IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
August 28, 2019

Lyle W. Cayce
Clerk

No. 18-10342

CHAD WILSON, Individually and as next friend of S.W.; MARTHA WILSON, Individually and as next friend of S.W.,

Plaintiffs - Appellants

v.

CITY OF SOUTHLAKE; SOUTHLAKE POLICE DEPARTMENT; RANDY BAKER, Individually,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before HAYNES, GRAVES, and HO, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

This is an appeal of the district court's grant of the defendants' motion to dismiss or alternatively for summary judgment regarding plaintiffs' disability-related claims under Section 504 of the Rehabilitation Act of 1973 or the Americans With Disabilities Act. Because the district court erred in granting summary judgment, we VACATE and REMAND.

FACTS AND PROCEDURAL HISTORY

The City of Southlake, Texas, and the Carroll Independent School District (ISD) had a Memorandum of Understanding whereby the Southlake Police Department (SPD) would provide services to the district in the form of

School Resource Officers (SROs). Under the agreement, the City would provide law enforcement training and certification, SRO training, including crisis prevention training, a police vehicle, and other necessary equipment. The agreement also provided that, before the district would request assistance in regard to any special-needs child, the district would provide detailed instructions and access to the child's Behavioral Intervention Plan (BIP), their Admissions, Review & Dismissal (ARD) paperwork, and Individualized Educational Plan (IEP) to the designated SRO. The purpose of the SROs is to enforce violations of the law, not to enforce school rules.

S.W. was an eight-year-old child with significant emotional and behavioral disabilities who was in second grade at Carroll Elementary during the relevant time period. S.W. was diagnosed with autism, oppositional defiant disorder, and separation anxiety disorder. S.W., who weighed approximately 87 pounds and was about 58 inches tall at the time, also received Special Education services.

On October 8, 2013, Carroll Elementary School Principal Stacy Wagnon made a report to Child Protective Services (CPS) that S.W. had made a statement that he "wanted to suicide himself." Wagnon also contacted SPD. This led to various meetings and discussions between officials from the school, SPD, CPS and S.W.'s parents.

On January 7, 2014, S.W. was serving in-school suspension in Wagnon's office when he had an incident that resulted in Jennifer Bailey, school counselor, requesting Slusser's assistance. During this incident, S.W. screamed obscenities at Wagnon and Assistant Principal Angie George, overturned chairs, punched and kicked Wagnon, threw a jar of beans, said he was going to kill someone, and eventually dropped his pants and exposed himself. Wagnon and Slusser gave S.W. space and were able to calm him down.

His parents arrived shortly thereafter to take him home. Slusser also reported this incident to Baker.

On January 23, 2014, S.W. was serving in-school suspension in Wagnon's office and became visibly upset, using obscenities, crumpling papers and throwing items on the floor. S.W. referenced a weapon in his backpack and produced what he referred to as "home-built nunchucks." The "nunchucks" consisted of a jump rope provided by the school as part of a "Jump Rope for Heart" program. S.W. twirled the jump rope and attempted to hit Wagnon. He also threw a cup of coffee and hit the wall. Wagnon called for Slusser and he observed while she tried to calm S.W. who then ran into the hallway with his jump rope.

Shortly after S.W. entered the hallway, SRO Sgt. Randy Baker, who had been called by Slusser, arrived. Slusser told Baker, "stand and watch right here, say nothing."[1] Seconds later, as S.W. was twirling his jump rope, Baker handcuffed S.W. and took him to Wagnon's office. Baker sat face-to-face with S.W., screamed at him, called him names, including "punk" and "brat," mocked S.W., and laughed at him. While screaming, Baker indicated that he was reacting the way he was because of how S.W. had acted during a previous incident.

Baker continued antagonizing S.W. and aggravating the situation until S.W.'s parents arrived. When S.W.'s mother asked Baker if he realized handcuffing a child with autism would traumatize him, Baker replied: "You know what? You're right, I don't know that. I'm not a psychologist." With regard to S.W. having autism, Baker said, "You know what, he has no sign on his head that says, 'I have autism, I hit people.' You can't do that in a free

[1] Baker's police vehicle video recorded these exchanges. The parties do not contest these particular facts.

society." Baker then continued to laugh and make comments like "Great parenting!" S.W.'s mother yelled at Baker for laughing and asked for his information. Baker then demanded that they leave the school. S.W. was being carried by his father as they left the school. As a result of this incident, Baker filed various criminal charges against S.W.

Both Wagnon and Slusser indicated that Baker appeared to have lost his temper. Baker likewise conceded that he did sound like he had lost his temper. An internal affairs investigation found that Baker's interaction with S.W. was "unprofessional and unreasonable." Further, Baker's conduct was "demeaning, berating and antagonizing" toward S.W. Baker was terminated by the City as a result.

S.W.'s parents, individually and as next friend for S.W., (collectively S.W.) filed suit against the City of Southlake, the Southlake Police Department, and Randy Baker, alleging violations of the Americans with Disability Act of 1990, Section 504 of the Rehabilitation Act of 1973, and constitutional claims pursuant to 42 U.S.C. §1983. The defendants filed a motion to dismiss, or in the alternative, for summary judgment. The district court subsequently granted the motion. Now S.W. appeals the dismissal of the disability discrimination claims pursuant to a summary judgment standard.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Dediol v. Best Chevrolet*, 655 F.3d 435, 439 (5th Cir. 2011). Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Crawford v.*

Formosa Plastics Corp., 234 F.3d 899, 902 (5th Cir.2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

DISCUSSION

I. Whether the district court erred in granting defendants' motion to dismiss or alternatively for summary judgment regarding plaintiffs' disability-related claims under Section 504 of the Rehabilitation Act of 1973 or the Americans With Disabilities Act.

S.W. asserts that the district court erred in granting summary judgment on his ADA and Rehabilitation Act claims.

Section 504 of the Rehabilitation Act of 1973 provides, in relevant part:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. §794(a).

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.

This court has said that the evaluation of a claim for disability discrimination under the ADA and the Rehabilitation Act are substantially the same and "[t]he only material difference between the two provisions lies in their respective causation requirements." *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005). Under Section 504, the plaintiff must establish that disability discrimination was the sole reason for the exclusion or denial of benefits. *Id.* While under Title II of the ADA, "discrimination need not be the sole reason." *Id.*

This court has also said:

> To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate: (1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability.

Melton v. Dallas Area Rapid Transit, 391 F.3d 669, 672-73; *see also Hainze v. Richards*, 207 F.3d 795 (2000); and 42 U.S.C. §12132.

The district court relied on *Hainze* in its decision to grant summary judgment, finding "that no dispute of fact exists that the *Hainze* exception to the ADA and the Rehabilitation Act liability applies to this case. Requiring Officer Baker to inquire as to disability status of a child before attempting to secure the disruption would 'pose an unnecessary risk to innocents." However, there are disputes of fact here and *Hainze* is easily distinguished.

Hainze involved a 911 call requesting the transport of a suicidal man to a hospital for mental health treatment. *Id*. at 797. Kim Michael Hainze, who had a history of depression, was under the influence of alcohol and anti-depressants, carrying a knife, and threatening to commit suicide or suicide by cop. *Id*. When officers arrived at the convenience store, Hainze was standing by the passenger door and holding the door handle of a pickup truck occupied by two individuals. Hainze had a knife in one hand and was not wearing shoes in cold weather. When one of the officers exited his vehicle with his weapon drawn and ordered Hainze away from the truck, Hainze responded with profanities and began walking toward the officer with the knife in his hand. The officer twice ordered Hainze to stop, but Hainze refused. Once Hainze was approximately 4-6 feet away, the officer fired two shots into Hainze's chest and

called EMS. *Id*. Hainze, who survived, was convicted of aggravated assault with a deadly weapon as a result.

Hainze filed a civil suit alleging various constitutional claims, but also seeking declaratory, injunctive and compensatory relief under Title II of the ADA and Section 504 of the Rehabilitation Act. *Id.* at 797-98. Of relevance here, Hainze asserted that he was discriminated against on the basis of disability and that the defendants had failed to establish a policy or train deputies to protect the well-being of mentally ill individuals. "Specifically, Hainze alleges that Allison never engaged him in conversation to calm him, never tried to give him space by backing away, never attempted to defuse the situation, never tried to use less than deadly force, and never attempted to create any opportunities for the foregoing to occur." *Hainze*, 207 F.3d at 800-01.

On de novo review, this court concluded that Hainze was not denied the benefits and protections of a service or program because "Hainze's assault of [the officer] with a deadly weapon denied him the benefits of that program." *Id.* at 801. This court further recognized an "exigent circumstances" exception to the application of Title II "to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Hainze*, 207 F.3d at 801. In other words, officers do not first have to consider whether their actions will comply with the ADA "in the presence of exigent circumstances and prior to securing the safety of themselves" and others or when they are reacting "to potentially life-threatening situations." *Id*.

Here, we have an eight-year-old child with disabilities known to the officer and in possession of a child's jump rope provided by the school. There was no potentially life-threatening situation or threat to human life. As the

district court stated, this was merely a "disruption." Because there was no exigent circumstance, the *Hainze* exception does not apply.

The appellees consistently refer to S.W.'s "nunchucks" and to his "weapon." However, the appellees concede it is undisputed that the item S.W. referenced as "home-built nunchucks," consisted of "a jump-rope the school had given him as part of the 'Jump Rope for Heart' program."

The district court acknowledged that "the parties dispute whether this was a weapon," but noted "it is undisputed that S.W. attempted to hit Ms. Wagnon and threatened to do physical harm to others with it." The district court also found "that the difference in nomenclature used by the parties to describe S.W.'s device" did not create a genuine issue of material fact because he "'twirled it' at a staffer in a threatening manner."

We disagree. A jump rope in the hands of an eight-year-old child is not a weapon and is not capable of inflicting the same injuries or damage as an actual weapon, such as nunchucks, in the hands of an adult. Regardless of S.W.'s vivid imagination or characterization of the jump rope given to him by the school as something else, officials saw that it was a jump rope. While he may have been "twirling it" at officials in what is now described as a "threatening manner," he had already been doing that in Wagnon's office, and officials, including Slusser, neither deemed it an exigent circumstance nor tried to physically take the jump rope or restrain S.W. Moreover, Slusser explicitly told Baker "stand and watch right here, say nothing," reaffirming that there was no exigent circumstance. *Hainze* provides no authority for expanding the exception to include situations where there is no potentially life-threatening situation or even a real danger of physical harm.

Additionally, while it may be undisputed that "S.W. attempted to hit Ms. Wagnon and threatened to do physical harm to others," it is absolutely disputed whether it would have been possible for S.W. to actually inflict any

physical harm with a child's jump rope. To suggest that S.W. merely saying he was going to do something and twirling an object was sufficient to establish actual threat of harm would allow the same outcome if he had merely pointed his hand, called it a gun and said he was going to shoot them. At the very least, whether an 8-year-old twirling a child's jump rope created a danger of physical harm or a potentially life-threatening situation is a dispute of material fact.

The record here indicates that Baker ignored Slusser's instruction and, having lost his temper, decided to intervene. While the appellees concede S.W.'s known disability, Baker has declared that he had no knowledge of S.W.'s disability prior to the incident. Further, the district court appears to at least partially rely on Baker's lack of knowledge in its citation of Baker's declaration and in its statement that Baker would have had to "inquire as to the disability status."

Baker declared that "[o]n or before January 23, 2014, I had no actual knowledge that S.W. had any disability that qualified him as a special education student." Further, Baker stated that "[o]n information and belief, I understand that on or before January 23, 2014, Carroll Independent School District had not designated or recognized S.W. as having a disability that qualified him as a special education student and possessed no documentation supporting such a qualification." However, this is contradicted by the record. Moreover, in the defendants' motion to dismiss, they relied heavily on the facts that S.W. had known disabilities for which he was receiving psychological and psychiatric care, and that he had been exhibiting troubling behavior at school for months.

Baker was involved in a prior meeting regarding S.W.'s issues on October 9, 2013. S.W.'s parents informed the school that S.W. was under the care of a psychologist and a psychiatrist for depression, anxiety, and Asperger's Syndrome, and was undergoing additional testing. They also requested

notification of what plans and accommodations had been put into place for S.W. Slusser also reported the incident earlier in January to Baker. This establishes that Baker obviously had some knowledge of S.W.'s issues. Moreover, both the district court and the appellees repeatedly rely on all of S.W.'s prior behavior in an attempt to establish an exigent circumstance.[2] Again, at the very least, this is a dispute of material fact.

The record indicates that Baker was never properly trained to handle such situations. However, the agreement between the City and Carroll ISD provided that Baker would be informed of the need for any special accommodations and would be properly trained to deal with such issues. Any violation of that agreement was not the fault or responsibility of S.W.

The appellees appear to attempt to be making a distinction between S.W. actually being placed in handcuffs and Baker's accompanying behavior. However, the record indicates it is not possible to separate the two. Baker simultaneously handcuffed S.W. and shouted, "[h]ow old are you?" and then engaged in verbal sparring and attempts to antagonize S.W. by saying things like, "[y]ou want to act like a punk, this is what happens to little punk kids!" It is significant that Baker never told S.W. to drop the "weapon" or to step away from the jump rope or to stop "twirling" the jump rope that the appellees and the district court maintain formed the basis for the "exigent circumstance." Further, any reliance on previous events is contradictory. Either Baker was aware of S.W.'s issues or he knew nothing about them. Appellees do not get to benefit from having it both ways. Additionally, whatever the prior circumstances were, there was no reasonable basis for Baker's verbal attacks and antagonizing behavior after S.W. was handcuffed.

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[2] Notably, the prior incidents involving S.W. were resolved without him being handcuffed.

Also, attempts to rely on anything that transpired in Wagnon's office prior to Baker's arrival cannot form the basis for the exigent circumstance. Slusser did not find that it constituted an exigent circumstance and Baker was not there. For example, appellees cannot claim that S.W. throwing a coffee cup and hitting the wall created an exigent circumstance when the only officer who was present at that time did not find it to be threatening. Additionally, when Baker arrived, Slusser told him "stand and watch right here, say nothing," which further contradicts any claim that anything occurring prior to that moment constituted an exigent circumstance. These are disputes of material fact.

To be clear, we decide this case solely on the issues raised on appeal. Thus, we do not offer an opinion on any other potential issues not before us. Because the district court erred in granting summary judgment, we VACATE and REMAND.

JAMES C. HO, Circuit Judge, concurring in the judgment:

In *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000), our court created a categorical "exigent circumstances" defense that appears nowhere in the text of either the Americans with Disabilities Act or the Rehabilitation Act.

So it is not surprising that every circuit to opine on this issue has to our knowledge rejected our approach. *See*, *e.g.*, *Gray v. Cummings*, 917 F.3d 1, 16–17 (1st Cir. 2019) (discussing *Hainze* and noting that "[o]ther circuits . . . have charted a different course, holding that Title II [of the ADA] applies without exception to ad hoc police encounters"); *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014) ("We agree with the majority of circuits to have addressed the question that Title II applies to arrests."), *rev'd on other grounds*, 135 S. Ct. 1765 (2015); *Seremeth v. Bd. of Cty. Comm'rs Frederick County*, 673 F.3d 333, 339 (4th Cir. 2012) ("[N]othing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate."); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) (declining to follow *Hainze*).

Hainze is of course binding precedent, on us as much as on the district court. But our obligation to apply binding precedent faithfully does not require us to extend it where it doesn't belong. And as the majority explains, we need not apply *Hainze* where, as here, there is no threat of *deadly* harm to either the police officer or others.[1]

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[1] *See Hainze*, 207 F.3d at 797 ("Hainze had a history of depression and currently was under the influence of alcohol and anti-depressants, carrying a knife, and threatening to commit suicide or 'suicide by cop.'"); *id.* at 801 ("[W]e hold that Title II does not apply . . . prior to the officer's securing the scene and ensuring that there is *no threat to human life*.") (emphasis added); *id.* ("To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents."); *id.* at 801–02 ("We are not persuaded that requiring [police] to use less than reasonable force in defending themselves and others, or to hesitate to consider other possible

Whatever risk of pain or injury S.W. may have presented here, a child with a jump rope would not appear to pose a "threat to human life." *Hainze*, 207 F.3d at 801. Accordingly, *Hainze* does not apply to this case.

That still leaves the question, however, whether S.W. has been denied a reasonable accommodation for his disability, in violation of the ADA and the Rehabilitation Act.

It is difficult to imagine a reasonable justification for the officer's loss of temper and verbal abuse. Indeed, as the majority notes, the officer was terminated from the police department as a result of this incident.

But the City of Southlake may fare better arguing that it is not "reasonable" to require school employees and police officers to risk pain or injury to themselves or others under the circumstances presented here. Although the facts presented do not rise to the "exigent circumstances" contemplated by *Hainze*, the risk of pain at issue here is certainly relevant to the reasonableness analysis. *See*, *e.g.*, *Sheehan*, 743 F.3d at 1232 ("[E]xigent circumstances inform the reasonableness analysis under the ADA.") (citation omitted); *Seremeth*, 673 F.3d at 339 ("[T]he consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation."); *Bircoll*, 480 F.3d at 1085 ("The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification.").

Also relevant to the analysis is whether a reasonable officer would have insisted on alternative measures to calm and secure the child, while minimizing the risk of pain or harm to himself or others, before resorting to handcuffs.

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actions in the course of making such split-second decisions, is the type of 'reasonable accommodation' contemplated by Title II.").

Whether S.W. was denied a reasonable accommodation for his disability under these circumstances has not yet been addressed by the district court in the first instance. Accordingly, I concur in the decision to vacate the judgment and remand this case for further proceedings.