STATE OF MICHIGAN

COURT OF APPEALS

RICHARD JAHIEL,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN REGENTS, UNIVERSITY OF MICHIGAN MEDICAL SCHOOL, GILES G. BOLE, JAMES J. DUDERSTADT, UNIVERSITY OF MICHIGAN MEDICAL CENTER & HOSPITAL, and JOHN D. FORSYTH,

Defendants-Appellees.

UNPUBLISHED

No. 183644

Washtenaw Circuit Court
LC No. 93-681-NO

Before: White, P.J., and Griffin and D.C. Kolenda,* JJ.

WHITE, P.J., (dissenting)

I agree with the circuit court that defendants failed to establish that plaintiff was not qualified for medical school. I cannot, however, agree with the circuit court's determination that summary disposition was proper because there was no undue delay in the provision of accommodations. I conclude that plaintiff presented evidence sufficient to raise a genuine issue of fact whether defendants met their duty to reasonably accommodate plaintiff's handicaps, and therefore respectfully dissent.

The gravamen of plaintiff's complaint is that defendants failed to accommodate plaintiff by failing to timely make reasonable accommodations and failing to follow up or through on plaintiff's requests. The facts viewed in a light most favorable to plaintiff are that after receiving bachelor's and master's degrees from MIT and Harvard, plaintiff was admitted to Medical School at the University of Michigan, to begin in August of 1991, having fully disclosed his learning disabilities of developmental dyslexia and attention deficit disorder. Because of these disabilities, visual aids, such as videotapes, were of extreme

* Circuit judge, sitting on the Court of Appeals by assignment.

importance to plaintiff's learning and progress as a medical student. In the spring of 1991, plaintiff contacted six offices at the University of Michigan, four of which were at the Medical School, regarding assistance he would need when classes began. He was assured that tutors, class notes, videotapes of the classes, and counseling would be in place when school began.[1] However, when he arrived in the fall of 1991, plaintiff was largely left to his own devices to figure out how to go about obtaining services and, although many of the accommodations plaintiff requested were eventually made, at least one important accommodation—the provision of videotapes--took a full academic year to obtain. Plaintiff also had difficulty finding tutors.

It is undisputed that a committee was formed to address plaintiff's needs, apparently at the initiative of a medical school faculty member, Dr. Theodore Cole, who also was plaintiff's informal academic advisor.[2] Dr. Cole testified at deposition that plaintiff's requests for accommodations were reasonable. It is undisputed that the committee, and Dr. Cole in particular, took interest in plaintiff, considered his requests for accommodations, and agreed that many should be implemented. However, the committee lacked the power to implement the needed accommodations and thus had no control as to the timeliness of the accommodations. Dr. Cole testified at deposition that some of plaintiff's requests were not timely responded to, that there was a delay in getting tutors, that there were delays in getting videotapes, and that he believed that these and other delays caused plaintiff to fall behind.

Other evidence supporting plaintiff's position includes the minutes of a meeting of the executive committee of the Medical School, dated June 3, 1993, which were attached to his response to defendants' motion below, and state:

> The Executive Committee approved a fourth year for Richard Jahiel, M1 to complete the first two years of medical school. It has been determined that when Mr. Jahiel started medical school, he did not have the support system in place to meet his needs as a learning disabled student. That support system is now in place. Mr. Jahiel will be given until the last day of final examinations in 1995 to complete all of the first- and second-year course work and examinations.

MCL 37.1102; MSA 3.550(102) provides in pertinent part:

> (1) The opportunity to obtain . . . equal utilization of . . . educational facilities without discrimination because of a handicap is guaranteed by this act and is a civil right.
>
> (2) Except as otherwise provided in article 2, a person shall accommodate a handicapper for purposes of . . . education . . . unless the person demonstrates that the accommodation would impose an undue hardship.

MCL 37.1103(e)(i); MSA 3.550(103) provides in pertinent part:

> . . . "handicap" means one or more of the following:

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> (C) . . . is unrelated to the individual's ability to utilize and benefit from educational opportunities, programs, and facilities at an educational institution.
>
> MCL 37.1402; MSA 3.550(402) provides:
>
> An educational institution shall not do any of the following:
>
> (a) Discriminate in any manner in the full utilization of or benefit from the institution, or the services provided and rendered by the institution to an individual because of a handicap that is unrelated to the individual's ability to utilize and benefit from the institution or its services, or because of the use by an individual of adaptive devices or aids.

The definition of "handicap" was changed with the 1990 amendments to the HCRA, which redefined the phrase "unrelated to the individual's ability" to mean:

> with or without accommodation, an individual's handicap does not prevent the individual from doing 1 or more of the following: . . . . utilizing and benefiting from educational opportunities, programs, and facilities at an educational institution. [MCL 37.1103(l)(iii); MSA 3.550(103)(l).]

To establish a prima facie claim under the HCRA a plaintiff must demonstrate that 1) the plaintiff is a handicapped person as defined by the Act; 2) the plaintiff is qualified for the educational opportunity the plaintiff seeks despite the handicap; and 3) in spite of these qualifications, the plaintiff has not been given an equal opportunity to secure a similar education as other persons. *Crancer v Board of Regents*, 156 Mich App 790, 795; 402 NW2d 90 (1986); see also *Hoot by Hoot v Milan Area Schools*, 853 F Supp 243, 248 (1994).

The duty imposed by the HCRA is the duty of reasonable accommodation. *Hall v Hackley Hospital*, 210 Mich App 48, 54-55; 532 NW2d 893 (1995). If the plaintiff establishes a prima facie case, the defendant bears the burden of producing evidence that the accommodation would impose an undue hardship. *Id.* Defendants did not argue below that accommodating plaintiff resulted or would result in undue hardship.

The circuit court's opinion fails to appreciate plaintiff's implied contention that as a practical consideration, time is of the essence in a rigorous academic setting such as medical school. The question whether defendants met their duty to reasonably accommodate plaintiff under the circumstances presented here should have been left to a jury. Plaintiff provided evidence that the delays

in making the accommodations negatively affected his academic performance, and caused him to fall behind in his course work, and eventually to leave medical school. For example, plaintiff asserted below that the videotaping system about which he had received assurances in March 1991, was not in place until the beginning of his third semester—in the fall of 1992. The circuit court found that "by the end of plaintiff's first year his courses were being videotaped for him at no personal expense," and as to the provision of videotapes and other services plaintiff requested, concluded that there was no "undue delay" in defendants' accommodating plaintiff.[3] As to other requests of plaintiff's, such as for tutors, the circuit court did not view the facts in a light most favorable to plaintiff, when plaintiff had presented the testimony of Dr. Cole that there were delays in getting tutors and once gotten, plaintiff's experience with the tutors was "spotty." To be sure, there was evidence that plaintiff did not do all he could to help himself, but the circuit court, and this Court on review, is obliged to view the evidence in a light most favorable to plaintiff, the party opposing summary disposition.

The issue of what is considered to be a "reasonable accommodation" must be decided on a case by case basis. *Nathanson v Medical College of Pennsylvania*, 926 F2d 1368, 1383, 1384-1385 (CA3, 1991). In the instant case, whether defendants met their obligation to reasonably accommodate plaintiff, in light of the significant delays in provision of some of the accommodations, should be determined by a jury. *Nathanson*, 926 F2d at 1385. The timeliness of accommodations and the follow-up to ensure that the attempted accommodations are effective, have been taken into account in determining whether a defendant made reasonable accommodations for a handicapped employee. *Kent by Gillespie v Derwinski*, 790 F Supp 1032, 1040 (ED Wash 1991). Further, plaintiff produced evidence in support of his claim that the asserted delays in accommodating his handicap contributed to physical and emotional problems which caused him to withdraw from the medical school.

The circuit court improperly determined as a matter of law that defendants had met their duty to reasonably accommodate plaintiff, when questions of fact remained. I would therefore reverse and remand.

/s/ Helene N. White

[1] Plaintiff testified at deposition that he contacted the Office of Services for Students with Disabilities at the University in February 1991 and, in March 1991, contacted the Office of Academic Enrichment regarding his need for tutors, class notes and videotapes. Heather Buda from Academic Enrichment discussed his needs with him and assured him these would be in place when plaintiff began classes in August 1991. When plaintiff arrived in Ann Arbor Buda had left, and the services were not in place.

[2] Dr. Cole testified at deposition that he requested in writing to become plaintiff's faculty advisor, but he never received a response, and he thus advised him informally.

[3] In its written opinion, the circuit court relied on *Finger v University of Wisconsin*, 996 F2d 1219 (CA7 Wis 1993). On plaintiff's motion for reconsideration, the court's order denying reconsideration stated that *Finger* was not necessary to its disposition. *Finger* is factually distinguishable from the instant case. *Finger* involved a student with dyslexia who requested that textbooks be audiotaped by the university. In affirming the district court's grant of summary judgment to the defendant, the court noted that the tapes were usually completed within four to six weeks of plaintiff's request, and that plaintiff had other options and facilities available to him where he could obtain the tapes. In the instant case, some of the delays were of far greater magnitude and defendants made no showing below that plaintiff had other options and facilities available to him, except as to plaintiff's request for a computer with specialized software.