

TROUBLED TRIATHLETE EXPELLED FROM RECREATION PROGRAM

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Title II of the Americans with Disabilities Act (ADA) prohibits disability discrimination by local government. Similarly, Section 504 of the Rehabilitation Act prohibits disability discrimination by recipients of federal assistance, including States. In the case of *Talevski v. Regents of the University of California*, 2015 U.S. Dist. LEXIS 54895 (S.D. Calif. 4/27/2015), plaintiff alleged disability discrimination against the University of California at San Diego (UCSD) after she was dismissed for her allegedly inappropriate behavior in a recreational Triathlon Program. Based on her bi-polar disorder, plaintiff is considered a “disabled individual” within the meaning of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act.

In addition to educational programs, the University of California San Diego (UCSD) also operates recreational programs open to the general public. Plaintiff enrolled in UCSD's Triathlon Program. The coaches in the program were aware of "the nature of Plaintiff's disability." UCSD's Recreation Department provides recreation programs for students, faculty, staff, and the community at large. One program, called the Master Sports Program (Program), provides running, swimming, and triathlon training.

The Program offered group classes, and did not offer one-on-one coaching. The group workout sessions consist of about 50 participants each class, with some sessions numbering 100 athletes. On average, approximately 400 individuals participate in the Program each quarter and may attend any of 27 different workout sessions during the week. The personnel in the Program includes two full-time coaches and about 16 other part time assistant coaches. The high number of participants in the programs requires that the coaches "remain alert and focused on potential safety issues."

CODE OF CONDUCT

In order to participate in the Program, each participant was required to read, sign, and abide by the Athlete and Coaches Code of Conduct ("Code"). The Code required participants to "be courteous and polite during all scheduled workouts," "treat each other with respect and courtesy," refrain from "unreasonable loud, abusive, negative or foul language," refrain from "anger directed at another athlete or coach," refrain from "physical or emotional outbursts during scheduled workouts," and refrain from any kind of harassment directed toward another athlete or coach."

When plaintiff commenced the program in 2009, and again every quarter throughout her participation in the program, plaintiff acknowledged that she would abide by the Code. Notwithstanding "minor" disruptions in the Program attributable to plaintiff's disability, plaintiff was able to successfully participate in the Program, including general compliance with the Code. After plaintiff stopped taking her medications, she started to experience a depressive episode and had an occasional emotional outburst while

participating in the program. She also developed a harmless yet obsessive affection for another participant in the program.

On January 31, 2012, plaintiff was informed by the UCSD director of Recreation that she was suspended from the program because her behavior violated "the Athletes and Coaches Code of Conduct for the Masters Sports Program." The letter provided to plaintiff stated, among other things:

- a. "You regularly blurted out comments during the workout that were inappropriate and loud.
- b. You became angry at a fellow swimmer because you felt she spoke to you in a degrading manner.
- c. During the course of the workout you would randomly complain about people in your life that were apparently bullying you.
- d. You have, on a few occasions, had crying outbursts because of some of your own personal struggles.

On February 6, 2012, plaintiff was expelled from the sports program.

REHABILITATION ACT CLAIM

In her disability discrimination complaint, plaintiff alleged that her conduct was "the result of a person with manic-depressive disorder as they were manifestations of the despair, irritability, insecurity, and obsessive compulsive behavior that are among the classic symptoms of bi-polar disorder." In response, UCSD claimed it had "a legitimate non-discriminatory reason for dismissing plaintiff from the program" because she violated the Code of Conduct.

As described by the federal district court, to state a claim under the Rehabilitation Act, a plaintiff must allege the following:

- (1) she is an individual with a disability; (2) she is otherwise qualified to receive the benefit; (3) she was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance.

In this particular instance, the parties agreed plaintiff is "an individual diagnosed with a recognized disability, Bipolar Disorder Type 1, and UCSD receives federal financial assistance." Accordingly, the issue before the federal court was whether plaintiff was "otherwise qualified" to participate in the recreational program.

As cited by the federal district court, a "qualified individual" under the Rehabilitation Act is "one who is able to meet all of a program's requirements in spite of her handicap, with or without accommodation." In this particular instance, the federal district court found plaintiff had alleged sufficient facts to establish she was an otherwise qualified individual with a disability. Specifically, the court found evidence on the record that plaintiff was

able to successfully participate in the program, including general compliance with the Code.

Having found sufficient facts to establish a claim under the Rehabilitation Act, the federal court noted that the burden would then shift to UCSD “to articulate a legitimate, non-discriminatory reason for its action.” Further, if a legitimate non-discriminatory reason was established, the burden would shift back to plaintiff to “prove that the proffered legitimate reason is a pretext for discrimination” on the basis of her disability.

NON-DISCRIMINATORY REASON?

As noted above, UCSD claimed “a legitimate reason for terminating Plaintiff’s participation in the Program because she violated the Code.” Plaintiff did not dispute that the Code was “an integral aspect of the Program” for qualified participants. Instead, plaintiff disputed whether she had indeed violated the Code and/or whether UCSD had “accommodated her disability.”

In a January 2012 meeting, two of the coaches informed the Recreation director that plaintiff had been a program participant for about three years. The coaches further informed the director that “Plaintiff’s presence in the Program had been tumultuous and that she had violated the Code.” The coaches explained “that they gave second chances for many of these rule violations because they felt bad for her, but they expressed concern that the incidents were becoming more frequent and more severe.”

In addition, the coaches provided several specific instances of misconduct, including a number of incidents where plaintiff had been “disruptive in practices, including blurting out inappropriate comments, demanding attention of the coaches, and interrupting workouts.” In each instance, the coaches stated they were “forced to interrupt the workout” to deal with plaintiff, and “often could not focus on monitoring the safety of workouts because of her actions.” As a result, the director found plaintiff’s conduct constituted a serious violation of the Code because each interruption by plaintiff “required coaches to provide her with individualized attention at the detriment of the safety and training of every other participant.”

The director subsequently met with the UCSD director of student health to discuss his concerns about plaintiff’s bipolar disorder and whether “any other ways the Program might accommodate her presence.” In the absence of any alternative accommodations, the director had indicated “Plaintiff’s repeated violations of the Code warranted dismissal from the Program.”

Even though Plaintiff had never requested any type of accommodation, the recreation director and health director discussed accommodations, but determined that dismissal was appropriate under the circumstances. In the opinion of the UCSD health director, the staff had bent over backwards for three years to try and keep plaintiff in the program. Moreover, in the opinion of the health director, the coaching staff was effectively required to fill the role of plaintiff’s full time counselor, rather than coach. Also,

plaintiff's conduct was having a negative impact on other participants. Specifically, the monopolization of the coaches by plaintiff "came at the detriment of the other paying participants who complained about it." The only possible accommodation which had been identified by plaintiff's medical expert was that she "could have been referred to a mental health counseling unit or program."

In the opinion of the federal district court, UCSD had "met its burden in demonstrating that Plaintiff's numerous Code violations established a legitimate basis for Plaintiff's discharge from the Program."

In so doing, the court noted that "this case does not deal with the accommodation of a disability in the context of fundamental rights such as primary and secondary education or in employment." Rather, the court found "the Program is open to the public and provides group classes for participants who desire to improve their physical fitness."

Given the group nature of the classes (approximately 50 participants per class with one, possibly two, coaches), Plaintiff's disruptive conduct undermined the ability of the coaches to provide effective group coaching.

CONDUCT CODE VIOLATIONS?

Having established a legitimate non-discriminatory reason UCSD's actions, the burden then shifted to plaintiff "to come forward with evidence to show that the proffered reasons were a pretext for disability discrimination."

Having signed a form acknowledging that she read and understood the Code, plaintiff testified that she indeed "understood her conduct had to comply with the Code." That being said, plaintiff maintained that there was "a question of fact as to whether she violated the Code." Specifically, plaintiff denied that she ever engaged in any inappropriate behavior while participating in the program. Moreover, plaintiff claimed "no one ever mentioned the Code of Conduct and no one ever said I was doing anything that violated the Code of Conduct," even after she received the dismissal letter from the Recreation director.

While "the overwhelming weight of evidence" favored UCSD, in light of plaintiff's denial of any violations of the code, the federal district court found further trial proceedings would be necessary to determine the facts and credibility of the evidence.

VIABLE ACCOMMODATION?

UCSD alleged plaintiff had never requested, nor had she ever identified "any viable accommodation" related to her disability. As noted by the federal district court, plaintiff had "the ultimate burden to show that Defendant [UCSD] failed to reasonably accommodate her disability." As noted, the only accommodation suggested by plaintiff's medical expert was that UCSD "could have referred Plaintiff to a mental health counseling unit." In addition, plaintiff argued that UCSD "could have suspended her and

later readmitted her once she stabilized and began taking her medications.” That being said, plaintiff’s medical expert acknowledged that no one could have made plaintiff “take her medication if she refused to do so.”

Accordingly, the federal district court found plaintiff had failed to “identify or explain how a referral to a mental health professional or an indefinite suspension would have accommodated her disability.”

Unlike a ramp for the mobility impaired, or a sign language interpreter for the hearing impaired, that directly addresses and accommodates the disability, a referral to a mental health professional accomplishes nothing...

There is simply no evidence to show that if Plaintiff were referred to a medical health professional, she would immediately be accommodated... [I]t is not the referral to a mental health professional that has the potential to accommodate Plaintiff’s bipolar condition. Rather, it is the treatment received from a mental health professional that would address, treat, and accommodate Plaintiff’s condition.

As a result, the federal district court denied plaintiff’s claim the UCSD had failed to “reasonably accommodate” her disability by failing to refer plaintiff to a mental health counseling unit.

INTERACTIVE PROCESS?

Further, once she began exhibiting “obsessive-compulsive behaviors and threatened to commit suicide,” plaintiff claimed “her behavior placed the coaches on notice that they were under a mandatory obligation to refer her to mental health professional.” The federal district court rejected this argument.

In so doing, the court found such assistance was only required by the ADA in an employment situation. In the context of employment, where an employer knows of an employee’s disability and the employee is unable to make an accommodation request, under the ADA, the employer must assist in initiating the interactive process to discuss accommodations.

In this particular instance, the federal district noted “Plaintiff’s claim does not arise under the ADA (although there is substantial overlap with the Rehabilitation Act) nor in the context of employment.” Unlike “fundamental rights such as employment and education,” the court found further plaintiff’s participation in the program was “not generally considered indispensable to maintaining a productive and sustainable livelihood.”

[A]ttending and participating in a group exercise class, one of hundreds of thousands of classes available in San Diego County, is a voluntary and

discretionary activity. Plaintiff is one of many voluntary participants in a group exercise class with emphasis on triathlon.

As a result, the federal district court found UCSD had no legal duty “to employ mental health professions, or to provide sufficient training to its coaches to become proficient in recognizing debilitating mental health issues in participants in the Program.” Further, in the absence of such a duty, UCSD had no responsibility to “then refer that participant to a mental health professional who may or may not provide successful treatment over weeks, months, or years.”

Under the circumstances of this case, Defendant [UCSD] was not under a duty to engage in a mandatory interactive process. The coaches oversee about 27 classes per week, each with about 50 participants each class. Plaintiff did not enroll in private classes where she could obtain individualized attention, but in large group classes.

Under the circumstances of this case, the coaches, who are trainers and not mental health professionals, were not under a mandatory obligation to identify and diagnose Plaintiff's mental health issues, refer Plaintiff for mental health treatment, provide mental health treatment, or engage in an employer-type interactive accommodation.

CONCLUSION

Having rejected plaintiff's claim that UCSD had failed to accommodate her disability, the federal district court would nonetheless allow further trial proceedings to fully consider the sole remaining issue of dispute between the parties, i.e, whether plaintiff had indeed violated the Code. That being said, on the pretrial record alone, the court acknowledged “the overwhelming weight of evidence” would suggest that plaintiff had violated the code, prompting her expulsion from the program.

(With 20-20 hindsight, it may have been helpful to have had some minimal due process in place to document initial and ongoing violations of the UCSD Code of Conduct. In so doing, Program participants would be provided written notice of alleged code violations and be provided a reasonable opportunity to respond in an informal hearing before the Recreation director. Had such documented due process evidence been available in this particular instance, it would have the likelihood the federal district court would have dismissed this case without further trial proceedings.)

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