Oral argument not yet scheduled

No. 21-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Scott Creech,

Plaintiff-Appellant,

v.

Ohio Department of Rehabilitation and Correction,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio
Case No. 2:19-cv-104 (Graham, J.)

REPLY BRIEF FOR PLAINTIFF-APPELLANT SCOTT CREECH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and regulations

INTRODUCTION AND SUMMARY OF THE ARGUMENT

After the Department confiscated his cane, Mr. Creech struggled to walk and stand. It became harder for him to do everyday activities like exercising on the prison track, eating meals in the cafeteria, visiting the law library, and watching fellow inmates play sports in the prison yard. Mr. Creech suffered several falls and, on his worst days, was bedridden by his pain.

The Department insists that its failure to accommodate Mr. Creech did not violate Title II of the ADA and, even if it did, that Mr. Creech is not entitled to recover damages. The Department is wrong on both scores.

I. The Department violated Mr. Creech's rights under Title II of the ADA when it forbade him from using his cane. As we showed in our opening brief, Mr. Creech was an otherwise-qualified individual whose disability excluded him from the prison's programs, services, and activities, and the cane was an objectively reasonable accommodation. The Department responds by arguing that Mr. Creech needs to show it acted with discriminatory intent (he doesn't) and that his claim sounds in medical malpractice rather than the ADA (it doesn't). The Department is similarly unsuccessful at contesting the elements of the failure-to-accommodate inquiry.

II. Our opening brief explains that Mr. Creech is entitled to recover damages for the Department's violation because the ADA abrogated states' Eleventh Amendment immunity in the context of prison administration. The

Department offers little in response, and we rest mostly on our opening brief. And, as we show below, the arguments that the Department does raise are premised on fundamental misunderstandings of Supreme Court precedent.

ARGUMENT

I. The Department violated Title II of the ADA when it denied Mr. Creech a reasonable accommodation for his disability.

A. The Department misunderstands the structure of Mr. Creech's failure-to-accommodate inquiry.

As our opening brief explains (at 14-22), Title II required the Department to accommodate Mr. Creech and his proposed accommodation—continued use of his cane—was objectively reasonable. The Department offers two counterarguments that misapprehend the failure-to-accommodate inquiry.

First, the Department overlooks that Title II of the ADA "does not merely prohibit intentional discrimination," *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 913 (6th Cir. 2004), and contends that Mr. Creech must show that the Department acted with discriminatory animus in denying him an accommodation. Resp. Br. 19-20. But courts have long recognized that public entities violate the ADA by failing to provide reasonable accommodations to individuals who are entitled to them, whether or not that failure is motivated by discriminatory animus. *See Ability Ctr. of Greater Toledo*, 385 F.3d at 907-08. Title II "imposes on public entities

the requirement that they provide qualified disabled individuals with meaningful access to public services, which in certain instances necessitates that public entities take affirmative steps" to do so. *Id.* at 913 (citing 28 C.F.R. § 35.151). Accordingly, "[t]wo types of claims are cognizable under Title II: claims for intentional discrimination and claims for a reasonable accommodation." *Roell v. Hamilton Cnty.*, 870 F.3d 471, 488 (6th Cir. 2017) (citation omitted).

Second, the Department accuses Mr. Creech of repackaging a disagreement about his medical care as an ADA claim. Resp. Br. 15-17, 29-30. This case is easily distinguishable from the cases on which the Department relies, in which inmates' claims "sound[ed] in medical malpractice." *Ford v. Jindal*, 2022 WL 992959, at *7 (E.D. Mich. March 31, 2022); *see also Butler v. Scholten*, 2019 WL 4126470, at *4-6 (W.D. Mich. Aug. 30, 2019). Mr. Creech does not allege that he has been denied medical care in violation of the Eighth Amendment (or state law). Rather, his claim that the Department did not provide him with equipment (like a cane) to ameliorate his disability falls into the heartland of Title II failure-to-accommodate cases.

As required by Title II, we have shown that the cane was an objectively reasonable accommodation and that (1) Mr. Creech is disabled, (2) he was "qualified" to take part in the prison's "services, programs, or activities," (3) he was "excluded from participation in" or "denied the benefits of" such

"services, programs, or activities," and (4) that exclusion or denial occurred "by reason of" his disability. *See* 42 U.S.C. § 12132; *Keller v. Chippewa Cnty., Mich. Bd. of Comm'rs*, 860 F. App'x 381, 385-86 (6th Cir. 2021); Opening Br. 14-22. The Department's contrary arguments are unconvincing, as we now explain.

B. Mr. Creech has a disability because his injuries and pain substantially limit his ability to walk and stand.

Mr. Creech suffers from a "physical … impairment that substantially limits" his ability to "walk[]" or "stand[]." 42 U.S.C. § 12102(1)(A), (2)(A)*; see* Opening Br. 4-8, 16-17. Mr. Creech's permanent physical injuries affect him "all the time." (RE 66, Creech Deposition, PageID 509). Without his cane, Mr. Creech at times "ach[ed] so bad [he] couldn't hardly walk" (*id.* PageID 509-10) and had to hold onto walls or beds to maintain his balance (*id.* PageID 504). He suffered several falls when he experienced waves of intense pain or when, unsupported by his cane, he lost his balance. (RE 65, Mot. For Summ. J., PageID 409; RE 66 PageID 504-06). The pain also rendered it "just out of the question" for Mr. Creech to "[s]tand[] up … for a long period of time." (RE 66 PageID 575-76).

The Department observes that there are no "mobility-related concerns noted in any of [Mr. Creech's] medical records" during the time when his cane was confiscated. Resp. Br. 18. But "a plaintiff does not need to submit

scientific, medical, or statistical proof to establish" his disability. *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292, 299 (6th Cir. 2019). The ADA's definition of disability is "to be construed broadly in favor of expansive coverage," *id.* at 299 (citation omitted), and plaintiffs may rely on their own deposition testimony and the testimony of lay witnesses, as Mr. Creech does here. *See id.* at 300-01.

The Department also disparages Mr. Creech's description of his physical condition as a "self-diagnosis" at odds with "medical evidence." Resp. Br. 28. But the purported "medical evidence" does nothing to refute Mr. Creech's showing of his disability. Rather, it indicates that Mr. Creech was sometimes able to move around without assistance and walked with a "swift gait using [a] cane." (RE 73, Def's Opp. And Cross-Mot. For Summ. J., PageID 863-66; *see also id.* PageID 842). The ADA forecloses the argument that Mr. Creech does not have a disability because he did not always need his cane. An "episodic" impairment is a disability if it "substantially limit[s] a major life activity when active," 42 U.S.C. § 12102(4)(D), as Mr. Creech's does here. *See also Anderson v. City of Blue Ash*, 798 F.3d 338, 354 (6th Cir. 2015); Opening Br. 22. And as for the nurse practitioner's observation that Mr. Creech could walk *with* his cane, the ameliorative effects of an accommodation may not be considered in determining whether an individual requires one. 42 U.S.C. § 12102(4)(E)(i).

In any event, the cases on which the Department relies are inapposite. In those cases, "nobody regard[ed] [the plaintiff] as having a … disability" and "even [the plaintiff] and his doctors had no record" of the plaintiff's purported disability. *Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm.*, 370 F.3d 763, 771-72 (8th Cir. 2004); *see also, e.g.*, *Kayser v. Caspari*, 16 F.3d 280, 281 (8th Cir. 1994). Mr. Creech, in contrast, was initially prescribed his cane by a civilian physician and used it for eight years in the Ohio prison system after an orthopedic surgeon determined that he needed it. (RE 66 PageID 488-89, 498-99).

The Department's other arguments fare just as poorly. The Department states that it did not "regard" Mr. Creech as disabled during the period in which it confiscated his cane. Resp. Br. 27. But Mr. Creech does not bring a "regarded-as" claim. *See generally Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 434-35 (9th Cir. 2018). The question here is not how the Department categorized Mr. Creech—it's whether Mr. Creech's physical condition falls within the ADA's definition of disability. *See* 42 U.S.C. § 12102(1)(A), (2)(A). Trying a different tack, the Department suggests that it lacked actual knowledge that Mr. Creech had a disability between 2016 and 2019. Resp. Br. 27. The Department does not support that contention with any citations to the record, which contains extensive evidence that prison officials knew Mr. Creech struggled to get around without a cane. (RE 66 PageID 488

(Chillicothe Correctional Institution officials), 498-88 (orthopedic surgeon), 503 (correctional officers)).

At base, each of these arguments insinuates that Mr. Creech was not actually disabled between 2016 and 2019. *See* Resp. Br. 18, 22-23, 27-29. But at the summary-judgment stage, this Court construes the evidence and draws all reasonable inferences in Mr. Creech's favor. *See Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 416 (6th Cir. 2020) (citation omitted). As we described in our opening brief (at 4-8, 16-17), the record contains extensive evidence that Mr. Creech's disability did not suddenly abate between 2016 and 2019.

C. Mr. Creech was otherwise qualified to take part in the prison's services, programs, or activities.

The Department acknowledges that "virtually everything that a public entity does" is a service, program, or activity. *See* Resp. Br. 14; 42 U.S.C. § 12132; *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998). And the Department does not dispute that a prisoner's daily recreational, medical, educational, and vocational activities are "services, programs, or activities." *See United States v. Georgia*, 546 U.S. 151, 157 (2006) (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998)).

Our opening brief (at 17-18) identifies a variety of prison "services, programs, or activities" for which Mr. Creech was qualified, including walking on the prison track, watching sports in the prison yard, eating meals

in the cafeteria, and accessing the prison law library. *See Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 72-73 (2d Cir. 2016). The Department nowhere argues that those programs fall outside the ADA's coverage, implicitly conceding that they are within the scope of 42 U.S.C. § 12131.

Instead, the Department posits that "a prison's medical restrictions service permitting inmates to carry a cane" is one of the prison's "services, programs, or activities," and insists that Mr. Creech was not qualified because the Department determined that his use of a cane was not "medically indicated." Resp. Br. 14-15. That scrambles the failure-to-accommodate inquiry beyond recognition. As our opening brief describes (at 14-22), using his cane was not a *service* that Mr. Creech sought to access, it was a *reasonable accommodation* that the prison was obligated to provide because his disability denied him meaningful access to the prison's services, programs, and activities.

The Department also argues that allowing Mr. Creech to continue to use his cane would have "fundamentally altered" the nature of the prison's services, programs, or activities, and thus the ADA did not require the Department to do so. Resp. Br. 15-16. That's just not true as applied to the services, programs, or activities actually at issue here: the prison's provision of exercise and recreational facilities, a law library, and meals to their inmates. *See* Opening Br. 17-18. The Department does not (and could not)

explain how allowing Mr. Creech to use a cane while exercising on the track, watching other inmates play sports in the prison yard, accessing the law library, and eating meals in the cafeteria would have "fundamentally altered" those services.

D. The Department's confiscation of Mr. Creech's cane excluded him from meaningful access to prison services, programs, or activities "by reason of" his disability.

Mr. Creech was excluded from meaningful access to the prison's services, programs, or activities as a result of his disability. *See* Opening Br. 18-20. Without his cane, Mr. Creech struggled to walk and stand. He worried about "getting a sharp, paralyzing pain and being stuck," unable to move without assistance. (RE 66, PageID 577). As a result, Mr. Creech "slowly just quit going" to the prison track to walk, "wouldn't even attempt" to go to the law library or to the prison yard to watch sports, and "[v]ery seldom" went to the cafeteria for meals. (RE 66, PageID 510, 537-38, 575); *see also Wright*, 831 F.3d at 73-74; *Keller*, 860 F. App'x at 386.

The Department insists that because Mr. Creech did not entirely cease "walking around the prison yard" and "frequent[ing] the law library, the prison's gym, and the prison's exercise facilities," that he was not excluded from those services. Resp. Br. 22. But, as this Court has explained, "the simple fact that he successfully used [those services] does not necessarily

mean that [Mr. Creech] had meaningful access." *Keller*, 860 F. App'x at 387. The record shows that Mr. Creech's disability frequently inhibited his ability "to move freely throughout the [prison] and discourage[d] his participation in prison activities," thereby denying him meaningful access to them. *Wright*, 831 F.3d at 73. To the extent the Department's argument amounts to a dispute about the effects of Mr. Creech's disability, the summary-judgment standard requires crediting Mr. Creech's account. *See Fisher*, 951 F.3d at 416.

E. Mr. Creech's proposed accommodation—continued use of his cane—was objectively reasonable, and the Department has not shown otherwise.

Once a person shows that he has a disability that denies him meaningful access to a public entity's programs, services, or activities for which he is otherwise qualified, as has Mr. Creech, Title II requires the public entity to reasonably accommodate him. *Ability Ctr. of Greater Toledo*, 385 F.3d at 909-10. The ADA creates a burden-shifting framework to determine whether a plaintiff's proposed accommodation is reasonable. First, a plaintiff need only propose an objectively reasonable accommodation by showing that it is both effective and proportional to its costs. *See Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996) (citation omitted). The public entity then bears the burden of persuasion to show that the accommodation is unreasonable. *Id.* This Court has described the reasonable-accommodation inquiry as a

"highly fact-specific" examination that "require[es] case-by-case inquiry," rendering summary judgment inappropriate when "conflicting evidence" as to the reasonableness of a plaintiff's proposed accommodation exists. *Anderson*, 798 F.3d at 356 (quoting *Lentini v. Cal. Ctr. For the Arts, Escondido*, 370 F.3d 837, 844 (9th Cir. 2004)).

Mr. Creech's continued use of his cane was objectively reasonable. *See* Opening Br. 20-22. It posed no financial burden on the Department in 2016 to allow Mr. Creech to retain his cane. Moreover, as the magistrate judge determined the Department "effectively conceded" below, the cane was effective in helping Mr. Creech walk from 2008 to 2016 and from 2019 onward. (RE 82, Magistrate Judge's Rep. and Recs., PageID 1014). The cane was thus "efficacious" and "proportional to costs." *Monette*, 90 F.3d at 1183 (quoting *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995)).

The Department does not dispute that continued use of Mr. Creech's cane from 2016 to 2019 was cost-effective and would have helped Mr. Creech get around the prison. It says only that Mr. Creech "has not presented testimony from a single medical professional to support his assertion that he needed the cane." Resp. Br. 38. True, but irrelevant. No expert testimony is required for an individual with a disability to establish that a proposed accommodation is objectively reasonable. *See Anderson*, 798 F.3d at 354-56.

The Department makes no substantial argument that Mr. Creech's cane was suddenly an unreasonable accommodation from 2016 to 2019. It states that, in general, "in a prison environment a cane can and will be used as a weapon." Resp. Br. 24. But it offers no evidence that some increased risk arose suddenly in 2016 and then abated in 2019, nor that Mr. Creech ever used his cane inappropriately. (RE 82 PageID 1018 n.5); *see* Opening Br. 21-22. And the Department has not disputed that other inmates were permitted to use canes between 2016 and 2019. (RE 17 PageID 100) The Department's vague gesture towards an interest in prison security is insufficient to create a genuine dispute of material fact as to the reasonableness of Mr. Creech's cane from 2016 to 2019, and Mr. Creech is entitled to partial summary judgment on that point. *See* Opening Br. 22.

II. The Eleventh Amendment does not shield the Department from Mr. Creech's Title II claim.

A. The Department's forfeiture argument is baseless.

The Department's suggestion that Mr. Creech forfeited any part of his claim for damages is wrong. *See* Resp. Br. 34-38. The Eleventh Amendment issue was litigated extensively below. In his summary-judgment reply and response, Mr. Creech argued for several paragraphs that Title II validly abrogated the Department's Eleventh Amendment immunity as applied to his case. (RE 80, Pltf's Reply to Def's Opp. and Resp. to Cross-Mot., PageID

984-85). When the magistrate judge's first report and recommendations concluded that the case should be dismissed, Mr. Creech renewed that argument in his objections, again discussing the Eleventh Amendment and the Supreme Court's precedent at length. (RE 85, Pltf's Obj. to Rep. and Recs., PageID 1037-40). In response to Mr. Creech's objections to the Report and Recommendations, the district court "returned [the matter] to the Magistrate Judge with instructions to file a supplemental report analyzing the Objections and making recommendations based on that analysis." (RE 86, D. Ct's Recommittal Order, PageID 1045). The magistrate judge concluded that the Eleventh Amendment shielded the Department from liability, and Mr. Creech *again* objected, re-stating once more that the Department is not entitled to Eleventh Amendment immunity. (RE 88, Magistrate Judge's Supp. Rep. and Recs., PageID 1064-66; RE 91, Pltf's Obj. to Supp. Rep. and Recs., PageID 1082). The district court ultimately rejected Mr. Creech's arguments in deciding the Eleventh Amendment issue. (RE 94, Decision and Order, PageID 1125-26).

In light of the district-court filings, the Department does not directly argue that Mr. Creech did not raise the Eleventh Amendment issue below. Instead, it minces words, stating "the words 'congruence and proportionality' were never uttered" until Mr. Creech filed his objections to the magistrate judge's first report and recommendations. Resp. Br. 36. But

forfeiture doctrine "does not demand the incantation of particular words." *Nelson v. Adams*, 529 U.S. 460, 469 (2000). Mr. Creech "state[d] the issue with sufficient clarity to give the court and opposing parties notice" that the ADA's abrogation of Eleventh Amendment immunity was at issue, and provided more than "some minimal level of argumentation in support of" his assertion that he was entitled to damages. *United States v. Huntington Nat. Bank*, 574 F.3d 329, 332 (6th Cir. 2009) (citations omitted).

B. The Department misunderstands the Eleventh Amendment inquiry.

The Department begins with the non sequitur that the ADA does not abrogate a state's Eleventh Amendment immunity "for non-meritorious claims." Resp. Br. 47. A plaintiff whose rights have not been violated is (of course) not entitled to a remedy. But when, as here, a state entity *does* violate Title II in the context of prison administration, a plaintiff may recover damages because the ADA's abrogation of the Eleventh Amendment satisfies the congruence-and-proportionality inquiry.

Our opening brief (at 23-45) explains, in detail and in keeping with Supreme Court precedent, why the ADA's abrogation of Eleventh Amendment immunity in the context of prison administration was a congruent and proportional response to the intractable problem of unconstitutional discrimination against incarcerated people with

disabilities. For the most part, the Department does not respond, and thus we rest largely on our opening brief.

The few arguments that the Department does raise are insubstantial. For starters, the Department contests that the appropriate context for the Eleventh Amendment inquiry is Title II violations that implicate prison administration. According to the Department, the Eleventh Amendment inquiry in this case should ask whether the ADA abrogates the states' immunity for cases "wherein a prison denied an inmate's self-diagnosis or self-prescription regarding an alleged disability in the face of unrefuted medical evidence to the contrary." Resp. 40-41. Even if that were an accurate representation of Mr. Creech's failure-to-accommodate claim (and it's not, *see supra* 5-6), the Department offers no justification for conducting such a narrow, fact-specific abrogation inquiry. Nor could it. Under *Tennessee v. Lane*, 541 U.S. 509 (2004), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), when asking whether the ADA successfully abrogated the Eleventh Amendment in a particular set of circumstances, a court should look beyond a case's facts to examine the broader class of constitutional harms that Congress sought to address. *See* Opening Br. 25-27. Here, therefore, this Court should ask whether the ADA validly abrogated the states' Eleventh Amendment immunity for statutory violations that arise in prison administration. *Id.* at 27.

The Department also confuses the first step of the *Boerne* inquiry, which "requires [a court] to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Lane*, 541 U.S. at 522 (citation omitted). The Department faults us for "invoking" the Eighth Amendment's protections against inadequate medical care and inhumane conditions of confinement and a "half-baked" right of access to the courts protected by the Due Process Clause. Resp. Br. 43-47. But Mr. Creech's argument simply follows the Supreme Court's lead, which recognizes that Title II claims implicate a variety of constitutional rights, which form the basis for Congress's power to enact prophylactic legislation. *See* Opening Br. 27-28 (quoting *Lane*, 541 U.S. at 522-23, and *Georgia*, 546 U.S. at 162-63 (Stevens, J., concurring)).

Similarly, the Department mistakenly describes the abrogation inquiry as requiring that Title II's remedies "be congruent and proportional to the defendants' *constitutional* misconduct" in a particular case. Resp. Br. 48. But, as just explained, the congruence-and-proportionality inquiry analyzes "the class of cases" implicated by the plaintiff's claims, not the facts of the plaintiff's case in isolation. *Lane*, 541 U.S. at 531 (citation omitted).

CONCLUSION

This Court should reverse the district court's judgment and remand for further proceedings on the merits.

Respectfully submitted,

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April 29, 2022

CERTIFICATE OF COMPLIANCE

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April 29, 2022

/s/ Hannah Mullen

Hannah Mullen

CERTIFICATE OF SERVICE

I certify that on April 29, 2022, I filed this brief with the Clerk of the Court electronically via the CM/ECF system. All participants in this case are registered CM/ECF users and will be served electronically via that system.

April 29, 2022

/s/ Hannah Mullen

Hannah Mullen