background check on Mr. Smithies and claimed that he knew Mr. Smithies better than Mr. Smithies knew himself.

Caprine Academy had knowledge of Mr. Smithies' disability and regarded him as being disabled.

D. Mr. Smithies suffered an adverse employment decision.

An adverse employment decision occurs when an employee *involuntarily* loses a job because an employer fails to reasonably accommodate that employee. *E.E.O.C. v. United Parcel Service, Inc.*, 249 F.3d 557, 563 (6th Cir. Ohio 2001). In *E.E.O.C.*, the appellant was an employee of United Parcel Service (UPS) in Texas. He was advised by his physician to relocate from Texas due to serious reactions to a local allergen. When the appellant requested the reasonable accommodation of a transfer, UPS refused. UPS suggested that the appellant resign and then reapply in Ohio for a position. The appellant followed this advice, moved his family, and reapplied in Ohio. UPS denied his application. The court held that "a reasonable jury could find that [the appellant's] resignation was not truly voluntary and not actually intended to end his employment with UPS." *Eeoc*, 249 F.3d at 563.

The position of Mr. Smithies is similar to that of the appellant in *Eeoc*. Mr. Smithies required an accommodation to continue working. Dr. Seleye refused this accommodation but gave Mr. Smithies the "choice" to continue working *if* he came back without his prescribed therapy dog. Mr. Smithies could not do this, and Dr. Seleye fired him. The "choice" Dr. Seleye gave Mr. Smithies was really no choice at all.

When Caprine Academy fired Mr. Smithies he suffered an adverse employment

decision, and this case should be remanded to the district court for further proceedings on this element of Mr. Smithies' prima facie case.

E. Mr. Smithies has established all the essential elements of a prima facie case.

Based upon the facts just presented, Mr. Smithies has established all the essential elements of a prima facie case in order to bring a cause of action for disability discrimination under the ADA. This case should be remanded to the district court for further proceedings on the merits of this issue.

II. MR. SMITHIES WAS A LOYAL, TRUSTED, AND WELL-LIKED EMPLOYEE AND DID NOT POSE A RISK TO ANYONE DURING HIS FIVE YEARS WITH CAPRINE ACADEMY.

Under the ADA an employer must provide reasonable accommodation to a qualified disabled employee unless that employee poses a "direct threat". 29 C.F.R. § 1630.15(b)(2). A direct threat "means a *significant risk* to the health or safety of others that *cannot be eliminated by reasonable accommodation*." 42 U.S.C. § 12111(3). (Emphasis added). The regulations further define a significant risk as a "high probability, of substantial harm; *a speculative or remote risk is insufficient*." 29 C.F.R. app. § 1630.2(r). (Emphasis added). Mr. Smithies did not pose a direct threat to anyone at Caprine Academy.

A. Mr. Smithies' reaction to the withdraw of his accommodation was predictable based on his disability. Mr. Smithies never threatened or posed a risk to Dr. Seleye.

The ADA protects qualified disabled employees from discrimination. 42 U.S.C. § 12112(a). However, employers are not required to retain an employee who poses a threat to other employees. *Green v. Burton Rubber Processing, Inc.*, 30 Fed. Appx. 466, 470 (6th Cir. Tenn. 2002). The ADA and its enforcement guidelines provide employers and courts with a number of factors to use in evaluating if an employee poses a risk. These factors include "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." 29 C.F.R. § 1630.2(r).

In *Green*, the appellant suffered from a mental disability and checked himself into a hospital. While at the hospital the appellant paced the floor telling people that he wanted to kill his supervisors. The appellant's wife reported that he "'voiced a desire to kill all of his employers.'" *Green*, 30 Fed. Appx. at 468. The appellant subsequently left the hospital against his doctor's advice. A nurse at the hospital called the appellant's employer, informed them of the threats, and advised them to call the police – which they did. *Green*, 30 Fed. Appx. at 468. A restraining order was also obtained against the appellant. When the appellant arrived at work the next day he was requested to leave. He was fired two days later. The court held that the employer was not required to retain the appellant because of the risk he posed to others. In reaching its decision the court explicitly relied on *Palmer v. Cir. Court of Cook County*, 117 F.3d 351 (7th Cir. 1997).

Green, 30 Fed. Appx. at 470.

The appellant in *Palmer* was diagnosed with major depression and a delusional disorder. The appellant had a falling out with a coworker and was suspended for ten days after threatening to "'kick [the coworker's] ass' and 'throw her out of her window'." *Palmer*, 117 F.3d at 351. When the appellant returned to work she was suspended again for seven days when she told a coworker to "'go to hell'." *Palmer*, 117 F.3d at 352. The appellant was finally fired a few months later after a minor tiff with the same coworker when she made a series of calls to the office and said, "'I'm ready to kill her. . . . I want her dead.'" *Palmer*, 117 F.3d at 352. The district court granted summary judgment in favor of the employer on the appellant's ADA claim. The court of appeals affirmed on the grounds that she was fired "because she threatened to kill another employee." *Palmer*, 117 F.3d at 352.

Unlike *Green* and *Palmer*, Mr. Smithies' only alleged threat was confined to one brief, isolated incident in the presence of one individual, Dr. Seleye. The appellants in *Green* and *Palmer* specifically threatened to *kill* coworkers and supervisors; the deadly nature of these threats and the potential for harm was very serious. Mr. Smithies never threatened Dr. Seleye; rather, he reacted to the denial of his accommodation in a predictable manner based on his disability. Mr. Smithies was frustrated, and his reaction was misunderstood by Dr. Seleye.

Dr. Seleye is knowledgeable of Mr. Smithies and aware that paranoid schizophrenia is "characterized predominantly by megalomania and delusions of persecution." Paranoid schizophrenia, Dictionary.com, *The American Heritage*®

Stedman's Medical Dictionary. Houghton Mifflin Company, http://dictionary.reference.com/browse/paranoid schizophrenia (last accessed: June 09, 2008). When Dr. Seleye took away Mr. Smithies' dog he split apart Mr. Smithies' basis for stability and caused him to fall into a chasm of confusion and delusion. When Mr. Smithies pounded and waived his fists he was calling Dr. Seleye names associated with dictatorship – such as Saddam Hussein. These were not threats; they were Mr. Smithies' way of comparing Dr. Seleye to a dictator. Mr. Smithies' actions were predictable and consistent with the manifestations of his disability and, of course, were taken out of context by Dr. Seleye. Because Mr. Smithies' actions were predictable, the likelihood of harm was remote, and any risk to Dr. Seleye was merely speculative. In addition, Dr. Seleye never called for any type of help or security.

Mr. Smithies did not pose a direct threat to the staff, students, patrons, or anyone else at Caprine Academy. Mr. Smithies was a well-liked, loyal, and trusted employee for five years. His performance was commended, and aside from the one isolated incident with Dr. Seleye he never received a complaint. During this incident with Dr. Seleye, Mr. Smithies' reaction to the denial of his accommodation was predictable. Dr. Seleye misunderstood and misinterpreted Mr. Smithies' reaction.

III. CAPRINE ACADEMY VIOLATED THE ADA WHEN IT FAILED TO ENGAGE IN AN INTERACTIVE PROCESS WITH MR. SMITHIES TO EVALUATE HIS REQUEST FOR A REASONABLE ACCOMMODATION.

Employers are required to engage disabled employees in an interactive process to discuss potential accommodations. 42 U.S.C. § 1630.2(o)(3). The purpose of this

interactive process is to ensure that the employer and employee have worked together to arrive at an appropriate accommodation. 29 app. C.F.R. § 1630.9. Caprine Academy – in violation of the ADA – did not engage in an interactive process with Mr. Smithies.

A. Caprine Academy failed to engage in an interactive process with Mr. Smithies.

This court and other jurisdictions have held that the ADA *requires* an interactive process between both the employer *and* the employee to determine a reasonable accommodation. See, e.g., *Kleiber v. Honda of Am. Mfg.*, 485 F.3d 862, 871 (6th Cir. Ohio 2007) ("the interactive process is mandatory, and both parties have a duty to participate in good faith"); *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 735 (5th Cir. Tex. 1999) ("the interactive process requires the input of the employee as well as the employer"); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. Wis. 1996) ("the regulations envision an interactive process that requires participation by both parties"); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312 (3rd Cir. Pa. 1999) (a great deal of communication between the employee and employer is required).

In *Kleiber*, the appellant suffered serious injuries in an off-the-job accident and was disabled. The appellant was fired when the employer determined that he could no longer perform his job and there were no other suitable positions available. The appellant claimed that his employer violated the ADA by "failing to participate in . . . the informal, interactive process required to identify a suitable reasonable accommodation." *Kleiber*, 485 F.3d at 868. Although the employer communicated to the appellant via the

appellant's Bureau of Vocational Rehabilitation proxies, the court found that the employer acted in good faith and engaged in an interactive process with the appellant. *Kleiber*, 485 F.3d at 872. Moreover, the appellant could not show that he made an effort to participate directly in the process.

Unlike the employer in *Kleiber*, Dr. Seleye withdrew Mr. Smithies' accommodation without discussing the matter with him. When Dr. Seleye returned from his trip he *immediately* determined that having a dog at the Academy was unreasonable. Even when Dr. Seleye did engaged Mr. Smithies it was not to discuss Mr. Smithies' request for a reasonable accommodation. Rather, Dr. Seleye's sole purpose for engaging Mr. Smithies was to tell him that his accommodation was unreasonable. Because there is no objective evidence that Dr. Seleye attempted to engage Mr. Smithies in an interactive process – *as required by the ADA* – it cannot be determined that Mr. Smithies' request was unreasonable. Dr. Seleye acted in bad faith when he arbitrarily refused Mr. Smithies' request for a doctor-prescribed dog as a reasonable accommodation.

Again, Caprine Academy failed to engage Mr. Smithies in an interactive process – as required by the ADA – to discuss his request for a reasonable accommodation. Dr. Seleye had no objective basis for denying Mr. Smithies' request. Dr. Seleye acted in bad faith and violated the purpose and intent of the ADA. This case should be remanded to the district court for further proceedings on the merits of this issue.

IV. ANY EXPENSES RELATED TO MR. SMITHIES' DOG WERE COVERED BY MR. SMITHIES AND WOULD NOT IMPOSE AN UNDUE HARDSHIP FOR CAPRINE ACADEMY.

The ADA requires an employer to reasonably accommodate a qualified disabled employee unless that accommodation would impose an undue hardship 42 U.S.C. § 12112(b)(5)(A). The regulations have defined undue hardship to mean "significant difficulty or expense in, or resulting from, the provision of the accommodation." 29 app. C.F.R. § 1630.2(p). Mr. Smithies request for a reasonable accommodation would not impose an undue hardship for Caprine Academy.

A. Mr. Smithies' therapy dog would not impose an undue hardship for Caprine Academy.

This court has held that undue hardship "is highly fact-specific and requires the court to engage in an individualized inquiry." *Hall v. United States Postal Service*, 857 F.2d 1073, 1080 (6th Cir. 1988). Guidance in the present case can be obtained from the seventh circuit in the case of *Branson v. West*, 1999 U.S. Dist. LEXIS 7343 (N.D. Ill. 1999).

In *Branson*, the plaintiff was a paraplegic physician who requested the reasonable accommodation of a service dog. The plaintiff purchased the dog, had the dog trained, and did not request any financial help from her employer. Moreover, the court found that the plaintiff's employer "failed to produce any evidence indicating that a service dog . . . would require any financial expenditure by [the employer.]" *Branson*, 1999 U.S. Dist.

LEXIS 7343 at *32.

Similar to the plaintiff in *Branson*, Mr. Smithies purchased his dog, the dog was fully trained, and Mr. Smithies never requested any financial help from Caprine Academy. Furthermore, Caprine Academy failed to produce any objective evidence that Mr. Smithies' dog would require any financial expenditure on its part. The only plausible argument that Caprine Academy could have appears to lie in the fact that a couple of parents complained, and the Academy assumed that the parents would remove their students from the school. This is speculative. Even assuming this to be the case, the loss of tuition dollars for Caprine Academy would be minute. The *potential* loss of tuition dollars from *two* students among a student body of *two thousand* would not rise to the level of undue hardship as envisioned under the ADA. Caprine Academy may argue that the dog could bite or injure someone at the school. However, the dog is highly trained, has never exhibited hostility, and Caprine Academy has offered no objective evidence to the contrary.

Mr. Smithies' requested accommodation would not impose an undue hardship for Caprine Academy. Moreover, Caprine Academy has provided no objective evidence to the contrary. This case should be remanded to the district court for further proceedings on the merits of this issue.

CONCLUSION

Mr. Smithies has established all the essential elements of a prima facie case in order to bring a cause of action against Caprine Academy for disability discrimination.

Mr. Smithies was a qualified employee; he worked for Caprine Academy for five years and received good to excellent performance reviews. Mr. Smithies was disabled; he suffered a recognized mental impairment which was known by Dr. Seleye, and was regarded by his coworkers as being disabled. Finally, Mr. Smithies suffered an adverse employment decision when he was fired, and his position remained open.

Mr. Smithies was also a well-liked, loyal, and trusted employee; he did not pose a risk to anyone at Caprine Academy. Caprine Academy failed to present any objective evidence to the contrary. Mr. Smithies' reaction to the one isolated incident with Dr. Seleye was predictable and in accord with his disability; it was misinterpreted by Dr. Seleye and did not constitute a risk.

Finally, Dr. Seleye failed to engage Mr. Smithies in an interactive process as required under the ADA. Without this interactive process it cannot be determined that Mr. Smithies' request was unreasonable or would cause an undue hardship for Caprine Academy. Caprine Academy has offered no objective evidence to suggest otherwise.

For these reasons summary judgment was inappropriate, and this case should be remanded to the district court for further proceedings on the merits for each of the issues presented.