SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.. A-1285-07-T1

THOMAS B. DUFFY AND TAMMY J. LUSK, HUSBAND & WIFE,

Plaintiffs,

v.

THE HON. VALERIE H. ARMSTRONG, A.J.S.C., THE HON. JAMES SAVIO, THE HON. PHILIP S. CARCHMAN, JAD, THE CITY OF MARGATE, THE MARGATE MUNICIPAL COURT, THE COUNTY OF ATLANTIC, THE ATLANTIC COUNTY BOARD OF CHOSEN FREEHOLDERS, THE NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, THE STATE OF NEW JERSEY, CHRISTINE A. DANILO AND J. DOES #1 TO #10, jointly, severally and in the alternative,

Defendants.

CIVIL ACTION

On Appeal From a Final Judgment of the Superior Court of New Jersey, Chancery Division, Gloucester County

Sat Below:
Hon. James E. Rafferty, P.J.G.E.

PLAINTIFF/APPELLANT'S BRIEF

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Procedural History

This case was filed on March 8, 2006 in the Chancery Division of Atlantic County. Pa27 (Initial Filing Notice). The Verified Complaint requested emergent relief due to various threatening and retaliatory conduct that had occurred and declaratory relief for an alternative procedure so I could obtain ADA/LAD accommodations while I was suing the people who are in charge of such matters in Atlantic County. Pa23 (Initial Order to Show Cause). I was told the Chief Justice would determine the venue.

I received a notice of docketing without an allocation (County) and assignment (Judge). Pa27 In June, I learned that the matter had been allocated to Gloucester County. I got a severe "run around" trying just to find out which judge was assigned to the matter. See, *e.g.*, Pa28.

While the Court System was giving me a run around about the venue and judge assigned to the case, I was turned down for an accommodation in the application process to be hired as a Law Clerk in the Administrative Office of the Court's (hereinafter AOC) Resume Book Program without any "interactive process" regarding my disabilities. Pa144-50 (Job Announcement & Correspondence). I added this new matter to the Complaint without making any material changes to the original claims in the Original Complaint and filed it as a First Amended Complaint under R. 4:9-1.

Judge Rafferty was assigned sometime in late September or October. His Honor refused to sign an Order to Show Cause against the defendants due to the prolonged period since the case was filed. Pa161 (middle paragraph). He did sign Order to Show Cause for the law clerk matter. Pa168.

My application to have my resume included in the Law Clerk Resume Book was denied mainly on the grounds that damages would be an adequate remedy if I could prove my case against the AOC. (This Order being moot is not being appealed but the damage issue, or future inclusion in the Resume Book remains.)

The City of Margate's attorney Robert Paarz then filed a Removal Notice in Federal Court which was defective in that all defendants, particularly the State, had not agreed to the removal. Pa186-7. The matter was returned to Superior Court with a Consent Order. Pa189-92.

The defendants then all filed motions that the Complaint failed to state a claim on which relief could be granted. Pa353 (Margate), Pa360 (Judge Savio) & Pa401 (State). (Note that these are included in the appendix because the judge cited all the defense briefs as the basis for his decision without specificity.) While the motions to dismiss were being briefed, I filed two Verified Amended Complaints. Pa196 (Motion for Second Amended Complaint) & Pa206 (Motion for Third Amended Complaint). The Second Amended Complaint was highly technical in nature. It just filed my "Right to Sue Letter" from the EEOC (Pa203) and added those Federal claims to the Complaint

regarding the Law Clerk issue and, if I were *de facto* employee of Margate, the Municipal Public Defender Act (MPDA) issue. The Third Amended Complaint fleshed out facts in greater detail and added new retaliatory allegations.

Judge Rafferty dismissed the entire action stating that he disagreed with all my legal theories. T34-19-22. His Honor ruled, "[I]t would be difficult to address all the factual and legal allegations presented by Mr. Duffy in a very specific manner, so I would indicate that … I agree with, concur with, and adopt the factual and legal arguments presented by the defendants …." T36-2-8. There was no rigorous issue by issue analysis. There was no mention of a U.S. Supreme Court case directly on point. I stated there were totally new matters in the Third Amended Complaint that had been totally unbriefed. T48-13-22 & T49-13-14. They were dismissed too. T48-23 to 49-2 & T49-15-18. His Honor made two findings of fact: I had agreed to serve voluntarily on March 8, 2004 (T38-9-14) and all the judges, including Administrative Director Carchman, were acting in judicial capacities (T40-3 to T41-21). It is important to note the motions to amend the complaint were scheduled for a week after the dismissal motion. As a result, causes of action unique to the Second and Third Amended Complaints (such as new discrimination or retaliation claims for filing the original complaints), were dismissed without proper adversarial briefing and due consideration. This appeal followed.

Factual History

To have a full appreciation of the facts in this case, it is going to be necessary to go back about a decade to a prior legitimate *pro bono* appearance I made for Client X. I have broken the facts into disability facts, the illegal assignment/appointment/lack of accommodation issue, the Law Clerk Resume Book application and the recent retaliatory issues.

A. Disability Facts

I have Crohn's Disease, which is a digestive disorder. In 1990, some rather drastic measures were taken to save my life. For details, see Pa211 – Third Amended Complaint, Para 2. I only survived because of a feeding machine I carried in a back pack for the next two years. I was severely nutritionally compromised. I could not work full-time so it was not possible to even consider being a law clerk in New Jersey while I was a "recent" (1991) law graduate. See Pa146-7 (facts from law clerk accommodation request). I was able to go to school so I entered Georgetown's Graduate Law Program where I received a Dual LL.M. in Tax and in Securities & Financial Regulation and was an Olin Fellow in Law & Economics. Pa469-70 (my resume: Exhibit 5 to State's Brief).

Immediately after Georgetown, I found out that I had contracted Hepatitis C which makes you very physically weak. I

started the standard interferon[1] treatment for the disease which knocks you "out of the box" for the first 3 or 4 months of the 11 month treatment. Three of these treatments failed in the 90s. In this Century, two biotech improvements tripled the chance of remission from 20% to 60%. These improvements added to the treatment's bevy of warnings and side-effects. I tried this improved treatment in 2002 and it failed. Pa147 & Pa30-33 (Complaint).

In late 2001, I was found to be disabled under Social Security's rather stringent definition of disability but I made too much income to be eligible for benefits. See generally, Pa30-35 (Initial Facts from Complaint) & Pa211-2 (Disability Facts from Third Amended Complaint) & Pa231 (SSD letter).

The treatment relevant to this case was supposed to start in mid-2004. By late January 2004, I had cleared my work schedule and was preparing to have the Summer of 2004 off. By minimizing stress, I hoped to maximize the potential for a curative treatment.[2] I had applied to jobs in such a manner that

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[1] Interferon, a biochemical, causes fevers to fight viral infections.

[2] In fn3 of Sb1 (Sb for State, Mb for Margate), the State seems to make the claim that, because it (wrongly) thinks I was working for Client X in other cases in the Summer of 2003, it was "OK" to assign me against my will in the criminal case at issue here in 2004. First, the two other matters on Pa76 were for other clients – they were legitimate assignments from my County Legal Services (CLS) Organization. Second, they were "basically *pro bono*" because they were both consumer fraud cases and CLS and I had agreed long before that, if I could obtain a fee from the defendant pursuant to that Statute, my hours would not count toward my *pro bono* obligation. If there were no fee, the hours would count. Third, I was doing two cases at once

I should be getting one near or at the end of the treatment. (The main goal was not to have any work or stress during the initial treatment period.) The assignment and lack of accommodation that is the subject of this suit derailed that plan. This, in turn, was the reason I had to start (rather than be finishing) the treatment as I began new IRS job. These treatments required more time off than I had available in a new job, which eventually led to my having to resign from that job which, in turn, led to my wife divorcing me. Pa35-8 (Complaint Para. 9-17) & Pa54, Para. 64 (Divorce allegation).

B. Assignment/Appointment/Lack of Accommodation Issue

My wife and I did everything humanly possible to work out some kind of accommodation with the Court System both in general and in this case in particular. In the early 90s, these requests were usually granted immediately. Subsequently, the requests would be ignored at first. When I persisted, I was usually dismissed – frequently after being blamed for the delay while being ignored. If I sought reconsideration or were persistent, I was usually castigated or retaliated against. I

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because **CLS HAD accommodated me** by allowing me "to double up" on cases while off the treatment so I could have no assignments while on the treatment. Forth, this minimal practice of law in the courts was part of my agreement with then Assignment Judge Winkelstein concerning my 2001 "Long Term Accommodation" in Atlantic County. Fifth, these two cases were both over by January, 2004. Sixth, and most importantly, no one was going to end up in the "slammer" if I made a mistake. This is totally

call this approach IDA (instead of ADA): Ignore, Dismiss & Admonish. This pattern shows up again and again in the facts of this case. Pa32-25 & Pa56-59 (Complaint).

I was a willing member of the County Legal Services (CLS) *pro bono* program. Pa30 (fn. 2). As part of my CLS duties, I got a conviction of Client X reversed in this court in 1998.[3] Opinion at Pa665-72.

As I became sicker from the Hepatitis C, Atlantic County Assignment Judge Winkelstein issued me a "Long Term Accommodation" that covered the debilitating chemotherapy treatment at issue here.[4] In an earlier matter,[5] I was told the

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consistent with preparing for treatment in May or June of 2004 and being "out of commission" for June-August.

[3] The case started as a CLS assignment to get the client out of the mental ward. I got her out. A few days later she was convicted on three charges while *pro se*. I sent her medical reports, basically stating she was insane, to the Court asking that her conviction be vacated in the interests of justice. The prosecutor joined in the request. This was denied. A *de novo* appeal followed. The Law Division reconvicted. This Court dismissed one count, which had no evidence to support it, and sent the other two charges back with the very strong suggestion that the prosecutor dismiss those cases in the interests of justice. Pa672. He did. In *dicta*, this Court suggested the client was too confused to appear *pro se*. Pa667.

[4] There were rather clear incidents of retaliation regarding my health status and accommodation requests in January 2001. This mainly resulted from making separate requests (usually with different results) to all the judges before whom I was appearing. I call this an *ad hoc* reasonable accommodation system which is very annoying to all involved – especially the person with disabilities. The staff started retaliating against me for this extra work. Then Assignment Judge Winkelstein learned I was considering suit and invited me to a very productive meeting. After reviewing my health records, Judge Winkelstein gave me a long-term comprehensive accommodation for

accommodation did not apply to criminal cases.[6] I thought this was wrong as a matter of law and as a matter of Judge

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all cases in which in which I was appearing so the annoyance factor would be mitigated.. He designated a civil case manager to be the "point person" for the accommodations. See, *e.g.*, Pa34-6. (It would later become important that because she was a civil manager, she thought the accommodation only applied in the Civil Dvision.)

For my part, I took His Honor's suggestion that I should reduce my Law Division practice. I did so to the extent that nearly all of my Law Division appearances were legitimate civil *pro bono* assignments from my CLS such as those in fn. 2, supra.

[5] In 2001, I requested Client X be assigned a public defender due to indigency. The request was refused. Because I agreed with the 1998 suggestion of this court, that the client was too confused to appear *pro se,* I appeared. She was convicted of harassing an unknown man who never testified. Pa676-79. I tried to take advantage of my rights under Madden as well as Rule 7:3-2(b) to be replaced on appeal and did not need to use Judge Winkelstein's long-term accommodation. Pa130-132. This did not work. See next footnote.

[6] As stated in Footnote 5, I requested to be relieved on appeal pursuant to Madden and R. 7:3-2(b) (right to relief on appeal upon filing of "application for assignment of appellate counsel").. Two different attorneys were assigned by the Madden *pro bono* wheel person but they both got out of the case on bogus excuses.. The Law Division Judge sitting on appeal called me and asked that I just do the appeal. I managed to turn him down. I called the point person on the long-term accommodation and asked her to call the judge and please ask him to stop trying to get me to take the case. I got her boss who told me that the long term accommodation did not apply outside the Civil Division. The next time the judge called back, I directly told him about my health, without detail, and told him that I felt I had made mistakes below.. He responded that he had read the transcript, didn't see any mistakes and, while he did not know yet whether he would reverse, he thought the 30 day jail term was ridiculous and would be vacated. Pa130-1 & Pa108 (First Paragraph).

I could hardly ask if this was a general statement or whether this was a bizarre (ADA) accommodation or "deal" he was offering me to get the case moving. I felt ethically compelled to accept the assignment "to lock in" the "offer" for the client. Pa131 (top of page). His Honor did vacate the jail time.

I appealed to this Court. I had trouble getting relieved despite filing an application under R. 2:7-2(d). My wife "put her foot down" and I was relieved. Pa134 (fn. 4). It took over a year to get a replacement under R. 2:7-2(b), during which time

Winkelstein's intention (he was "boss" of the Criminal Division too) but it was not important enough to risk His Honor gettting angry and canceling the entire accommodation. Pa35 (fn. 9).

In 2003, at the request of the Margate Public Defender, I agreed to write an interlocutory brief in a Client X case because the Defender was "too busy" to do it. I was designated as co-counsel on the brief. Although unhappy with this situation but I felt ethically compelled. I registered my displeasure by noting in the brief how unfair I thought it was. Pa76. The brief succeeded in having an insanity defense, with a psychiatrist, ordered at Margate's expense. Pa84-5.

Subsequently, the public defender was relieved because of a breakdown of the attorney/client relationship (caused by Client X's insanity). Pa82-3. Rather than following the Municipal Public Defender's Act which mandates prompt replacement of a "conflicted" public defender, the municipal judge told Client X to look for an attorney. I saw this as a clear invitation for me to appear as trial counsel and I did not take His Honor up on the "offer." Pa33 (fn. 7) & Pa133-34 (especially fn. 3).

The client complained to me that she was being discriminated against in Margate. I looked on the AOC's website and found an ADA Complaint procedure designed to address this

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I had to get the appeal reinstated because the County had not processed my transcript request form. Pa131-34. New counsel resigned from the bar after filing the brief. He sent me a substitution form which I had no trouble declining to sign. Pa132. This court reversed for essentially the reason I argued below, without assigning new counsel. Opinion at Pa673.

kind of lack of accommodation, access and discrimination in the Courts. Pa296-8 (Please note "Informal Grievance Procedure" at very bottom of Pa 296). Following this AOC ADA complaint procedure to the letter,[7] I filed an informal (but written) discrimination complaint[8] (Pa86-94) against Judge Savio and the Margate Municipal Court for allowing the City Solicitor illegally to appear in the criminal case and to deprive the disabled client of a defense team (attorney and psychiatrist) which the judge had mandated about a week before His Honor vacated his own order on the motion of the solicitor (Pa70-73). I alleged the judge vacated his own order due to the political and conspiratorial motives to save money. The public defense had been mandated by the Law Division on interlocutory appeal but the Judge and City were dragging their heals on getting a new public defender. Pa86-94 (Client X Informal Complaint filed by me as **civil** counsel). It was clear from this complaint that I did not want to appear or, quite obviously, I would have.

This complaint was supposed to be investigated and remediated under the AOC's website rules. Pa296-8: "Procedure

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[7] Having no desire to bother a judge unnecessarily (even in her administrative capacity), I first called Clarence "Dick" Dickerson, in his capacity as "Access" coordinator. Pa299 (4thth line on page). Mr. Dickerson stopped me and told me the complaint would have to be directed to Judge Armstrong. See Pa94 (Informal Complaint, Page 9, First New Paragraph, last sentence; please also note "cc:" to him).

[8] I used the informal complaint process because it was touted as being the best way quickly to resolve problems. Pa296-7 (Printout of AOC's website). However, probably because it was written, Judge Armstrong replied in a "formal" or written manner

for Handling a Complaint About Access to Judicial Programs, Services, Activities (sic)."[9] By her own admission, Judge Armstrong did none of this. Pa102. I would claim it was because she did not want to investigate her former law partner. (Her Honor never informed me about this conflict.) Pa30-1 (Complaint Para. 3).

While waiting to hear back from Her Honor on the complaint, I went to the organizational hearing of March 8, 2004 because it seemed the correct ethical thing to do.[10] Pa95-6.

At that hearing, the judge asked if I was going to be counsel. While I was explaining that I was counsel from the appeal, he interrupted me and asked if I'd be trial counsel. Pa372 (T4-2-8). In a similar vein, I tried to explain why I was there citing this Court's suggestion that she was too confused

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but Her Honor conducted no investigation of any kind – formal or informal. Pa102.

[9] The appendix copy is a printout I made on 6/13/07. This AOC ADA web page has been at http://www.judiciary.state.nj.us/services/aocada.htm during the entire time relevant here.. I used the informal complaint procedure for the complaint of March 5, 2008.. Pa86-94. The page from February/March/April of 2004 is at: http://web.archive.org/web/20040218213243/www.judiciary.state.nj.us/services/aocada.htm.. Please note Judge Armstrong's name was bolded (suggesting she was the principal ADA Coordinator). All those on the list are designated as "Americans with Disabilities Act Coordinators" at the top of the list . Pa298 (last line). This is a legally significant designation. See Point IV (citation to 28 C.F.R. Part 35, App. A, § 35.107 on p. 63).

[10] I felt sure that if I did not go, Judge Savio would call to ask why I was not there – and such position probably would be correct as I had not been relieved as co-counsel on the appeal. This says nothing of the client's insanity warranting extra care in the transition of counsel. See infra, Point XXXXXXXXX where I brief these points.

to be *pro se*. Pa373 (T4-11-13).[11] The following colloquy then unfolded:

THE COURT: Mr. Duffy, do you or do you not represent [Client X] for these charges? Pa372 (T4-14-15).

MR. DUFFY: **I do not** – I – I am here to get – guide her through the process of trying to have a P.D. appointed for her. I can be – appear in this case, today, however, I'm pending chemotherapy[12] in a couple – in a couple of mon – in a month or a wee – you know, a couple of weeks, I – six weeks, eight weeks, **I do not want to get myself into a – into a case.** Pa372 (T4-16-22) (emphasis added).

Despite this solid negative answer – stated TWICE with an explanation of a good reason why I could not appear in the case, the judge kept coming at me. At this point, I realized that he would not take "no" for an answer. Still, I tried to find out if the client would be *pro se*, which I would consider to be an ethical violation – especially if I was still co-counsel, which was very unclear. Pa372-4 (T4-24 to T6-3). To reiterate, after saying "**I do not**" twice and being coerced that the client might be *pro se*, then I stated:

MR. DUFFY: Somebody has to and I guess **I'll do it**. Pa374 (T6-4-5).

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[11] I note the Law Division has come to this conclusion too.

[12] I would like to note, as I have noted in many different documents, that at this point the prosecutor, right after the word "chemotherapy," made a very loud, "Ha!" or "Pa!" mocking noise that obviously disrupted my train of thought. See, *e.g.*, Pa98 (fn. 4).

Now that I had given the answer he wants, then His Honor solicited:

THE COURT: The answer is yes. Pa374 (T6-6).

And I replied:

MR. DUFFY: Yes. **Since I am being forced**. Pa375 (T6-7 & -9)

Later, I stated:

MR. DUFFY: I would still like her to go through the P.D. application process because that's what [the South Jersey Legal Services *Pro Bono* Director] and I had envisioned. a378 (T10-3-5).

So it looked like I'd have to complain to Judge Armstrong about being forced to take the case too. I renewed my (admittedly ignored) complaint/accommodation request for the client with Judge Armstrong and added in that I also had not been accommodated and had possibly been retaliated against for protecting the client.[13] Pa97-101 (April 2, 2004 follow-up

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[13] There are numerous references: Pa97 ("illegal procedure which, once again, violated our Handicap Accommodation Laws"), Pa98 ("discriminatory treatment of those who appear before [the Margate] Court without regard to which judge is sitting or whether the appearance is as a defendant or defense counsel"), ("I was appearing to help [Client X] through this hearing") & ("did not want to appear for the defense because I thought one of the purposes of the hearing was to obtain a new PD and since I am scheduled for chemotherapy in April or May"), Pa99 ("failure to accommodate a mentally handicapped citizen was inexcusable, illegal and unethical"), (putting me in a position of choosing between ethical responsibilities and "my own health considerations was unnecessary, rude and probably also illegal") & (fn6: Handicapped Accommodation Statutes are implicated but even if I were healthy the 13th Amendment is implicated) &, finally, Pa100 ("I need to know whether Your Honor is going to

complaint to ignored March 5th Informal ADA Complaint). I stated several times that I was serving involuntarily and that I needed medical treatment in a month or less.[14] I left the remedy to Judge Armstrong because I had been castigated in the past, as Judge Armstrong would eventually do in the future, for proposing suggested accommodations.[15] Still, it was clear I wanted to be replaced noting that Legal Services could not replace me due to their charter.. Pa100-1.[16] Furthermore, while just acting as her civil attorney in the informal complaint process, I had solely advocated in favor of a PD being appointed. I also clearly proposed the compromise that I obtain the client's mental exam (which would not have delayed my treatment) and then be relieved See generally, Pa97-101.

Her Honor made the incredible determination, despite my need for nearly immediate, planned treatment for a fatal disease that I was "in the best position" to represent Client X. Pa102.

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make sure that these handicapped accommodation statutes apply in our Municipal Courts").

[14] My letter to Her Honor mentioned the following: "I did not want to appear for the defense because … I am scheduled for chemotherapy in April or May." Pa98 (First New Paragraph). In footnote 4 right after the word "May," I wrote, "… I have to have chemotherapy for a potentially fatal condition …." Pa98. In footnote 7, I clearly but sheepishly suggested the accommodation of limited trial hours and predicted, "but I am sure that such a request will fall on deaf ears in the Municipal Court." What more could I have done? I really must ask Your Honors to read the whole letter at Pa97-101. I clearly wanted out of the case (note the mention of not being relieved by the County Legal Services).

[15] A typical response would be, "I will determine what accommodations are appropriate, Mr. Duffy!"

She “hop[ed]” that the matter would be quickly resolved (with no instructions to the Municipal Court to make sure that happened or what I was to do if it was not). Pa102. Her Honor clearly understood I was asking for an accommodation because she paid lip service to the ADA/LAD by stating “accommodations would, of course, be made.” Pa102-3. She did not state how that would be implemented. Perhaps most importantly, she did not state how I could appeal if I disagreed with her findings (“best position” and “hope” the case would be over quickly) and her proposed accommodation (nothing). Further, because the Assignment Judge clearly does have the power of assignment under Madden, I took this to be either an affirmation of Judge Savio’s assignment or an original assignment under her Madden powers – this is how I interpreted her “best position” comment. Pa102-3 (Her Honor’s letter) & Pa34-6 (Complaint allegations).

My wife and I were aghast at this letter. First, there is a rather clear subtext to it that “You have made such a big deal out of this case: you are so smart, you do it!” Still, I called Her Honor’s chambers to arrange a meeting to discuss this rather dire situation. I stated the meeting would be about Her Honor’s assigning a case to me while in need of medical treatment. I was put on hold for a few seconds (perhaps the Judge was consulted). I was told just to get the assignment over with. Pa35-6 (Complaint).

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[16] I wrote, “Any ‘back up’ I have in this case must (and should) come from the Margate Public Defender’s Office pursuant to [the

I called Mr. Ernest Comer who is the AOC's ADA Coordinator "to appeal" Judge Armstrong's bizarre lack of accommodation (and investigation).[17] He told me that the AOC would not "overturn" an Assignment Judge on something like this. See, *e.g.*, Pa31 (first new sentence) and Pa35-6 (Para. 9 - bridging pages). I also sought the intervention of Judge Winkelstein's designee to deal with my accommodations. Pa36. These administrators were both quite frank that they were not going to take on a judge. Pa35-36. That led to a call to Judge Winkelstein asking for intervention – that call was not returned, probably due to a (mistaken in my view) impression that such a call would be "improper." Pa36 (Para. 9 & 10).

So with no relief, I buckled down to try to get the case over. As the case dragged into June, however, it was impinging on my treatment. I assumed that Her Honor had pawned off accommodations on her former law partner Judge Savio. I had constantly complained about my involuntary service and about my health condition to no avail. Pa350 (Appendix B to Brief Below – Verified Synopsis of Letters from Duffy to Judge Savio regarding disability; Letters in Pa232-92).

I was in constant contact with the ethics hotline in Trenton mainly because the Judge had found that Client X was

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interlocutory appeal Judge's] order."

[17] I would like to note that under both versions of the Supreme Court rules on such complaints, which are not reflected on the AOC's ADA web page to this day, there is an appeal to the AOC from any decision in the vicinages.. See flow charts of both

competent to direct her defense (in spite of the unrebutted psychiatric finding that she was incompetent to stand trial). Client X, meanwhile, had ordered me not to release the psychiatric report because it was "part of the city's conspiracy against her and she was not incompetent." The ethics hotline told me to file a motion for a guardian. The client got mad and told the judge, but not me, I was fired. I called the ethics hotline and was told to offer my resignation of record (Pa255). They told me I was not allowed to resign or be fired because I had done what was ethically required of me (per their instructions). Ethics Hotline attorney Sam Conti noted that, if the judge accepted it, that would solve my ethical problem of not being allowed to quit or be fired as a result of filing the required guardian motion and it would also solve the problem with my lack of accommodation. Pa216-218 (Third Amended Complaint) & Pa245-292 (Letters to Court discussing this issue in detail and mentioning what I was doing was frequently at the behest of the Ethics Hotline).

The resignation (Pa255-6) was not accepted or even discussed. However, I think it may have convinced that judge that I was serious about being relieved. In chambers during the hearing about the release of the psychiatric report, I told him the case was holding up my treatment. He stated I could be relieved if I filled out the paperwork and got a public defender

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complaint processes at Pa552 (older) & Pa586-8 (newer – where AOC may have both original and appellate jurisdiction).

to replace me. I felt this was the court's job. (The MPDA says this is the court's job.) Still, in the context of this case, I did not mind trying to get the form completed – if for no other reason than my life was at stake. Pa259-264 (Letter begging Court to take judicial notice of client's indigency (Pa260) status per both divisions of Superior Court & Subpoena to Law Division to attempt to find old Indigency Form 5A).

The client refused to help me because she did not trust the Margate officials. This was not fatal (no pun) to getting the form filled out because Law Division had the information from early 2002 in the case still then pending in this Court. I sent a subpoena to the Criminal Part for the form. They subsequently replied that the form was not in the file. Pa259-264.

At that point, again, I just worked on getting the case over. It seemed like it would be over on August 16, 2004. The city was still dragging its feet on payment but the psychiatrist was willing to give it "credit." Pa94-104 (numerous requests for payment during case) & Pa248 (complaining to judge about earlier lack of payment from City). Still, I did not want to squander the city's money so I wrote to the judge and told him that I would be bringing the psychiatrist unless told not to. Pa265 (first paragraph). The prosecutor responded that, if I procured the appearance of the psychiatrist and the Court did not get to his testimony, he'd file a motion to make me pay the $1500 fee. I wrote back to the judge since I did not want my "fee" on the case to be "less than zero," I'd only be bringing

the psychiatrist if told to. Pa268 (fn. 1). I was not told to bring him. Now desperate, I filed a Motion to Determine the Competency of the Client to get the case over summarily by motion. Pa268-272. It was never addressed.

I was becoming severely depressed about the extreme delay in the case. I expressed this concern to the Ethics Hotline along with the concern that the client was still in control of the case and she might order me, at the last minute, not to put the psychiatrist on the stand (with me getting "hit" for his fee). We decided to file a declaratory action in the Chancery Division asking what to do and requesting, as one possible remedy, that the client be declared incompetent and assigned a guardian. This would not necessarily over-rule the Municipal Court determination of competency (although we also requested the Chancery Court take control of the criminal case in some fashion) but it would perhaps, at least, give me a sane person to answer to in the case. I also mentioned my medical issues in the lawsuit at the recommendation of the Ethics Hotline because of my extreme need to be relieved. See, *e.g.*, Pa44 (Complaint Para. 35-6).

The Complaint and Order to Show Cause were accepted for filing by the Chancery Division but were returned with the instructions to file it in the Law Division. Since the case clearly belonged in the Chancery Division because it asked only for declaratory (and possibly injunctive) relief, involved a request for determination of competence and did not ask for a

penny of damages, it was clear this was a warning to watch my step. Additionally, this judge had always followed the transfer rule for cases filed on the wrong side of the court when I had previously filed commercial fraud cases (asking for rescission and/or damages) where the jurisdiction of the Chancery Division was more in doubt, so that was perhaps an even bigger warning. Finally, the time scales of the Law Division were inconsistent with the immediate need for relief in the client's case. Pa44 (Complaint, Para 36).

The next time I tried to procure the attendance of the psychiatrist, he informed me that he was not appearing without being paid first. Pa240. This put the ability to obtain the testimony of the psychiatrist totally with the City of Margate. I tried unsuccessfully to get them to pay. September, October and November floated by without a payment. Pa239-42 (Ignored payment demands to Margate Treasurer Thomas Hiltner of 10/14/04 & 11/02/04) & Pa282-3 (complaining to Court about bill not being paid). See also, Pa234-6 (April 2, 2004 letter to City to be prepared to pay the psychiatrist).

I was determined to get to my treatment started so I re-captioned the former Chancery Complaint and filed it as an ADA action in Federal Court, hoping to at least get the payment released from the Margate Treasurer's Office. It had that effect: Judge Savio, on the day of trial, personally went to the Treasurer's Office and demanded the check for the psychiatrist. Pa282-9 (Constant mention of Federal Suit).

The case was concluded that evening. The signed disposition of the case stated the client was "not guilty." However, the judge ordered her to get psychiatric help. Obviously, this was an error and I wanted to correct it under R. 1:13-1 but the client, who you will recall is still directing her own defense, would not hear of it. So I had to file and appeal of the "Not Guilty" verdict! Pa291-2.

With the Notice of Appeal, I asked, under Madden, if not the ADA, that I be relieved. Pa108-10. I also had another appeal in the Law Division from Margate for a case against Client X's father. With the massive amount of work in both Federal and Municipal Court for Client X's case while I was in a very poor mental and physical condition, I had gotten behind on the father's brief. I asked for more time on the grounds that I really should have been on chemotherapy but had been forced to do the daughter's case. Pa104 (Request of 12/17/04).[18] It was nearly immediately denied. Pa105 (Denial of 12/17/04). I guess the judge did not believe what I had written him. I took this much harder than I should have: I assumed here I was going to have a malpractice case after working hundreds of hours on the Client X case. I started spinning into a major depression: the total lack of accommodation, the interferon treatment waiting for months in the refrigerator and the near certainty of ruin

[18] Recall, I had taken the father's case, which had a trial date on the same date as a hearing in the daughter's matter, to help pay law office maintenance bills due to having to keep the

and death were more than I could handle. Pa44 (Complaint Para. 37).

On December 23, 2004, in this very depressed state, I talked to the law clerk. She had already **ignored** me on 12/17/04; so now she was **dismissing** me but quickly switched to being nasty. Apparently, she did not believe any of the facts that I told her. She was extremely petulant with me and stated if I was "sooo sick," I should not have taken the father's case. Pa46 (Para. 42). She apparently did not believe anything I told her from the way she was "taking notes" to catch me lying so I could literally be **admonished** later (as in by the Ethics Committee). Pa106. On the other hand, she did know more about the law than the others in this case: she asked for my medical records to prove this. Pa106-7 (second paragraph memorializing conversation). I told her about giving the records to Judge Winkelstein but offered to drive the four miles to the criminal court, show her my medicine in a cooler and she could look up on the internet that interferon was only used to treat Hepatitis C – which was always fatal if not cleared from the system. (She did not transcribe this but see Pa45-7, Complaint Para. 39-44, for my recollection of this unpleasant conversation.)

In any case, she did engage me in an "interactive process" – however rude she was. This eventually led to her boss, Judge Garofolo, realizing that the incredible facts being related were

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office open because of the assignment to the daughter's case. Pa37 (Compl. Para. 13-4).

true. He saw to it that I was immediately relieved on appeal. Pa46-7. I was still counsel below and was directed to set up several psychiatric sessions and was constantly "called on the carpet" every time Client X did not show up for counseling. See, *e.g.*, Pa291-2 (Informing Judge Savio of Appeal but discussing arrangements to get the client to court ordered therapy sessions -- she missed) and Pa114-17 (same: discussion about my responsibility to get her to these sessions).

One of the times I was called into court, I brought my interferon with me in an igloo, showed the judge the box and stated to the judge that, as he knew, the case had been holding up my treatment. (Obviously, I got this idea from my interaction with the Law Clerk.) He relieved me from an appearance in two weeks for another status conference. Pa48-9 (Complaint Para. 50).

Around that time, I also received a letter from Judge Armstrong stating she had reviewed the memos I had sent to Judge Garofolo's clerk and she did not realize that I had been sick for a long time and that she wanted to accommodate me to help with my court schedule, etc. Pa111. Too little, too late – I had no other cases left. The key fact to glean from this letter is that I had said repeatedly in my memos to Judge Garofolo that I had been assigned to Client X's case and Judge Armstrong did not rebut that characterization. See Pa108-9 (at bottom of first page: "From what I can tell, I think the judge and his law clerk think I am lying to them about **the desperate situation**

that has been imposed on me by Judge Armstrong's having assigned me to [Client X]'s case in spite of my health condition."

(Emphasis added.)

If this Footnote #2 on Pa109 were untrue – even in part, don't you think it was worthy of rebuttal:

> I point out that, even if I were healthy, Judge Armstrong was totally outside the Supreme Court's guidelines in Madden when she assigned me [Client X]'s case (or affirmed Judge Savio's involuntary assignment of the case to me after the Public Defender was relieved). This is especially true since I have opted for the *civil pro bono* program with South Jersey Legal Services so my name should not have been on the Assignment Judge's *pro bono* list. The fact that such a non-Madden assignment was made while I was pending chemotherapy treatment is, really, unfathomable.

Pa109 (Letter requesting to be relieved from Client X's case on appeal to Law Division).

Please note on Pa110 (bottom of page) that this letter with these stark (but true) facts was sent by fax and mail to Judge Armstrong, Judge Savio, Judge Garofolo and Howard H. Berchtold, Jr., the Atlantic County Municipal Court Administrator (by fax only). These facts were unimportant to Judge Garofolo – he did his job, he granted my absolute right to relief per Madden and the Court Rules. That was all that was required of him. In the case of all the other recipients, if this characterization (of an assignment which violated Madden) were untrue, don't you think they should have rebutted it? Especially, as Judge Armstrong did, if they wrote me about a related issue (future accommodations)? I will refer to this footnote as the "Assignment Footnote" in the Argument.

In any case, my request to be relieved on appeal[19] did seem to get things moving to get me relieved below too.[20] The municipal court clerks called several times to arrange to get the information for the public defender application – as always had been their duty under the MPDA. They then called up and said that application was not getting processed without the $100 application fee. I pointed out to them that there had to be

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[19] I'd like to note that I only asserted my absolute right to be relieved on appeal based on Madden and R. 7:3-2. CITE XX. This "application" was (properly) directed at Judge Garofolo. I got a call from the civil division that I should have applied to the criminal court managers. So I "applied" to them too. The State has made a "big deal" that I apologized for directing my requests to the Judge: true, but I was doing this to avoid more retaliation – the civil division manager was angry. The State has also asserted that when I "asked," I was "accommodated." First, I was still slaving away in the municipal court. Second, I had an absolute right to relief under Madden so it really cannot be characterized as an accommodation. Also, since I was free of the contempt cases, I let my displeasure about how I had been treated be known – before then, it would just have likely resulted in more retaliation – possibly including the client.

[20] I note that "to get listened to," I had to deal with an extremely hostile law clerk who was clearly "taking notes" thinking I was lying to her. Most attorneys would have stopped asserting their rights in face of such hostility – I did for a week – but ultimately I plugged onward, mainly because I figured I was a "goner" and had nothing to lose. It is obscene that the State uses this as an example of my being accommodated as soon as I asked. First, I was turned down so fast it could make your head spin – same day service. Only three weeks later as all the facts came together, due to my extensive 5 page letter on my discriminatory and illegal treatment, was I relieved in the Law Division – where I had a Madden right to be relieved without regard to my ADA status or requests. I still was counsel in the Municipal Court for at least the rest of January until Judge Garofolo told me I was relieved. As a matter of our rules, I continued to be counsel after January because, without regard to the sanity of the defendant, counsel is not relieved until a substitution is filed. One would assume that this Rule would be particularly stringently applied, to my possible detriment, where the defendant was actually insane.

some procedure to waive the fee,[21] they told me "no." Well, I was due at a new IRS job in a few days,[22] so I needed to KNOW that I was relieved so I could truthfully tell the IRS that I had no cases pending as an attorney so I paid the $100. I feel I was blackmailed for the $100 and that this was retaliation for having represented a disabled person or being disabled, or probably both. See Pa49 (Complaint Para. 54).

I wanted to duly record this blackmail so I wrote a letter relating the facts and circumstances under which I was forced into paying the $100 to get fully relieved. Pa114-7. I was hoping somebody might get embarrassed and send the $100 back – I really did not have the money. While I was writing the letter, I realized that I should also write a memo about my thoughts and the status of the case. I could be severely incapacitated (or dead) by the time my replacement was named – recall, it took over 12 months to replace me 3 years earlier in this court (see

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[21] Please refer to Municipal Public Defenders Act, N.J.S.A. 2B:24-17b (Application fee, waiver; deposit in dedicated fund). I am extremely embarrassed that I did not know of the MPDA – but I am a tax and financial attorney (one of those attorneys about whom the Supreme Court joked for having to find our way to the courthouse, Madden at 607-8). My embarrassment is diminished a great deal in that it absolutely clear the Assignment Judge, the Presiding Judge (Criminal Part), Judge Savio and the Margate Public Defender (see his totally inaccurate reliance on the *pro bono* program to replace him on the bottom of Pa82) do not know about it either. In any case, my Constitutional reconnoiter that there had to be waiver provision, whether by case or statute, was accurate. N.J.S.A. 2B:24-17a (MPDA § 17a).

[22] I'd like to note I was going to start the treatment at this point but then my wife reminded me that this would send me to the IRS in horrible condition with no leave time accrued – so we decided to build up some leave time and start the treatment

fn. 6, supra). If I had had a replacement, I would have just given this information to him or her but I sent it out so that the replacement could get the transfer memo from many sources – including the courts' files. Pa49-50 (Complaint, Para. 52-4).

This drew a somewhat harsh letter from Judge Garofolo that I had been relieved. Pa119. He did not realize the situation I was in – my memory could easily have been destroyed by the time I was replaced from the treatment I needed. Also, he did not seem to grasp that I had not been relieved BELOW[23] and wanted to document the status of the case when I left it. Clearly, if something had gone wrong, I would have been blamed for it so I needed to protect myself as well as any replacement counsel. Pa49 (Complaint Para. 52-3). In any event, I was relieved at this point – a Superior Court judge had said so and the application for a PD was being processed. I conferred with the new PD sometime in April. He and I used the letter as a transfer memo as I had forgotten quite a few details.

In June 2005, just after I had been able to start my treatment, I thought I was reassigned again to the case (as Client X had said) and I called the court to determine whether I had been reassigned to the case while I had 100+ fever from the

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later. Then I ran out of time and had to resign rather than be AWOL. See IRS resignation letter at Pa142-3.

[23] The municipal court staff was calling me all the time about Client X (PD application and whether she had gone to her therapy sessions). Judge Savio clearly was looking to me to make sure I told her to go to these appointments. If I was relieved below, it sure did not seem like it.

treatment. Judge Garofolo's secretary thought I was rude. [24] (I think the real problem was I threatened to go to Federal Court to get an order that I could not be reassigned.) Anyhow, the secretary did not help to clear up any misunderstanding: she kept saying a fax was "expected" from me which I took to mean I had been reassigned. (Recall, I had been reassigned after I should have been relieved at least twice before. Despite the fact that I felt these statements were protected by the First Amendment and the ADA, I apologized to the Judge for raising my

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[24] My behavior was driven by the medicine I was on please refer to the medical warning at Pa152 (under "Mental Heath problems"): "Pegasus may cause some patients to develop mood or behavioral problems. Signs of these problems include irritability (getting easily upset), depression ... and anxiety. Some patients may have aggressive behavior." This is the exact reason why I could not be appearing in court on the medicine -- and had arranged my affairs accordingly. Even so, my behavior was not that bad: I was "ranting and raving" (Angello Memo, Pa125, paragraph 2) but Ms. Angello stayed on the phone with me and did not hang up. Judge Garofolo characterized the conversation as unprofessional -- fair enough -- but I was not calling the Court as a professional. I was calling as a sick, sad, frightened person, whose lawyerly instincts were "out the window" due to the chemo side-effects AND a CO-INCIDENT and RELATED Post Traumatic Stress Disorder attack. Please refer to Pa136-8 for a full account of the debilitating effect of this PTSD attack. I thought I had been reassigned to Client X's case again and wanted to make clear I could not, and would not, appear. Any mistakes I made (which the court did not help to clear up) were also driven by my condition and were not that serious. The mistake was driven by the fact that every time from 1997 to 20042004 Client X had no attorney, the Court System "came looking" for me. This was true whether it be the Municipal Court in the person of Judge Smoger or Judge Savio, the Superior Court in the person of Judge Neustader or Judge Armstrong or this Court (which took over a year to get other counsel -- during which time I thought they were waiting for me to get better). This was indicative of a “If it is Client X, call Duffy” attitude which, as I said in the Complaint, is predicated on the belief that I “created” Client X’s cases – which is untrue; the prosecutor did by demanding jail time. Pa50 (Complaint, Para. 55).

voice and that was the end of the matter between him and me. Pa51-2 (Complaint Para. 57-8) & Pa135-8. For reasonably accurate memos of the conversations, see Pa123-5. (Please note I was constantly saying I was NOT Client X's attorney.)

Meanwhile, I had asked Judge Armstrong (who you will recall 5 months earlier had finally offered to accommodate me) for help with the misunderstanding with Judge Garofolo and, to PLEASE not let Client X lapse in having an attorney (because the Court System had invariably assigned me to her cases when that happened) and have the staff who deal with Client X stop mentioning me as a possible attorney for Client X. Pa120. Please note that there was an extensive conversation with the law clerk before this memo where I explained I wanted some help with the Judge Garofolo misunderstanding, which was caused by Client X tricking me and by my incapacitated state on the chemo. I also explained that I just wanted to try to keep my job at the IRS. Pa53 (Complaint Para. 60). Be assured, I only called Judge Armstrong (and got Warren, her law clerk who, I had to assume, was fine to talk to about ADA matters) BECAUSE SHE WAS THE **ADA COORDINATOR FOR ATLANTIC COUNTY** AND I NEEDED AN ACCOMMODATION due to the misunderstanding that had occurred.[25] Pa53-4 & Pa298-9 (designated ADA Coordinator).

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[25] To be specific, I was using the informal reasonable accommodation (Pa295-6) or complaint (Pa296-7) procedure – you know, the one that is supposed to resolve ADA problems, not make new ones. Both being lawyers, I saw nothing unusual in Warren's request to write something up about the misunderstanding, get it to the Judge and then, if I wanted, I could write a bigger

Well, Judge Armstrong blew up at me and told me to stop wasting her law clerk's time and to stop "injecting" myself into Client X's cases. Pa126. So I stopped writing a major letter I was writing to her about my mistreatment, etc. (which the law clerk told me to write) and just left her alone. Pa53 (see mainly fn. 20). I was attempting to engage her as the ADA Coordinator but she reacted as an autocratic judge.[26] Pa53-4.

C. Law Clerk Issue – Applied in Early May 2006

The law clerk issue began after I filed suit. The Court System was busy dragging its feet so I thought, well, if I could get a law clerk job to get my career going again (if I lived, which was still in doubt), then maybe I could propose the job as a settlement. After all, Madden had some cryptic language that those who had been unfairly assigned had some vague right to

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letter about my other issues I wished to discuss (which was basically avoiding the damage of having to quit the IRS due to my illegal assignment). That incomplete letter is at Pa129-140 (it was not finished because, clearly, finishing it would just lead to more retaliation). Due to my condition, my brother (who is law professor) helped me write the apology letter to Judge Garofolo (at Pa127-8). He totally authored the explanation letter to Judge Armstrong at Pa141 but then we decided to just leave Judge Armstrong alone to prevent further retaliation.

[26] This is the essence of the whole case – it is totally unfair to have people have to go to Judges, hat in hand, asking for an indulgence. God forbid, if the ADA requestor gets assertive, they will be insulted and threatened with all kinds of retaliation, although they are usually just ignored. (It also violates the Judicial Canons because the judges are, basically, practicing law for the state: acting as adversaries to the requestor in an ADA reasonable accommodation process. What is the requestor's bargaining chip in the process? That the requestor will sue or complain to AOC if unhappy? How many

paying work. Madden at 611 (see quote at Pa41, Complaint, Para. 28). But the "no practice" rule was in the way: it stated that the candidate should not have practiced law. Pa55-8 (Complaint Para. 67-77). I figured this rule had some rational basis such as avoiding the clerk having conflicts. Pa27-8 (Para. 69-70) & Pa147-8 (Inclusion/Accommodation Request – assuming that conflicts are the reason for the "no practice" rule).

I stated I was still disabled in the letter to the AOC. Pa146-7. I stated, I may be "cured"[27] from the Hepatitis C in the future but was then still on chemo. It took 120 days for the AOC to take action on the email, despite two reminders (which are in reverse chronological order on Pa146-7). When the "rejection" came, it just restated the rule again and did not engage in a mandatory "interactive process" with disability and minimum job qualification analysis. Pa148. I explained, even with the Hepatitis in remission, I still have Crohn's Disease and, even if not, under the law I am still "disabled" as an "individual [who has] a record of such [disability]." 42 U.S.C. § 12102(2)(B); see similar N.J.A.C. 13:13-1.3 (interpreting N.J.S.A. 10:5-5(q))(herein after "'record of' definition"). I stated I was a person with disability (I was still on chemo) and, by way of explanation and as a further reason for accommodation, that I was simply unable to do the job in the

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judges are going to take kindly to being reminded, however politely, of that possibility?

[27] I put "cured" in quotes because the technical term is remission.

past (and I still was uncertain but hopeful). Those were the honest facts. I do not think they were that hard to comprehend. See my analysis email at Pa149-50 to attempt to resolve the issue without litigation.

So after 120 days of **ignoring** me (while books were going out without my resume in them), I finally received a **dismissive** form letter for non-recent law grads –- no ADA analysis. Then to complete the usual IDA troika, I called the decision maker, Ms. Danilo, to discuss some of the issues and she **threatened** me with a professional complaint of some kind (for violating the Court Rules by applying for the job without meeting the qualifications) when I brought up the subject of litigation.[28] Her response is simply more discrimination or retaliation or both. Pa149 (second and third paragraphs). Certainly, it is not the way the "system" is supposed to work.

D. Retaliation in the Divorce – September 2006 to May 2007

There was also some retaliation in my divorce. Pa54 (Para. 64). I was given a run around when I moved that the divorce venue be changed because I was suing all the judges' boss. The motion was refused for filing in September 2006. (**Ignore**.)

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[28] I note that Ms. Danilo has filed a certification in this matter and has not rebutted this allegation. I also wrote her an email memorializing our conversation, including the threat, and asking her to check whether there was an internal appeals process. Pa166-7. I'd also like to note that I only brought up the subject of litigation within the context that I thought they had dragged their feet on answering me so as to deny me a chance at court review on a quicker decision.

Pa221 (Third Amended Complaint, Para. 39-41). I was told it was being handled administratively. The administrator took 6 weeks to write a dismissive and rude letter mainly trying to blame me for his delay and telling me to file a motion. Pa305. (**Dismiss**.) When the motion was heard, the Court set it for argument when neither party had requested it. Pa221-2 (Para. 42).

The court told my adversary to inform me about the oral argument and he forgot. Pa221-2 (Para. 42). (This violates the court rules – the court has to inform the parties of a hearing itself -- it's sometimes called Due Process). At the hearing,[29] the adversary immediately admitted his error but the judge held the hearing anyway, listening to my adversary's inaccurate rendition of the facts (when there was a copy of the complaint in this case in the divorce file), without getting to the important issue: that both cases would have a lot of disability issues in them which really created a super conflict for the judges, no matter what they did all kinds of propriety issues could (and will) be. Pa222 (Para 42).[30] I claim that having a hearing *in absentia* was punishment or retaliation for suing the judge's boss. This was the most severe punishment that a judge

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[29] I know this because I listened to the tape a few weeks later.
[30] This says nothing of the possibility that, if the State had offered a settlement and my then-wife and I disagreed about whether to take it, the divorce judge may have to have decided whether we had to accept the settlement or not. This reason was listed in the motion. PA311 (2nd para.)

could impose on me in a civil case. (**Admonish** – completing the IDA pattern so often repeated in this case). Pa222 (Para. 43).

In any case, I wrote a letter and personally delivered it to the Ombudsperson (due to the fact that I was barred from filing it with Judge Armstrong as a represented party in this case) that, if the case was going to be in Atlantic County, they had to address a reasonable accommodation for my Post-Traumatic Stress Disorder (PTSD) issues (regarding the abuse I had received at the hands of the Court System regarding my disability issues) and the fact that I needed a major operation. Pa222 (Third Amended Complaint, Para. 44) & Pa306-311 (It was "Cross-filed," meaning it was filed as both an ADA request and as a motion, Accommodation & Anti-Retaliation Request Letter). The Ombudsperson said she understood the issues and would ask Judge Armstrong (or a substitute judge) what to do with the reasonable accommodation request. Pa222 (Para. 44). The AOC's own website says to ask for accommodations as soon as possible -- in writing, if possible. Pa295-6 (bridges pages). I have never received an answer to this accommodation request. Pa222 (Para. 44). (**Ignore**.)

The judge in the divorce case did an unacceptable job with my *ad hoc* accommodation requests. I was forced to move up the operation a week -- luckily, the surgeon was able to squeeze me in. (**Dismissing** my request to keep my operation on schedule.) The judge did not see the last request in time to act on it(he had a week). He also had a procedure to work out accommodation

requests with the adversary[31] but this violates the ADA & LAD (privacy, if nothing else) and the procedure is that the Reasonable Accommodations are supposed to come from the court not by agreement with the adversary – per the court system's own rules. Pa222-3 (Para. 45). Although I am sure my hospitalizations annoyed this judge and certainly caused extra work for him, he did not follow the pattern of admonishing me at any time and I certainly appreciate that.

Preliminary Statement

This case is about the Public Good and "public goods." The former is reflected in "*pro bono publico*." The latter is a very complicated economic concept about those institutions which benefit society and, yes, contribute to the Public Good.

In this case, producing a rule for ADA accommodation in the Court System which everyone can understand, AND FOLLOW, would be an extremely valuable public good.

It does not matter so much what the rule is – just that it is clear. If the courts want to give themselves a pass on the ADA and the LAD (and that really has to be the interpretation of Judge Rafferty's opinion), that's fine with me -- really. All I ask is that court users be TOLD that the ADA/LAD processes are not mandatory for the Courts -- that any accommodations (or investigations) given are in the form of an indulgence and no

[31] I have since learned this is not the individual judge's procedure but is it is endorsed in Directive #6-04.

enforcement actions are possible. This is the *de facto* situation in the courts now so it would just be nice to have somebody stand up and admit it.

If, on the other hand, Your Honors think there ought to be some measure of remediation of the Ignore – Dismiss – Admonish (IDA) system presently in use, then I think you will find this an intellectually stimulating exercise. The "IDA" system is no way to treat somebody who was just trying to do a little good in this world (when his health allowed it) -- and follow the ethics rules -- before his number came up. Since, miraculously, my number did not come up, I am just trying to make sure situations such as this do not repeat themselves in the future – especially for those less able to look out for themselves than I am. But only Your Honors can provide the public good that will provide guidance to that future.

ARGUMENT

Point I: This in not an Insane Lawsuit Brought in Ignorance of Rooker-Feldman Principles or Judicial or Sovereign Immunity. (Not Raised Below.)

I feel I need to make this point first because this is the way this lawsuit has been treated until now: a typical judge or prosecutor lawsuit brought by a nut (or prisoner) who has nothing better to do. The State did not argue Rooker-Feldman (Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206

(1983)). Still, I think it is the reason that Judge Rafferty took the suit so lightly: Just another insane lawsuit for the circular file. Obviously, Rooker-Feldman does not apply in State Court but I think its general principles of finality are what led to the lack of consideration of my arguments – or even the facts. This concept is tightly wrapped with principles of judicial and sovereign immunity that also got the case dismissed. These principles do not apply in cases such as these[32] – there is a Supreme Court case that says so! Tennessee v. Lane, 541 U.S. 509 (2004). In short, this case is nothing like Hawkins v. Supreme Court of New Jersey, No. 05-4361, 2006 U.S. App. LEXIS 7950 (3d Cir., N.J., March 30, 2006) -- it is much more like Lane.

A good recent case that discusses these troika of issues is Gonzalez v. Commonwealth of Pennsylvania, No. 06-CV-5471, 2007 U.S. Dist. LEXIS 41374 (E.D.Pa. June 7, 2007). The case involved deaf individuals who were arraigned and processed without qualified sign language interpreters. Id. (slip op. at 3-5). Citing heavily to Lane, the court held the lawsuit for damages for the state's behavior was viable, overruling the above usual triplet of state arguments. Id. (slip op. at 6-11). My case is easier than Gonzalez or Lane because there is no judicial decision that is intimately intertwined with the discriminatory behavior – indeed, this is probably why Rooker-

[32] Judicial immunity may apply to a particular judge if he or she was issuing a decision but it does not get the "public entities"

Feldman-like concepts were not raised. Yet I feel I must dispel the shadow cast by that concept on this case.

The disposition of the motions in this case should have followed a Gonzalez pattern and not the pattern of a "sue-the-judges-'cause-your-mad-as-hell" suit such as Hawkins where the "Judicial Troika" was implicated.

The big lack of consideration was the TOTAL failure to consider or to discuss Lane.[33] To dismiss this case, Lane must be addressed and distinguished. If Lane applies, the case goes forward in some fashion.

As I said in the Preliminary Statement, feel free to rule that Lane does not apply to attorneys or that the State must be free to coerce attorneys to represent people with disablities so that it can meet its obligations under the ADA's unfunded mandate. People with Disabilities, especially attorneys with disabilities, need to know what the rule is. No matter how unfair, we'll adapt to it – but we need to know where we stand or, to analogize to Lane, where to crawl.

I am counting on the Appellate Division to remedy this lack of analysis – even if Your Honors see fit to rule against me.

"off the hook" if the decision is discriminatory.

[33] Of course, the genesis of this lack of analysis was the State's ethical failing of not addressing Lane in its motion below. It has cured this failing in this court but has simply characterized my reliance on Lane as "frivolous and repugnant." This proves the old adage that if the law and the facts are against you, not all is lost: you can still call your adversary names.

Point II: The Court Below Totally Failed to Read the Complaint and Other Submissions in My Favor as Required on a Motion for Judgment on the Pleadings.

Dismissals under R. 4:6-2(e) should rarely be granted. Our Supreme Court's most recent relevant case is In Re Contest of the November 8, 2005 Election, 192 N.J. 546 (2007). It, of course, cites to Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). The operative words are "indulgent," "liberal" and "all possible inferences" – this is particularly so of "technical" defects. It is very obvious my complaint and its amendments received no such treatment. Was my complaint perfect? None ever is. But it did make out a formidable barrier to dismissal and its "defects" have been exaggerated to the point of ridiculousness.[34] As to some of the technical imperfections in the complaint, I'd like to point out that, when I wrote the initial complaint, I was on chemotherapy and I lacked a legal research service and was financially strapped. I also don't mind telling the court I was incredibly depressed – I was certain that the treatment would fail and that I would die. Still, I think I did an acceptable job and any defects should be measured against the condition I was in at the time of filing. Further, the verified amended complaints I filed should have

[34] For example, I am asserted not to be disabled, at any time, because I am better (or partly "reabled") now. The Complaint does nothing but assert my disabilities and the discrimination and retaliation I encountered. This totally overlooks 1) at the time I was suing, I had a fatal disease in need of treatment and 2) the "record of" definition of disability – one of such "records" is that Judge Winkelstein saw fit to accommodate me.

been granted (or at least considered as verified statements in opposition to dismissal).

Judge Rafferty gave absolutely no weight to the allegations in the Complaint. I know the allegations are hard to believe: they happened to me and I have trouble believing them. That's why I have documented nearly every allegation in the complaint in great detail in the exhibits and verified the complaints and amendments.[35] When the motions to dismiss were filed, I clarified my questioned allegations and put even more documents into the record via VERIFIED Second and Third Amended Complaints. Finally, I even verified my opposition brief so that the summaries of the evidence in the complaints (Appendices A, B & C at Pa348-51)[36] and other statements, not yet in the record, would have to be considered.

I had alleged I was assigned – I had pretty good proof of it: telling the trial judge "I do not" twice and then accepting with the reservation "since I am being forced" (Pa374. T6-4-9), many complaints to the trial judge about involuntary service without rebuttal and a major damning characterization of the appearance as an assignment in violation of Madden in the "Assignment Footnote" (Pa109, fn. 2, which I discussed in great detail on page 31-2 of the Facts section of this brief), also

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[35] I'd like to point out that none of the defendants has been able to dispute ANY of the substantive allegations made in the complaint or the amended complaints. The sole issue they were able to dispute was whether my appearance in the case was "voluntary" – which still does not end the case.

without rebuttals. I argued below that this lack of response is an adoptive admission of my characterizations of assignment and involuntary service. Pa341. That should be enough to get past even a Motion for Summary Judgment, let alone a Motion to Dismiss voluminous, verified and, yes, damning pleadings.

Instead this considerable evidence was trumped by the judge's assumption that assignments are done by written order (T38-7-8) – the State never produced assignment rules of any type for written or oral orders.[37] Neither Madden, nor R. 7:3-2(b)[38] nor the AOC's directives specify the manner of assignment. The cases that talk about orders are the twin "Contempt Cases" of In re Spann Contempt, 183 N.J. Super. 62 (App. Div. 1982) & In re Frankel Contempt, 119 N.J. Super. 579 (App. Div. 1972). (These shall be referred to as the "Contempt Cases" in this brief.) These cases very much pre-date Madden so I think they are defunct as to procedure. Clearly, in Municipal Court, many "orders" are simply oral instructions, leaving the attorney few options when, as here, the judge is not taking "no" for an answer.

That's just one example. **All** of these verified allegations and documents formed a considerable obstacle to dismissal even

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[36] These verified Appendices, taken alone, should have been enough to deny the motion. I invite this Court to read them.
[37] I think every lawyer simply knows the actual rule: if a judge tells you to do it, you better do it --quickly!
[38] Municipal assignment rule on conflict of public defender: judge is to assign an attorney, in so far as practicable, from the assignment judge's list -- which list the State says does not exist anymore.

if the facts were read in the most negative light possible. Of course, they were read in an extremely dismissive light.

Further, I point out even regarding Judge Defendants in cases such as these (where there is possible immunity), they are usually dismissed, if at all, in motions for Summary Judgment. The majority of the cases, per Lane (with or without Judges and other court personnel being dismissed) go to trial against the State and other "public entities" and various administrators. For example, in Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001),[39] a deaf individual was not given adequate transcription at his trial. In addition to the County, he sued the judge, the ADA coordinator and several other officials. Id at 1130-1. He conducted discovery and the judge "testified"[40] about his role in the matter. Id at 1133. True, on Summary Judgment the judge was dismissed, based on his own testimony and the circumstances, on judicial immunity grounds. Id at 1133-4. But the case was not dismissed out of hand at the pleading stage as this one has been. The plaintiff was allowed to discover the surrounding circumstances.[41] I also note the ADA coordinator in

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[39] I'd like to note in this Title II action, the circuit judge uses the term "accommodation," with and without the modifier "reasonable" throughout the opinion. This is similar to the State using "Accommodation Request" on the AOC ADA (Title II) webpage. Pa295. In our profession, the term is becoming a unified concept bridging all the ADA Titles without regard to their actual wording.

[40] All the other state officials were "deposed" so it appears that the judge was too.

[41] If, in this case, Judge Savio is also Chief Administrator and ADA Coordinator in the Margate Court, that would weaken his

Duvall tried to take advantage of quasi-judicial immunity due to her close work with the judge. She was not dismissed. Id. at 1133-5.[42] So, as inconvenient and embarrassing as these cases are for the judiciary, the plaintiff should have discovery. Parts of the action may be dismissed but the "public entities," such as the State and Margate, are held to answer.

POINT III: Unbelievably, the ADA Complaint Procedures Published on the AOC's Website Are Totally Inconsistent with the Complaint Procedures Approved by Our Supreme Court Which Have Been Well Hidden From the Public. (Not Raised Below.)

I have marked this "issue" as a point not raised below so as not to draw the Court's ire if there is disagreement that it is an "issue." It is not really a legal issue: it is the body of relevant rules that should have been applied to the mis-processed complaints and requests for investigation and accommodation in this case. If these rules (or even the legally incorrect rules on the website) had been followed, I have enough confidence in the New Jersey Judiciary that I would have been given some accommodation.

First, in case the court does not agree with me that this is body of applicable rules are not an "issue," let me cite the standard to raise an issue not raised below:

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claim for judicial immunity – especially given that he shares the "appointment power" for attorney with the City.

[42] I note that many of the cases cited by the defense (but particularly Margate) did go to the trier of fact on some issues – they were not totally dismissed out of hand.

> An issue not raised below may be considered by the court if it meets the plain error standard or is otherwise of special significance to the litigant, to the public, or to achieving substantial justice, and the record is sufficiently complete to permit its adjudication. See, *e.g.*, Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 230, 708 A.2d 401 (1998) (Affidavit of Merit); State v. Micheliche, 220 N.J. Super. 532, 533 A.2d 41 (App.Div.) (absence of jury instruction on the legal effect of voluntary intoxication and a lesser included offense), certif. denied, 109 N.J. 40, 532 A.2d 1108 (1987).

State v. Walker, 385 N.J. Super. 388 (App. Div. 2006).

I think these rules or issues meet this standard – especially where the State has been clearly hiding these rules from the public.[43]

The relevant collection of rules are "Judiciary of the State of New Jersey: Equal Employment Opportunity/Affirmative Action Master Plan" (May 2000) (hereinafter EEO/AA Master Plan or Master Plan) (Pa495-561 – also at http://www.judiciary.state.nj.us/policies/eeomastr.pdf) and "New Jersey Judiciary: EEO Complaint Procedures Manual – Reporting and Handling Complaints of Discrimination or Harassment in the Judiciary" (April 27, 2004) (hereinafter Complaint Manual or Manual) (Pa583-634 – also at http://www.judiciary.state.nj.us/notices/reports/EEOManual.pdf).

Both of these documents apply to "court users" for

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[43] To show the court how well hidden the one manual is, I'll tell you how I found it. I was reading Judge Schott's case, Schott v. State, No. A02612-04T1, (App. Div. June 5, 2006) (Pa635-44) and, on Page 6, this court mentions "New Jersey Judiciary Discrimination and Sexual Harassment Complaint Procedure." Since I had never heard of this manual, I Googled it and only

complaints against judges and other court officials. See Master Plan, Page 53 (Pa548: "Internal Discrimination Complaint Procedures") and EEO Complaint Manual at 1 (Pa584, bottom of preamble: The Manual also provides procedures for filing complaints against judges … by any Judiciary employee, applicant for employment, court user, volunteer, attorney, litigant, witness …). These documents are hidden: neither is hyperlinked (*i.e.* a web address embedded in a webpage that takes you to a new document or web page) on the AOC's ADA page (http://www.judiciary.state.nj.us/services/aocada.htm). The EEO/AA Master Plan is available here: http://www.judiciary.state.nj.us/admin.htm. This "admin.htm" HTML page is the AOC's main page on the Judiciary's site. This is not a place one would look for Title II materials – especially given the EEO/AA mislabeling.

In the case of the EEO Manual, there are no hyperlinks on any of the pages in the entire AOC website.[44]

Mr. Comer never informed me I had a right either "to

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got the opinion itself on the Rutgers website. I played with the name a little and then I found the manual.

[44] At the time this brief was originally written, doing a Google search for the term "EEO Complaint Procedures Manual" for the entire web, surprisingly, produces only 3 results: the manual itself, the web link for Directive #5-04 which established the manual as the judiciary's legal rules for these matters and an irrelevant link. The link to the directive, http://www.judiciary.state.nj.us/notices/n040512c.htm, is nested many, many levels down from the judiciary's home page which is in keeping with the EEO Manual's being hidden from the public.

appeal" (or complain about) Judge Armstrong.[45] He told me the AOC would not help and my only remedy would be suit after the assignment was over. Pa31 (Para. 3 of Complaint – the "AOC official" was Mr. Comer). Yet, under the rules above state he is the correct official with whom to file an appeal of a Vicinage decision or complaint against an Assignment Judge.

If had been able to appeal to some people who were not busy retaliating against me (or afraid of a judge), I think I would eventually have gotten somebody to say, "This guy needs to get his chemotherapy in" – and I would have had a sufficient accommodation.

The Manual supercedes the Master Plan as to complaints. There are many changes. An important one is there is a very comprehensive and professional Complaint Form which is a huge improvement over the old one. Pa626&628.[46] Also, while the Master Plan does not address time limits, this the Manual is ABSOLUTELY clear that there is no time limit on complaints where a remedy would be relevant. Pa599 (Item B.1&2). (To this day, the AOC ADA website (erroneously) has a 60 day limit.)

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[45] To this day, the website lists no appeal above the Assignment Judge – only "reconsideration" to that same judge, see 297-8)

[46] The old complaint form has two links on the old "aocada.htm" page. They both led here: http://web.archive.org/web/20061213013936/www.judiciary.state.nj.us/services/adaform.htm. Please note this form does not ask the complainant to state a requested accommodation. (**I do not see how the State can say that I failed to ask for a remedy (which I clearly did, many, many times) when their own complaint form, on their website at that time, doesn't ask for a requested remedy or accommodation.)**

Now the major earthquake that affects this case is that the Manual "punts" on all discrimination complaints in Municipal Court – putting that authority in the hands of the municipalities. Pa609 (Item VIII. Complaints Involving Municipal Courts.)[47] So there is a major change from Page 56 of the Master Plan (see Pa552, footnote 8), where it is clear that my dual complaints (for the client and, then, myself for being forced to represent her) to Judge Armstrong about Judge Savio and the Margate Municipal Court were at least made to the correct official at that time. I should have been informed of this policy change by someone – Judge Armstrong or Mr. Comer. The public has a right to know this information! (If you are not being accommodated in Municipal Court, you're out of luck with the AOC -– you have to complain to City Council!)

Because the Complaint Manual only became effective April 24, 2004 -- after I had written both of the complaints to Judge Armstrong, the older EEO/AA Master Plan applies to those filings. However, the Complaint Manual may have applied to the appeals I attempted with regard to Judge Armstrong turning me down for a remedy (mainly to Mr. Comer). I am stumped on how to deal with the fact the proper place to complain had changed.[48]

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[47] I will argue, in Point Heading XV, this decision violates the Constitution of this State – in several different ways.

[48] I have tired to find when this questionable decision "to cut lose" the municipal courts from the Judiciary ADA system was made. Mr. Comer wrote a paper in 2002 where he states that the Municipal Courts were being given autonomy from the central ADA plan – but he does not suggest that they are not part of the state's ADA system. Pa566-7. On Pa567, it is interesting to

If the public had been told about it, I think I would have been fine -- I think I could have gotten relieved.[49]

The main point to take from this is that my Complaint asserted lack of correct procedures (as a denial of Due Process and "Access" to the actual procedures) as a source of discrimination (and retaliation). **This Point shows that the New Jersey Supreme Court agrees with me.** They set up adequate procedures but the AOC does not want them known to the public.

The result is the AOC ADA website which should be a valuable resource, upon which I heavily relied to be accommodated, is just a cruel joke on people with disabilities.

Point IV: The ADA Has Abrogated the 11th Amendment: The Lane & Goodman Cases

In May 2004, the Supreme Court of the United States ruled that Congress was within its powers to vitiate the sovereign

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note, that he does confirm that the Assignment Judges are "the decision-making authority in ADA matters." Note also on the top of Pa566, he points out 5 functions of ADA compliance structure – I think it is safe to say that all 5 failed in this case. Finally, on Pa568, he reiterates providing notice to the public: it would be nice if the information on the website (and handout flyers) accurately reflected the complaint procedures actually put in place by our Supreme Court in the EEO Complaint Manual.

[49] If this fact had been available to me when I sued the city and municipal court and asked the Chancery Court to give me instructions on how to represent an incompetent person without a guardian (I also mentioned my health status and that the assignment was holding up my treatment), I doubt the judge would have sent the lawsuit back to me. Pa44 (Complaint Para. 35-6). His Honor would have seen that I had no choice but to sue the city to address discrimination in its court. Instead, he probably had Rooker-Feldman and judicial immunity thoughts per Point Heading I. In many ways, "bouncing" that lawsuit was possibly the most serious due process violation in the case.

immunity of the states with regard to Title II of the ADA.[50] Tennessee v. Lane, 541 U.S. 509 (2004). Mr. Lane, a paraplegic who was a defendant in a criminal action, was required to present himself in a courtroom at the top of two flights of stairs. The first time Mr. Lane attended Court, he disgorged himself from his wheelchair and dragged himself up the stairs. The second time, he refused to crawl and he also refused to be carried. As a result, he was arrested on a failure to appear warrant. Mr. Lane had a co-plaintiff who was a paraplegic court reporter who had similar access issues. Id. at 513-14.

Obviously, the State of Tennessee trotted out the 11th Amendment. The District Court held Tennessee to answer, the Sixth Circuit affirmed and so did the Supreme Court. These courts held that Congress make the States to answer for disability discrimination under the 5th Paragraph of the Fourteenth Amendment. See holding of the court at 531-34.

To be sure, Lane was a 5-4 vote but, if Justices Scalia, Thomas and Alito are true to their previous writings, they would not vote to over-rule the holding of Lane because the rule does not involve a fundamental issue and it has been internalized into the system -- most importantly, to their reasoning, that Congress has not had the opportunity to invoke properly its 14th Amendment Powers if the case had gone the other way. In respect of this concept, a unanimous Court held that Tony Goodman had a

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[50] There is no Title I claim against the State for the non-law clerk issues.

direct cause of action against the State in U.S. v. Georgia, 546 U.S. 151 (2006). (The U.S. had intervened to uphold Congress' 14th Amendment Powers.)

Goodman was a paraplegic prisoner in the Georgia penal system. He was subjected to degrading treatment with regard to his disability -- sufficiently degrading that no one questioned his right to invoke the 8th Amendment. His claims did not stop there: he made other Fundamental Rights claims under the 14th Amendment and the ADA. Id. at 154-57. The unanimous Court upheld Congress' power to vitiate sovereign immunity where the same conduct violated both Fundamental Rights concepts and the ADA. Id. at 158-59. As relates to this case, does this mean that the plaintiff must win both on his § 1983 claims as well as his ADA claims – obviously not. I think it is obvious that the plaintiff can pick and choose. I wish I could tell the Court that I will just proceed with the (easier and clearer) ADA claim. However, I read Goodman to hold that to have an absolutely unshakable 9-0 vote ADA claim, you have to at least have a colorable claim of Fundamental Rights (my takings, Due Process, Speech and Equal Protection claims) under the 14th Amendment in addition to the disability discrimination claim.

Do you need to have a good § 1983 claim to have a good ADA claim? Absolutely not -- Lane answered that question. However, it is clear that Congress' power to vitiate the 11th Amendment to enforce the 14th is stronger when it is trying to remedy "irrational discrimination" against the disabled (which violates

the Equal Protection Clause's case law that the State must have a rational basis for differentiating among its citizens) or fundamental right violations.

In Board of Trustees of the University of Alabama v. Garrett, 121 S.Ct. 955 (2001), the Court, on a 5-4 vote, held Congress does not have such power under Title I. I concede this case clearly dooms any Federal claim for damages against the State, without its consent, UNDER Title I ONLY.

Finally, Lane & Goodman/Georgia are alive and well in New Jersey and they extend beyond court and prison settings to **public education**:[51]

> Reported cases from the courts of appeals since the Supreme Court's decision in Georgia have likewise found that Congressional abrogation of sovereign immunity with respect to public education was valid. … For those reasons, and against the backdrop of discrimination against disabled students, the Constantine court concluded that Title II was valid legislation as applied to public education. Id. at 490 at 490. See also Toledo, 454 F.3d at 40 ("Title II's prophylactic measures are justified by the persistent pattern of exclusion and irrational treatment of disabled students in public education, coupled with the gravity of the harm worked by such discrimination."); Assoc. for Disabled Americans, Inc., 405 F.3d at 959 ("Discrimination against disabled students in education affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship, such as voting and participation in public programs and services. The relief available under Title II of the ADA is congruent and

[51] The AOC has continually evoked the image that the law clerk program was an education program. Pa165. Based on this, it is going to take much more that the *ipse dixit* statement of counsel to back the AOC out of this characterization. It's a job and an educational opportunity: like work-study at college or working for a law professor in law school.

proportional to the injury and the means adopted to remedy the injury.").

Bowers v. NCAA, 475 F.3d 524, 555-556 (3d Cir. 2007)

On the related matter of State immunity and the LAD and other Civil Rights Laws such as the ADA, you do not need to comply with the Torts Claims Act to have a valid statutory cause of action.. Fuchilla v. Layman, 109 N.J. 319 (1988).

Finally, it is important to note that the ADA liability runs to the "public entity" so judicial immunity is not important: the question is did the entity discriminate against the individual. The "person" responsible may be a judge or they may be the janitor – it doesn't matter: the question is did the public entity discriminate.

Comparison of the Facts of Lane to This Case

When the case involves BOTH irrational discrimination (a violation of the Equal Protection Clause) and a Fundamental Rights violation, Congress' power is at its zenith, and no member of the Supreme Court questions its power to act under those joint circumstances. Goodman/Georgia, 546 U.S. at 158-9. This case presents such joint circumstances but, even if I am wrong on this point, the 11th Amendment is still vitiated under the holding in Lane.

Lane is also better factually on point with my facts than the Georgia case[52] First, the Court made absolutely no distinction between Lane himself, who was a litigant, and his co-plaintiff, who was a self-employed officer of the Court, as I am. For this reason, whenever I mention "Lane" as a person I am invoking both his fact pattern and his co-plaintiff's, which involves lack of accommodation for her access issues and a claim that court employees had gone out of their way to block various alternate access routes (service elevators) in some courthouses (retaliation) while others were simply inaccessible to her.

I would equate Lane being required to get up the stairs without any accommodation to my being offered no accommodations to perform as attorney in an insanity defense case while in need of chemotherapy. I, **like Lane**, had a difficult task to perform. I, **like Lane**, was offered no accommodation and set about to do the task as best I could. I, **like Lane**, had to abandon my assistive technology (in my case, Hepatitis C treatment; in his, the wheelchair) because it was incompatible with the task at hand. I, **like Lane**, completed the task at the cost of my dignity and much more. I, **like Lane**, was faced with contempt charges[53] for refusing to complete the task on command. I, **like**

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[52] Although at times, it seemed I had been "sentenced" to represent Client X. One could view the ethical rules as a "prison." A better statement of the issue though is that the State is just pushing its ADA responsibilities off on counsel.

[53] I alleged I was being forced into a Madden assignment and I could be held in contempt for refusing to appear. Please refer to the Contempt Cases, supra, p. 48. Also, I was punished with a hearing *in absentia* without notice in my divorce case.

Lane, was not accommodated despite the fact that simple accommodations were known to be available (in my case, I could have been relieved or the case could have been accelerated[54], via special sessions, to comply with my treatment schedule – instead, as with Lane's co-plaintiff, Margate went out of its way to cause problems).[55]

When a second call came suggesting an assignment to the client, I, **like Lane**, steeled my reserve to refuse to be demeaned. I, **like Lane**, was threatened with inappropriate punishments given that the issue was really the disability, not any inherent unwillingness to perform, to appear or to retain a professional demeanor.

This case is controlled by Lane -- and I note it is so controlled whether my appearance for the defense is seen as an assignment, a *de facto* appointment[56] or "voluntary." In all three scenarios, I had a "job" to do, I could do it and I DID DO IT. Instead of being accommodated, I was taunted with the statement, "accommodations would, of course, be made" at some

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[54] I would like to note that the Judiciary HIV policy states in the "Reasonable Accommodation and Special Circumstances" heading (Pa577- bottom) that people with HIV or similar disease can "advance cases" on the calendar. Pa578. Hepatitis C is very similar to HIV – it is almost as deadly.

[55] I note that both the State and the County were liable for that Judge's decision not to accommodate Mr. Lane – and he had to be an employ of one or the other. (I suspect the County.) He was not even sued, and he could only have been an employee of one or the other and yet both were liable.

[56] As before, Margate totally ignored the Municipal Public Defender Act (MPDA) which was meant to end assignments of attorneys in this State's Municipal Courts.

uncertain time in the future[57] and Margate refused for about 5 months to pay the psychiatric fee ($1500) to finish the trial (the cost for which I was threatened to bear if I procured the appearance at a time when the municipal court could not get to the testimony). When I did ask for specific accommodations[58] with regard not to being assigned (or bothered) again while actually on the (delayed) treatment,[59] I was very clearly and definitively threatened to keep my place. This happened despite my making it absolutely clear to the Judge's Law Clerk that I was merely seeking assistance for my situation (not the client's) both orally and by fax.[60]

Also, she did all of this while I was merely engaging her **services** as the person listed on the AOC's internet site as the "Americans with Disabilities Act Coordinator" for Vicinage I. If Her Honor did not have the time, training or temperament to

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[57] I note that Lane too is now accommodated at the Tennessee Courthouse, which now has an elevator.

[58] In most of my requests, I was not so bold as to suggest a remedy – Judges don't like it when you tell them what to do (one of the many reasons they should not be handling accommodation requests). Look what happened when I made the specific suggestion of asking the staff not to mention my name.

[59] I made three requests to the law clerk: 1) help with the misunderstanding with Judge Garofolo caused by my treatment and by (justifiable) PTSD about being reassigned to Client X's case; 2) that my name not be mentioned as counsel while I was being treated; and 3) that I receive some assistance -- possibly a free lawyer -- to try to keep my job at the IRS, which was in jeopardy due to my service in the case having delayed my treatment for over a year. Pa53 (fn. 20).

[60] Bottom line, read Judge Armstrong's letter at Pa126: Is that a letter that one sends to someone on chemotherapy? The ADA mandates reasonable accommodation. Therefore, how can requesting an accommodation be the "egregious" offense of taking up too much of the staff's time?

hold this administrative position -- and the voluminous evidence is that she does not have any of these qualifications, she should delegate it to someone who does.[61]

This designation of Judge Armstrong as an ADA coordinator is highly significant under the ADA regulations:

> § 35.107 Designation of responsible employee and adoption of grievance procedures.
>
> (a) Designation of responsible employee. A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.
>
> (b) Complaint procedure. A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

28 C.F.R. Part 35, App. A, § 35.107 (emphasis added to show where the term “coordinator” came from).

Numerous cases state that designation of ADA coordinators is central to the Department of Justice’s vision of how Title II should be implemented. See, *e.g.*, Purcell v. Pennsylvania Dep't of Corrections, 1998 U.S. Dist. LEXIS 105 (E.D. Pa. Jan. 9, 1998). Failure of these designees to do their jobs, as happened

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[61] To the extent that Her Honor may have gotten mixed up between her Administrative and Judicial Duties, this a main reason why judges should not be fielding accommodation requests.

here, will almost certainly lead to liability.[62] They should especially be train not to lose their tempers on ADA clients.

I asked for various accommodations due to my personal situation. No matter what the merits of these requests were, no matter what the answer was,[63] I had a right to a prompt, on point and -- yes -- respectful answer. Also, I had been told that I should send a letter with specifics (beyond the fax) – it would have been appropriate to wait for that letter before jumping to (ridiculous and totally unsupported) conclusions.[64]

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[62] Judges should not be performing ADA duties because they are not used to incurring liability for their decisions. The coordinator job, involving possible serious State liability, makes the judge into the State's lawyer in violation of Canon 5(G) (no practice of law). Certainly, Judge Armstrong behaved like an adversary.

[63] I have no delusion that it would have been anything other than, "No, no and no" -- although I was hopeful that Her Honor has enough control over the judicial staff that she could at least get them to stop mentioning (or confirming) my name as replacement counsel.

[64] There is the mystery of Her Honor's law clerk Warren's role in all this. I thought I was "OK" talking to Warren about these issues -- I figured he was her "designee" to deal with me. I saw absolutely nothing improper about it -- it was not a case (as with a caption), there was no adversary, there were merely the three administrative issues. I saw nothing wrong with talking to the Judge's assistant about things for which the Judge herself was "advertising" herself as "point person" on the AOC's internet site. I still don't. Furthermore, here is the story with Warren: Warren is an adult, Warren is a lawyer and Warren was a fully trained law clerk near the end of his term. If Warren thought my talking to him was improper, he did nothing to indicate it to me -- he was a willing participant in at least two lengthy (about a half-hour and hour, respectively) talks. The first was on June 10, 2005 when he assured me that I was not going to be assigned to Client X's case. Pa52 (Complaint, Para. 59).

The second was before the fax of June 17, 2005. The content of that conversation would have followed the never completed June 17, 2005 Letter (Pa129-140) -- the one I was afraid to send in after I was retaliated against -- almost to the word. There

Point V: Ignoring The Municipal Public Defenders Act

As was clear from the Facts, there is an entire statute of this State – aimed specifically at appointing counsel in Municipal Courts for the indigent[65] – which Margate has been totally ignoring. I believe this makes out a *prima facie* § 1983 case when the Statute, the Municipal Public Defenders Act, N.J.S.A. 2B:24-1 to 17 (1998) (MPDA), was intended to secure the constitutional rights both of the indigent and of the attorney.[66]

Also, I did not know of this Statute when I filed the Amended Complaint. However, contrary to what has been mis-stated by Margate, I did plead in the Complaint, in the

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is good reason for this: Warren told me to get the Judge Garofolo letter into him then and to write up the rest of what I had said to him and send it in to the Judge at the end of that conversation -- so I was doing what I was told when the retaliatory letter showed up in the mail. I was shocked and still am.

No matter how you slice it or dice it, my fax of June 17, 2005 at least clearly asked for one accommodation -- having staff not mention my name while I was in chemotherapy. Furthermore, the fax was supplemented by a lengthy call which made it clear I was solely interested in help getting through the difficult treatment and keeping my job -- if that happened to help Client X get another attorney, that was good too. As the fax says twice, "I cannot be put in the position" of having my name mentioned as replacement counsel. Pa120.

[65] It also includes protections for the possibly indigent (*i.e.* defendants, including Client X, whose indigency status was undetermined). MPDA § 9. (I'd like to note that her indigency status was undetermined, as Judge Savio colorfully put in September 2003, because he "screwed up." Pa715 (T12-3))

[66] See Robert J. Martin & Walter Kowalski, A Matter of Simple Justice: Enactment of New Jersey's Municipal Defender Act, 51 Rutgers L. Rev. 637 (1998). Written by two Assembly sponsors, they state "the existing practice of reliance upon court-appointed attorneys … was **unfair to defendants and attorneys alike**." Id. at 675 (emphasis added).

alternative (as a back-up theory), that I was an employee of Margate in the Forth Count (Action for Wages):

> 89. Duffy makes a claim for wages for his services rendered to the Defendants under principles of Quantum Meruit, the Federal FLSA (including for an extra measure of damages if the violations are found to be willful) or any similar or related Federal or State Law.
>
> 90. **To the extent that it may be necessary to allege under the Statutory Causes of Action that THE DEFENDANTS WERE HIS EMPLOYER(S), he does so** on the theory that his action were strictly directed by them, were not voluntary and severe penalties would have been imposed on him for failure to comply with their directions (as was clear from the Case Law of this State and the frequent threatening language of the Judges).
>
> 91. This is strictly a **"fall back"** cause of action because he explicitly did not want to be earning wages -- he wanted to be getting cured from the fatal disease which afflicted him. As a result, the damages under the other Counts (possibly including for wrongful death) are far in excess of the mere wages which could have been paid in this case (even if doubled or if punitive damages are added for intentional conduct under the relevant statute).

Pa61-2 (emphasis and capitals added).[67]

In short, besides the Title II Action and other civil rights actions, I want to get paid under Quantum Meruit or, if there were a statute to support such a claim, any such statute. In addition to the Title I and LAD employment actions for failure to accommodate (and to interact), I also have a Title II and LAD public accommodation action without regard to my employee, contractor or “voluntary” status (which is Count II).

In addition to this general allegation, the MPDA has now been added to the action (Ninth Count – Direct Action under MPDA for Wages). Ignoring this Statute dovetails exactly with the conspiracies I have alleged against Margate. See Margate Unconstitutional Policy & Practice listing in Appendix C at Pa352-3 (Duffy Opposition to Motions to Dismiss). The verified statement cites mostly items from the current Complaint as well as the Third Amended Complaint. Pa212-8.

If the municipal judges (as administrators) still have some assignment power – it is clear that it is co-incident with the appointment power of the MPDA. Rule 7:3-2(b) may leave some assignment power in the hands of the Municipal Judges – I was very much aware of this rule during the case.[68] Further, it was promulgated on the dual error that the Assignment Judges were still maintaining lists and that Madden still controlled the assignment of counsel where there was a conflict for the public defender.[69]

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[67] This also has implications for the State's "wish" that this action were based on Title I on the non-law clerk issues. See Point VIII.

[68] Rule 7:3-2(b) did not then include any reference to the MPDA (including Judge Pressler's comments). I figured I had been involuntarily assigned and that, if I did not watch myself on how I got out of the case, I would end up within the ambit of the "Contempt Cases." This Rule is still incorrect to this day.

[69] There may still be some need to maintain a list – certainly Judge Carchman still maintains a list when he writes to the bar every year to determine our "list" eligibility – possibly to assign attorneys to be appointed, as it were, due to the likely low pay. Pa293-4. I do not know. I'd like to find this out as well as other key questions by conducting discovery.

The MPDA was supposed to end assignments in our Municipal Courts by mandating paid Public Defenders (PD) in every municipality. N.J.S.A. 2B:24-1d.[70] & N.J.S.A. 2B:24-3 (at least one MPD). **It was not followed.** There is a very carefully thought out algorithm for replacing absent or conflicted "one person" MPD offices. N.J.S.A. 2B:24-4 (vacancies filled "as soon as practicable") & N.J.S.A. 2B:24-7b.[71] **It was not followed.** There is a procedure for resolving eligibility and error issues which involves "provisionally" referring the defendant to the MPD pending determination of the status of the defendant. N.J.S.A. 2B:24-9. **It was not followed.** It is the job of the "municipal court," not me, to determine the eligibility of the defendant (N.J.S.A. 2B:24-9) using various means to summon the information (N.J.S.A. 2B:24-10). **It was not followed.** There is a "trust fund" that should have paid for the psychiatric fees (and any replacement MPD legal fees) without burdening the taxpayers of Margate. N.J.S.A. 2B:24-17. **It was not followed.**[72]

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[70] Legislature finds "it essential to require the appointment of municipal public defenders by **each** municipal government in the State." Id (emphasis added).

[71] "If there is a vacancy in the office of municipal public defender, if the municipal public defender is temporarily unavailable or if a finding of conflict of interest precludes the municipal public defender from representing an indigent defendant, the municipal prosecutor may prosecute the offense if the municipal court appoints a qualified attorney to represent the defendant. …" Id.

[72] The existence of a trust fund, would show that the failure to follow the MPDA in Client X's case was INTENTIONAL: The city knew about the MPDA but did not want the indigent defended – and

Please note every time that the Legislature used the term "municipal court," they were describing administrative functions that would usually be handled by the staff but may occasionally be handled by the judge – in an administrative capacity. When the Legislature used the term "court" alone they meant "the judge" in his judicial capacity (usually with regard to determining eligibility). This buttresses the argument I have made that determination of eligibility is a Judicial Act – BUT determining who shall serve as MPD is an administrative one.

Finally, the status of persons who are working as MPDs is that of an employee of the city. In Stomel v. City of Camden, 383 N.J.Super. 615 (2006), Judge Winkelstein wrote for a unanimous panel that an attorney who filed a complaint after being fired as MPD was an employee of the city. The main reasons for this analysis are that the professional cannot, based on the ethical rules, be controlled by the city, the position must be filled and, since the position was "created by social legislation," a liberal standard should be used. Id. at 636. This is relevant because I have a possible double claim against Margate: as an employee and "court user."

The Right to be Paid under the MPDA

The MPDA demands that there must be a Public Defender for those who are indigent. N.J.S.A. 2B:24-1d (requires

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may have been converting the money to its use. See Pa215 (Third Amended Complaint, Para. 17).

appointment); § 6a (must represent all indigents but for conflict) and § 7b (prosecution can only go forward if the municipal court appoints a qualified attorney to represent the indigent defendant). Vacancies should be filled "as soon as practicable." Id. at § 4d. Client X's indigency status was never revoked – as well it could not have been without the participation of the (possibly temporary) Public Defender in the revocation hearing. Id. at § 9. When I served as Client X's counsel s/he was continuously represented by the Public Defender's Office under a finding of indigency. She has had indigency status in this court and in the Law Division: she is clearly indigent. Margate is just too cheap to pay for her defender. When faced with paying for her defense due to the "conflict" with the regular PD, my services were procured by any means necessary – even though the judge had previously characterized me as ineligible to be counsel because I had been a witness in the case. Pa724 (T3-13-14).

The MPDA also demands payment for those who serve in the replacement counsel role. Id. at § 7b ("the attorney [who is serving] shall be entitled to compensation … with payment in 30 days"). It is clear, whatever the status of the attorney (voluntary, involuntary, contingent, paid by the client), if there is a statute to pay his or her fee, s/he can get the fees.

Since it was an MPDA case, whoever was serving should be eligible to be paid. This is especially where I had gotten into the case at the request of the City's Public Defender when he

"did not have time" to file an (absolutely necessary) interlocutory appeal. One would think he had apparent authority to obtain other counsel to help him.[73] After he jumped ship, this saddled me with the duty, as designated co-counsel on the appeal, to assure continuity of counsel under R. 1:11-2(a)(2)[74] (client must consent to withdrawal) and RPC 1.14 (Client Under a Disability) or RPC 8.4(g) (discrimination in a professional capacity). Now I shared this duty with the Court but, when it was shirking its duty, that left me to protect the client's rights (or possibly face ethics charges).

Finally, a reading of MPDA § 6 makes it clear that anytime the city is paying for experts, the attorney serving as counsel, by definition of that section, is the Public Defender. The facts are plain: the city tried to get out of paying whatever they could but they were ordered to give Client X a public defense by the Superior Court (Pa84-5) and they just did not do it.

Point VI: Judicial Immunity: Not When Acting in an Administrative Capacity

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[73] I note that MPDA § 5 requires "additional compensation" for interlocutory appeals – I have a right to compensation for the appeal too – which was "voluntary:" I did not object; I did what was asked.

[74] The State has claimed I did not make a formal motion to be relieved under R. 1:11-2. My colloquy with Judge Savio at p. 18-20 of this brief **WAS** a formal motion. All motions are oral in municipal court. R. 7:7-2(a). Only motions which can determine "the general issue" may be made on paper – such the motion to adjudge Client X not guilty by reason of insanity in early August – which was ignored. R. 7:7-1.

Obviously a very important question in this case is judicial immunity.[75] Three parties happen to be Judges[76] but in this instance, as stated in Paragraph 20 of the Complaint, they lose their "traditional immunity" when they act as administrators. Pa39. This is particularly true where they act in the employment, or appointment, arena: they have to follow the civil rights laws. As for Judge Armstrong, she was the ADA Coordinator[77] for Vicinage I – that's why I contacted her. At first, it was just for the client, but the April 2 letter was nearly 100% complaining about my being made to serve as counsel when I need chemo as early as, perhaps, that same month.[78]

In any case, the starting point in the judicial immunity test is the Stump v. Sparkman, 435 U.S. 349, 362 (U.S. 1978) test for judicial immunity: "The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to

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[75] Recall, however, that ADA/LAD liability of the State and City are not affected by it.

[76] Despite the reasoning of the dismissal, the State does not argue that Judge Carchman cannot be sued despite being a judge. I am clearly just suing him because he is AOC Chief.

[77] ADA Coordinator's possible would affect the public entity's liability would destroy the private enforcement of the ADA against the state: prisons and courts, especially.

[78] By the way, it was Her Honor's decision turning me down for any relief, not her refusal to replace Judge Savio, that I sought to review by calling Earnest Comer – who is listed (near the middle of the internet page – after the last judge listing) as the "Statewide Judiciary ADA Coordinator (Title II Programmatic Access)." Pa301. Both Mr. Comer and the website said I have to sue – there are no appeals: well, *ecce id*.

the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." Id.

Under the facts, Judge Armstrong was performing as "ADA Coordinator." Anybody could fill this position -- in fact Her Honor "shares" the position with 2 non-judges. Further, I did not write to her as a judge: the first thing I wrote to her was that I was engaging her because she was "in charge" of the Municipal Courts and was "administering the ADA/LAD Handicap Accommodation Programs." I then reasserted I was writing to her "**in both of these administrative capacities**." March 5th Letter at Pa86 (emphasis added). This would clearly indicate that Judge Armstrong cannot shield herself from this suit on the Stump test.

Her Honor was clearly dismissive of me so I assumed the accommodations would have to come from the Municipal Court -- they never did. So whether Judge Savio was the designee of the County ADA Coordinator or was just the *ex officio* ADA coordinator for the Margate Court, this was an administrative duty that he, simply, did not perform. Please refer in the Third Amended Complaint to numerous letters I wrote mentioning my health concerns and need for accommodation. Pa243-292. **This says nothing of my mentioning in chambers that my treatment was being held up.** He did tell me I could be relieved in June 2004 if I filled out the indigency forms for the client -- this was his staff's job, not mine. Still in an effort to save my life, I did it. See Pa261-4 (Subpoena to Superior Court to obtain its

indigency form from previous year.) Eventually, I learned the big stumbling block on the indigency forms was the $100 processing fee -- so I paid it. It should have been waived but it was just an attempt to deny Client X the services of an attorney (if I did not pay).

I freely admit things are more difficult with Judge Savio and his appointment or assignment power. Clearly, deciding whether Client X needed a PD was a judicial decision but deciding WHO to appoint to the position was administrative and employment-based in nature. When His Honor filled it with Mr. Robertson, the administrative work had been done by the City Council pursuant to MPDA § 3. When the vacancy arose, someone should have been appointed by the city. MPDA § 4d. They knew of the vacancy and did nothing. The appointment power then passed to the court (yes, small "c"). MPDA § 7b. Anybody could (and should) have called around to attorneys to take the job. If I had been called, I would have said I needed chemotherapy just like I did in court -- but I would have been more free to say, "no" as many times as necessary because I would not have had the Contempt Cases to worry about. In any case, the MPDA makes it clear somebody should have been obtained (thought civil, as in polite and professional, means -- not in the roughshod manner that my services were procured). All this should have been done long before March 8, 2004 as demanded by MPDA § 4d (“as soon as practicable”). Instead this administrative task was put on Client X herself in late January

-- a very clear invitation to me to enter the case. Pa33 (fn. 7, end of first paragraph). When I declined, Administrator Savio had to force me to take the assignment (or appointment) or else I would have been in dereliction of my ethical duties.

The expectations of the parties should have been they would be contacted in a dignified manner to be asked whether they wanted to be appointed by some administrator trying to fill the position. Similarly, if it had been filled by assignment, one would have expected to hear from an administrator BEFORE the court date. Judges should not particularly have been involved. If they were, they were just administrators.

The fact that Administrator Savio shared this appointment power with the city is strongly indicative of its not being a judicial role. The city should act first under MPDA § 4d but, failing that, then the court staff should do it under MPDA §7b.

I believe that Forrester v. White, 484 U.S. 219 (U.S. 1988) is instructive:

> Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts. In Ex parte Virginia, 100 U.S. 339 (1880), for example, this Court declined to extend immunity to a county judge who had been charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts. ... Although this case involved a criminal charge against a judge, the reach of the Court's analysis was not in any obvious way confined by that circumstance. …
> In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts -- like many others involved in supervising court employees and overseeing the efficient operation of a court -- may have been quite important in providing the

> necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative.
>
> Id. at 228-29.

The result is not different under the K.D. v. Bozarth, 313 N.J. Super. 561 (App. Div. 1998) cited by the defense: "Judicial immunity has two prerequisites: 1) the act complained of must be a 'judicial act;' and 2) the judge must have subject matter jurisdiction at the time he or she acts. Delbridge, supra, 238 N.J. Super. at 335, 569 A.2d 872. A 'judicial act' is one normally performed by a judge in his judicial capacity. Ibid. In that case it was undisputed that Judge Bozarth's re-sentencing of K.D. constituted a 'judicial act.'" K.D. v. Bozarth at 568. None of the acts here are judicial acts -- they are all administrative in nature. The appointment power is shared with and (I would claim) only available when the municipality fails to provide a replacement. If I was assigned and that is a judicial act (I claim it is still administrative -- for example, it was done for years in Atlantic County by Annette LaVette, who is not a judge), it was still not within the jurisdiction of municipal judge to assign a case (particularly after the MPDA was passed) -- he had to go through the Assignment Judge (if that was "practicable" as stated in R. 7:3-2(b) -- and here there was plenty of time to do so).

Also, there is no “jurisdiction” here: if so, Judge Armstrong shares her “jurisdiction” as ADA Coordinator with two

non-judges (clearly not allowed) and Judge Savio shares his appointment “jurisdiction” with the city (also clearly not allowed).

Furthermore, the Bozarth case is also distinguishable in that the plaintiff was the defendant in a criminal action and she did avail herself of her appellate rights and her plea, conviction and sentences were all vacated on trial *de novo*. I had no such appeal rights. My remedy was to file a separate lawsuit (this one) after the appointment or assignment was over -- that's what the Contempt Cases say, that's what Mr. Comer told me to do and it’s what I have done. The lack of a method of direct appeal (other than ADMINISTRATIVELY complaining to the Assignment Judge or then to Mr. Comer) is highly indicative of the administrative, not judicial, procedure.

The city is derivatively liable for the acts of its administrators (I would think especially so where they had the option to act to appoint a replacement first):[79]

> We turn to the claim against the City which prevailed on summary judgment in the Law Division on absolute immunity grounds. We reverse because under certain circumstances the City could be liable under agency principles for the alleged discriminatory conduct of the Commissioner in charge of public safety. Of course, the City enjoys derivative immunity for Lynch's legislative activity, discussed above. This

[79] Under the ADA and the LAD, the City is derivatively liable but even under § 1983, where there is no derivative liability, the administrator – whoever that was – was acting under unconstitutional policies and procedures and not following the MPDA. As a result, there would be § 1983 liability also. See Point Heading X, infra, regarding § 1983.

> derivative immunity does not extend to Lynch's administrative or executive activities. The City may be liable as a principal or employer under the LAD. The definition section clearly includes as "persons," . . . "the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." ...
>
> We reverse and remand for trial on liability as to the City under extant agency principles generally recognized under the LAD. Again, with the sparse factual record before us, we cannot be more specific on the controlling agency principles, as applied to this particular racial discrimination claim.

Brown v. City of Bordentown, 348 N.J. Super. 143, 151 (App. Div. 2002).

The essence of these cases is that when judges are appointing, hiring or firing employees, they have no immunity. This was an employee position with the city -- it needed to be filled, pursuant to the 13th Amendment and numerous statutes, with a WILLING employee. Forrester and its progeny control.

In any event, even if there is judicial immunity, the state and city are still liable under the disability statutes. Not under the theory of Respondeat Superior but just simply because they are the relevant “public entities” in the case.

Point VII: Madden Applies to This Case

First, I wish to make it clear: I am not trying to overturn Madden v. Delran 126 N.J. 591 (1992)! I am suing based on Madden. In Count I (Constitutional Claims), I state: The count may also be seen as a direct action under Madden because Madden itself recognizes that attorneys subjected to sufficient

deprivations, as Duffy has been, are entitled to relief." Pa60.[80]

Second, no matter how you characterize my status when I left Judge Savio's courtroom on March 8, 2004, it is clear that Judge Armstrong was assigning me to Client X in Her Honor's April 8, 2004 letter. Pa102. I see no other reading of her "best position" comment – especially when made to someone who needs chemotherapy. She just assumed the case would be over in short order (or, if it was not, that her good friend, Judge Savio, would get a replacement): in essence, gambling my life on her assumptions.

Further, simply put, if the aspirations of Madden had been followed at nearly any point in this case before the last one[81] this case would not exist. Madden dictates a "wheel" or random system of a list of names of attorneys who are not doing *pro bono* (or public service) in other ways – which no longer exists.[82] Also, and very importantly to this case, it expects an **interaction**[83]between the assigning Judge (who should usually be the Assignment Judge herself but may be a municipal court judge

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[80] Madden clearly envisions, if not assigned though the list, that individual lawyers may have "either a due process or takings claim in his or her own right." Id. at 601. Further, if the rules set down in the case were not followed, it is rather clear that would give rise to a cause of action.
[81] When Judge Garofolo did follow the dictates of Madden and released me from serving as counsel in the trial *de novo* appeal. Then I had to beg (and to pay) to be relieved below.
[82] I am not trying to overrule Madden but its Constitutional reasoning was based on the random "wheel" being "fair." If that is no more, Madden has had its heart ripped out.
[83] Similar to the ADA's "interactive process" or inquiry.

acting from a name referred from the Assignment Judge's Madden List[84]) and the attorney chosen from the list. Id. at 608. ("We leave it to the municipal court judges to direct counsel, who will usually inform them of their concerns, if any, about their competency, to provide substitute counsel when appropriate …. Ultimately, however, if the municipal court judge concludes that the defendant will not receive effective assistance of counsel, the judge's obligation will be to select other counsel.")

Under a motion to dismiss the pleadings, I had plead that Judges Savio and/or Armstrong has appointed and/or assigned me, the State and City have simply not disproven that assertion. The judge looked to his own belief that if an attorney is assigned, he gets an order. T38-7-8. Madden says nothing of the sort. Neither did the former "assignment wheel" rule nor any directive of the Supreme Court. Judge Carchman does not say in his annual "Members of the Bar" letter how the bar will be notified if our names do end up being assigned from the "Assignment Judge's list." Pa293-4.

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[84] See R. 7:3-2(b) which states, "… [T]he court shall assign the municipal public defender to represent the defendant. The court may, however, excuse the municipal public defender for cause and assign counsel to represent the defendant, without cost to the defendant from, insofar as practicable, a list of attorneys maintained by the Assignment Judge." Id. (Emphasis added). The State has claimed this list is no longer maintained and, indeed, the "list" has been stricken from R. 3:4-2(c). However, R. 7:3-2(b) is still on the books – and had a considerable impact on my behavior making me think that "insofar as practicable" the assignment was valid and my only recourse was to the Assignment Judge herself. Additionally, Judge Carchman is still "taking names" every year with his "Madden Memo" to "Members of the Bar" – is he doing so for no reason? Memo at Pa293-4.

Madden only takes us so far. It does not tell us how to interface Madden with the ADA/LAD – no case does.[85] The case in the next Point is instructive, however.

Point VIII: Reasonable Accommodation in the Courts

Regarding the Court System's obligation to comply with the ADA and the LAD, I did find a very illuminating case involving a woman who asked to be accommodated. Tynan v. Vicinage 13 of the Superior Court, 351 N.J.Super. 385 (App. Div. 2002).[86] The main similarity is the Assignment Judge was involved in the accommodations (or lack thereof).

Briefly: Tynan, who worked as a Jury Manager, was terminated by the Vicinage which had failed to address Ms. Tynan's request for accommodation. Id at 392-5 (I recount the facts from her perspective). Her physical and emotional disabilities were exacerbated by her interactions with her supervisor. She (and her physician) requested that she be placed under the supervision of a different person, in order to avoid aggravating her illnesses. Id at 394. Instead of engaging in an "interactive process" with Ms. Tynan to determine a solution, the Vicinage fired her. Id at 395. Her case was

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[85] I hope that this case will tell us how to allow for ADA/LAD accommodations within Madden.

[86] Since I am certain that the vicinages have no separate existence from the AOC or the Court System in general, I suspect that naming the vicinage is "code" for naming the Assignment Judge in his/her administrative capacity. To pay homage to this fiction, I have added "Vicinage I" to the Third Amended

dismissed by the trial judge for failure to request a specific enough accommodation. Id.

On appeal, this Court agreed with the judge below that Ms. Tynan had "sufficient illnesses and psychological maladies to withstand summary judgment." Id. at 399. In my case, Judge Winkelstein gave me a comprehensive accommodation, I repeatedly stated I my disability in my letters, in my Complaint and a full recitation of my disabilities was given in the Third Amended Complaint. Pa211-12. Also, I have a social security disability letter issued in January 2002 (Pa231) so I think it's a pretty "cold deck"[87] to try to argue I am not disabled. (Furthermore, I will always be defined as disabled under the "record of" standard.) Most importantly, I was faced with an illness **known to be lethal** if not successfully treated. Yet, I was made to delay my lifesaving treatment for a case (really series of cases) that I had repeatedly tried to escape. For the sake of argument, let's say I did not "formally" request a "sufficiently clear" accommodation, certainly I requested some kind of "help" (repeatedly) and nobody cared.

In the Tynan case, this Court determined that the request for accommodation need not be formal or specific. Id at 400. Once "assistance" is requested, the employer must then engage in an interactive process with the employee in order to come to an

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Complaint. To not be able to sue, just because a judge was named, would violate the 14th Amendment and the ADA.

[87] As in collateral estoppel applies – at least as far as the Federal Causes of Action are concerned.

equitable accommodation. Id at 402. I repeatedly requested to be released from the case or to have the case expedited in order to get my chemotherapy in on time. Although the Tynan case points out that the employer does not need to comply with every request by the employee, it does make clear that "once the Vicinage knew of the handicap and Tynan's desire for assistance, the burden was on the Vicinage to implement the interactive process." Id. at 402. In my case, while I wanted to be removed from the case, I actually offered alternatives.[88] Judge Armstrong, on the other hand, merely "hoped" the case would be complete in time for my chemotherapy and failed to address what to do if it was not. With respect to an "interactive process", there wasn't one. Both judges just ordered me around and got angry at me when I was the slightest bit assertive about my rights to treatment for a **FATAL** disease! Furthermore, I was repeatedly humiliated and made out to be a fraud.[89] With respect to the argument that I was not an employee,[90] the cases suggest status is not important: accommodation is

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[88] Recall, I offer to obtain the psychiatric report and then be relieved and acceleration was requested.

[89] How else can you explain the total inaction (when I was "lucky" and not affirmatively humiliated) after I made specific requests? Clearly, State's counsel thinks I am a fraud. I reported to her in December 1996 that there was no movement on my ADA divorce request. Did she act to save her client from liability: no! Further, my citations to Lane are "frivolous and repugnant" –- one can only hope "to get away with" language like that due to fraud.

[90] There is a strong argument that I was a *de facto* employee of Margate because of their failure to follow the MPDA.

accommodation.[91] There may be a slightly higher standard for employers but, given this case's strong similarity to Lane[92] (and Tynan), I do not see how it could be argued there was no duty to interact and accommodate –- whatever my status. Furthermore, the Court's response was even more egregious as I WAS NOT BEING PAID to take these cases. This is highly indicative of retaliation – particularly in light of the "best position" attitude.

I have not been able to find a Supreme Court Title II case that states the level of interaction that is required in Title II cases. For Lane and Jones, the required accommodation was obvious. In a Title III case involving a pro golfer with very severe mobility problems due to a defect in his leg, however, the court has clearly stated:

> [T]he ADA was enacted to eliminate discrimination against "individuals" with disabilities, 42 U.S.C. § 12101(b)(1), and to that end Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be

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[91] Please also refer, *inter alia*, to the "Reasonable Accommodation" regulation in the "Access to Public Accommodations" section of the LAD regulations. N.J.A.C. 13:13-4.11. (Once again, this shows the general use of "reasonable accommodation" when not technically correct.)

[92] Whether relief or acceleration (or other), both would have assured my continued access to the Courts (and bar membership) in the future. (One motivation was clearly to get me to resign from the bar: if I was "sooo" sick, I should quit.)Further, it is clear that I was assuring Client X's "access" to an ADA-related defense so, even if I have no right to accommodation, I have stated a case for retaliation as "payback" for my effective advocacy for Client X. (The complaint constantly states that retaliation could be motive for my treatment. The word "retaliate" in various forms appears 34 times. Finally, I guess Tennessee felt the self-employed court reporter in Lane should quit too.

> reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered, § 12182(b)(2)(A)(ii). To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration. See S. Rep. No. 101-116, at 61; H. R. Rep. No. 101-485, pt. 2, at 102 (public accommodations "are required to make decisions based on facts applicable to individuals"). Cf. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999) ("Whether a person has a disability under the ADA is an individualized inquiry").

PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (U.S. 2001) (emphasis added).

Whether stated in terms of an “interactive process” leading to a “reasonable accommodation” under Title I or an “individualized inquiry” regarding “reasonable modification” in a Title II or III situation, once the individual comes to the employer/public entity/public accommodation stating he or she is disabled, the potential defendant must engage the person in an individualized interaction or inquiry.

If the defendants wanted to use the confiscatory force in R. 7:3-2(b), Madden and the Contempt Cases to get service out of me, it was not appropriate in my individualized situation. I had a duty to perform: as the sole lawyer left from the appeal, I needed to be sure the client was accommodated as I may have been liable under the ethical rules (or civilly or both) if there were no continuity of counsel. The defendants had a duty too: if it were necessary to use me, make sure I got my treatment in on time. I performed by professional duties (under

dire circumstances) but the defendants handled my requests in a very unprofessional manner.[93]

Point IX: My ADA/LAD Case is Unaffected by My Status as Counsel

Now here are two fairly fine points about what happened on March 8, 2004. First, I still have a case even if, by some convolution, my service can be seen as "voluntary." Second, the decision to let Mr. Robertson out of the case was a judicial decision but the decision as to WHO would serve in Mr. Robertson's stead was ministerial or administrative in nature – and should have been performed by the City or the "municipal court" as soon as he was relieved. MPDA §§ 4c, 4d & 7b.

Even if I did actually volunteer to do the case, I simultaneously put the Judge on notice of my medical limitations. In no uncertain terms, I said that if I did have to do it, it must not interfere with my treatment. This fell on deaf ears. See, *e.g.*, Pa378 (T10-1-5) & Pa382 (T14-5-9). This is disability discrimination: plain and simple. I was asking for an accommodation and the Judge did not care. The Judge's ADA and LAD duties are an administrative duty of his office. If he fails to accommodate, you do not file an interlocutory

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[93] In fact, they were handled in a very obviously retaliatory manner. I state in the complaint that I am suspicious that Judge Savio knew the contents of the informal complaint about Client X's lack of accommodation in his court and was retaliating against me. Pa42 – Complaint Para. 31 & fn. 12. (Recall, the complaint is supposed to be kept confidential (Pa297 under "C. Confidentiality") but it seems that it was revealed to His Honor.)

appeal,[94] you write to his "boss" and complain and, if the "boss" doesn't care either, you sue -- that's what I did and have done.

Point X: Section 1983 Is Applicable to This Case, Even If Only as Route to Collect ADA or MPDA Damages

Now that all the inter-related facts and statutes in this case are on the table, I turn to the most legally complicated cause of action in the complaint: § 1983. First, I think it is clear all persons were acting under some color of state law. Second, I guess it is appropriate to state whom I was suing. I am suing Margate and Administrator Savio for failure to follow Madden, the MPDA or both (not funding indigent defenses) as well as a policy and practice to deny Client X a lawyer and expert psychiatrist and pushing those costs on me.

Usually these would just be words on a page – which I think would get me past a failure to state a claim motion – but in this case there is a rich set of facts to prove both policies.[95] The complaints allege these policies and practices which are

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[94] Although you can file an interlocutory appeal too. Note that in Lane, he "struck out" on his two interlocutory appeals to get an accessible courtroom. Lane Class Complaint, Para. III(g), at Pa688. This did not affect his right to sue (under Rooker-Feldman or other theories), although the Supreme Court did not mention his lost appeals on the issue of accommodation in the facts, they clearly knew about them and considered them insignificant.

[95] Which ultimately may be the same policy and practice: one is general; one is aimed at Client X. I was also a target: The conspiracies were also aimed at me. First, due to the non-funding it was necessary to get me to appear for free. Second, since it would be imprudent to have Client X proceed *pro se*

summarized in Appendix C to the verified brief (Pa352). Some of the allegations are in the Exhibits to the First Amended Complaint but they are incorporated into the complaint by reference in Paragraph 8 of the Complaint. Pa34 (Para. 8).[96]

It is clear in the suit that I am suing the judges as administrators. See Pa39 (First Amended Complaint, Paragraph 20).[97] If the official/personal distinction was unclear, the Third Amended Complaint fixes it. Pa206-225.

With regard to Madden, I am suing Judge Armstrong and Judge Carchman, in their administrative capacities for injunctions and personally as administrators for endorsing and using non-Madden practices and not following our Supreme Court's ADA complaint and investigation procedures. See, *e.g.*, Pa30 (Paragraph 2).

With regard to the law clerk suit, I am suing Ms. Danilo in her administrative capacity for declaratory or injunctive relief and personally for damages. Judge Carchman has the misfortune of being named again as Ms. Danilo's ultimate boss. He is sued as an administrator for declaratory and injunctive relief (ultimately, it is he who must eliminate the discriminatory policy) and personally for damages. If the AOC is a separate entity from the State, it's getting sued too. The policy and

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(previous appeals had proven that), who better to force to the task than a broken down sick person who might to a bad job.

[96] "Both of these letters, as well as all the other exhibits to this suit, are adopted as part of this complaint as if set forth herein in full in the relevant part of the suit." Id.

[97] "Since their decisions are administrative in nature, they lose their traditional immunity which opens them up to suits, such as this one." Id.

practice on the law clerk issue is, substantively, having an irrational policy that discriminates (mainly by disparate impact) on all kinds of protected classes and, procedurally, having no policy or practice for handing disability accommodation requests.[98]

I have found only one case that is remotely similar to this one. In Whisenant v. City Haltom City, 106 Fed. App. 915 (5th Cir. 2004) the Court of Appeals found that in a similar situation the plaintiff could survive a motion to dismiss for failure to state a claim:

> Whisenant alleges that he was incarcerated in the Haltom City jail for fifty days in connection with various misdemeanors. According to Whisenant, former municipal judge Jack Byno incarcerated him without informing him of his right to counsel, providing him with appointed counsel, or holding a hearing to determine whether Whisenant was able to pay his misdemeanor fines. Whisenant argues that the City is responsible for these alleged constitutional violations because (1) the City had a policy of incarcerating defendants who were unable to pay misdemeanor fines without providing them with indigency hearings or appointing counsel for them, (2) the City ratified Byno's actions, and (3) the city council conspired with Byno to incarcerate indigent defendants in order to extract money from them.
> The City cannot be liable under § 1983 for having a "policy" of wrongfully incarcerating indigent defendants because the relevant decisions were made by a municipal judge acting in his judicial capacity. As the Ninth Circuit reasoned in Eggar v. City of Livingston:

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[98] First, the AOC seems to have no timeline for handing these requests. The timeline in the law clerk part of the case is laughable: 120 days to get out a form letter having nothing to do with disability. (For ADA/LAD purposes, such a timeline is *per se* discrimination – even if the person turns out not to be disabled because s/he must have been "regarded as" disabled.)

> Because [the judge] was functioning as a state judicial officer, his acts and omissions were not part of a city policy or custom. A municipality cannot be liable for judicial conduct it lacks the power to require, control, or remedy, even if that conduct parallels or appears entangled with the desires of the municipality.

40 F.3d 312, 316 (9th Cir. 1994) (footnote omitted); see also Johnson v. Moore, 958 F.2d 92, 94 (5th Cir. 1992). Similarly, because the City had no power to control Byno's judicial actions, the City cannot be liable for "ratifying" his judicial conduct.

Whisenant, however, also contends that the City is liable because the city council conspired with Byno to incarcerate him and other indigent defendants in order to raise money for the City. To state a claim for conspiracy under § 1983, a plaintiff must allege the existence of (1) an agreement to do an illegal act and (2) an actual constitutional deprivation. See Cinel v. Connick, 15 F.3d 1338, 1343 (5th Cir. 1994). Whisenant has alleged an agreement between Byno and the city council to violate his rights (and the rights of other indigent defendants): "Byno conspired with the City counsel [sic] to establish procedures designed to deprive individuals of their constitutional rights to generate revenues for the City by intimidating accused individuals to plead guilty, levying unjust fines, refusing to appoint counsel . . . and throwing citizens in 'debtor's prison." Whisenant Compl. at 4. Furthermore, by alleging that he was not given an indigency hearing or provided with appointed counsel before being incarcerated, Whisenant has alleged actual deprivations of his constitutional rights. See Scott v. Illinois, 440 U.S. 367, 373-74, 59 L. Ed. 2d 383, 99 S. Ct. 1158 (1979); Tate v. Short, 401 U.S. 395, 399, 28 L. Ed. 2d 130, 91 S. Ct. 668 (1971).
The next question is whether the City could be liable under § 1983 for this conspiracy. The City cannot be liable for Byno's role in the conspiracy, since Byno was not acting as a municipal official or lawmaker. Johnson, 958 F.2d at 94. But the City can be held liable for the city council's part in the conspiracy, because the city council is the City's policymaking body and, consequently, its decisions constitute City policy. See id. (defining "official policy").
Therefore, we hold that Whisenant has stated a § 1983 claim against the City for his wrongful incarceration. Whether the claim will survive a properly supported motion for summary judgment is not before us.

Id. at 917-18

I allege, *inter alia*, violations of several rights such as the equal protection clause (not using "the wheel" and/or not getting a willing appointee) and the 13th (not getting paid as indentured servitude) and 14th Amendments (a "taking"). As far as an illegal act, they are numerous but I do not think you have to go farther than having the solicitor interfere in the trial or not following the MPDA. I have alleged these actions were aimed directly at me (or were retaliation for representing the client) but, if I am wrong on that point, there certainly were illegal acts aimed at my client and the principles of transferred intent from tort law apply to § 1983.

If I am still wrong, this case involved an employment setting (MPDA). I have found a case where, if the city transferred all hiring and firing duties and policy in the court to a judge, the city would be liable for the judge's § 1983 employment illegalities:

> In light of the Supreme Court's decision in *Pembaur [v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)], we hold that § 1983 municipal liability may be imposed upon the City of Little Rock in this case. The record before us indicates that Butler was delegated final policy-making authority concerning employment matters in the municipal court, and that he acted pursuant to that authority when he chose to discharge Williams for exercising her first amendment rights. At the conclusion of the evidence the district court found that the undisputed evidence demonstrated that Butler was the policy maker with respect to employment matters in Little Rock Municipal Court. The district court specifically found that the city delegated to Butler, as judge and chief administrative officer of the municipal court, the

> final authority for administering personnel decisions in the municipal court. Butler "had the sole and exclusive control of the hiring, termination, discipline, [and] discharge of his employees." In response to the city's question whether Butler set policy, the district court stated: "I'm finding that they completely turned it over to him, and he operated it exclusively. Yes." The court added, "I think he not only set the policy, he did it all. I don't know how I could go into it other than just reaching that conclusion. The fact and the legal conclusion is that he did it all." The district court also found that Butler was acting in his official capacity if he in fact terminated the plaintiffs. The court therefore concluded that the city would be liable for Butler's conduct if the jury found that Butler violated the plaintiff's constitutional rights. …
>
> The record amply supports the district court's finding that Butler possessed policy-making authority and was acting pursuant to that authority when he, as the jury found, discharged Williams. Therefore, we conclude that the district court's finding is not clearly erroneous. Butler admitted in his response to requests for admissions that his personnel served at his "sole pleasure" because of the city's policy of delegating to him the final authority in employment matters. He also admitted that he did not consult the personnel office or the City Board of Directors when he discharged Williams or any other clerks.

Williams v. Butler, 802 F.2d. 296, 299-300 (1986) (footnote & citations to transcript omitted).

I allege that such a transfer occurred, by the city not naming a replacement itself, and this led to deprivations of my rights as stated above. See, *e.g.*, Pa43 (fn. 14) & Pa213-16.

Point XI: Law Clerk Resume Book: Job & Educational Program

The Court System's insistence that I was "in the best position" (Pa102, last paragraph) to represent an indigent person in an insanity defense -- for free -- while I had one foot in the grave but, now that I am better, my having appeared

in that case (and many others) now bars me from being considered for a paying, valuable job in that same Court System is maddening (unintended but appropriate pun).

The above argument is partly an emotional one but I would draw the Court's attention to the somewhat mysterious (to me) paragraph in Madden about "measuring all *pro bono* service by attorneys and considering such service both in assigning further *pro bono* work, as well as in making fee-generating appointments." Madden v. Delran, 126 N.J. 591, 611 (1992).

As I said in the Complaint, I really do not know what type of fee generating work they are talking about but I think the idea behind this statement would apply to salaried work as well. It is obvious that I have done far more *pro bono* work than should ever have been required of me -- especially from 2000-2004. I estimate that this slave labor totals close to 1000 hours -- 750 more than the ABA's "aspirational" goal of 50 hours per year (ABA Model Rule 6.1; recall our Supreme Court only requires 25 hours – see Pa294, Exemption 88). Also the 50/25 hour goal is for full time attorneys. Due to health, I always checked the "part-time" box on the AOC's yearly questionnaire.

Without regard to Madden's possible requirement of a preference for a paying job, the AOC is running an employment program: there are certain rules they have to follow. I meet the qualifications for the position but they have added this "no practice" criteria to the Resume Book Program (which is simply

the application process to the employment opportunity). Please refer to Danilo letter at Pa148. The AOC admits the "no practice" rule is not a required condition of employment. If it is not a qualification for the job, they cannot turn the applicant down for the application process -- which is what they are doing. This is straight forward non-EEO (good faith and fair dealing) employment law. If you add my EEO disability request in, it is simply not an essential job qualification. If it were the judge/managers could not request a waiver.

I requested a waiver of the no practice criteria as a disabled person who had previously been too disabled to work. See Pa146-7. Now I can do the job but this "criteria" is in the way – and should fall, if only due to my “record of” status.

The Division of Civil Rights (DCR) is well aware that these "criteria" can have a pernicious effect on the ability of the disabled to find employment:

> § 13:13-2.3. Employment criteria
>
> (a) It is an unlawful employment practice for any employer, employment agency or labor organization to make use of any employment test or **other selection criterion that screens out or has the effect of screening out people with disabilities** unless:
>
> 1. That test score or other **selection criterion is shown to be job related** for the position in question; **and**
>
> 2. **Alternative job-related tests or criteria that do not screen out or have the effect of screening out fewer people with disabilities are not available**.

N.J.A.C. 13:13-2.3 (emphasis added).

How is it job related that the person have, basically, no experience in the profession? Additionally, there are at least two less restrictive criteria: no such criteria or granting waivers as an accommodation to disability. I asked for the latter and got no reply (on that issue, see below).

There is also a very serious issue here that I made a legitimate, specific and very explanatory disability accommodation request which has been totally **ignored**. Pa146-7. The reply I received was no different from that which any practicing lawyer would have received without a disability accommodation request. This is a *per se* violation of the ADA, the Rehabilitation Act and the LAD. An essential job qualification (or function) and disability analysis must take place. Please refer to the EEOC's publication, Reasonable Accommodations for Attorneys with Disabilities (EEO Webpaper 2006) (http://www.eeoc.gov/facts/accommodations-attorneys.html).

Additionally, it took 4 months to mail me a form rejection letter that has kept me out of the June, August and October 2006 publications of the Resume Book. The EEOC and DCR require much quicker processing of a waiver requests. The violation of these time guidelines is *per se* discrimination.

The alternative application procedure, individual applications, provides no remedy. In fact, it imposes a huge economic "barrier to entry" to the application process no different from other barriers to physical entry for which

disabled people have a right to accommodation (or removal). See, *e.g.*, Tennessee v. Lane, 541 U.S. 509 (2004). Here, the clear remedy is inclusion in the Resume Book at zero marginal cost.

Furthermore, following the individual application advice would also lead to several rules violations. First, under Federal and State law, all possible steps must be taken to keep the disabled person's medical records private. Here the AOC is telling me to request the accommodation (waiver) from the interviewer. Asking for an accommodation from the interviewer/manager (as opposed the EEO/HR staff) violates at least two rules (I could list many, many other violations):

> § 13:13-2.4. Pre-employment inquiries
>
> (a) It shall be an unlawful practice for an employer, employment agency or labor organization to **elicit or attempt to elicit, either verbally or through the use of an application form or request for documentation, any information which would tend to divulge the existence of a disability or health condition,** unless required or necessitated by Federal law or regulation. An employer, employment agency or labor organization may inquire whether an applicant is precluded from satisfactorily performing the essential functions of the job in question. ...
>
> (c) Employers who request such information must observe requirements under Section 503 of the Americans with Disabilities Act, *42 U.S.C. § 12101* et seq., **regarding the manner in which the information is requested and used, and the procedure for maintaining such information as a separate, confidential record, apart from regular personnel records.**

N.J.A.C. 13:13-2.4(a & c) (emphasis added).

This is why I want the waiver in advance. I just want to say in the cover letter: "Dear Judges: Here is my resume. Your

Honors will notice I have practiced. The AOC has given me a waiver from the "no practice" rule. Thanks."

The AOC is trying to enforce the tradition that law clerks be just out of law school. The DCR is very clear that traditional criteria cannot be used if they are discriminatory. The Federal Government and the other states seem to have figured this out decades ago: no other state with a "no practice" rule. In any case, here is what the DCR has to say about BFOQs (bona fide occupational qualification or essential job qualification):

> § 13:11-1.4 Bona fide occupational qualification exception; application
>
> (a) For the purposes of these provisions, **the "bona fide occupational qualification" exception shall include only those vocational qualifications which are reasonably necessary to the normal operation of the particular business, enterprise or apprentice or other training program. …**
>
> (d) **The application of the exception is not warranted where based on, for example**: …
>
> 3. Customer, client, co-worker or employer reference, or **historical usage, tradition or custom**; or
> 4. The necessity of providing separate facilities of a personal nature, such as rest rooms or dressing rooms.

N.J.A.C. 13:11-1.4 (emphasis added).

Similarly, the AOC's own EEO/AA Master Plan states and strengthens these propositions. The Master Plan has the following propositions to support my position. For example, on Pa535, "XI. Personnel Policies, B. Job Specifications" (job specifications shall only reflect minimum requirements and current duties and responsibilities.

Down the page, this particular quote from "C. The Recruitment Process" (Third Bullet Heading) is particularly on point: "Job vacancy notices shall be written in gender-neutral language. Preference terms shall not be included (*e.g.*, male, **recent** college graduate)." Pa535 (emphasis added). So the AOC cannot recruit for a "recent college graduate" but can for a "recent law school graduate?"

Let's skip ahead to the job interview ("D. Interviewing Candidates" - First Bullet Heading):

> Interviewers shall have sufficient knowledge concerning the job functions and the knowledge, skills, and abilities that are required to perform the job. The criteria used in the screening process must always relate to the **essential functions of the job** and must be applied uniformly to all candidates.

Pa537 (mid page – emphasis added).

Then on the next page, the AOC specifically addresses the interview situation:

> During the interview, only the **essential functions of the job** and qualifications to fulfill the job shall be discussed. **There shall be no discussion of the applicant's disability.** The candidate's qualifications shall be evaluated on the basis of his or her ability to perform the essential functions of the job with or without a reasonable accommodation.

Pa538 (emphasis added).

How will there be no disability discussion when the AOC has told me to write to individual judges for an accommodation.[99]

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[99] Also, the ADA requires that all medical information obtained from an applicant or employee be kept separate from personnel files and treated as a confidential medical record. Disclosures of confidential medical information are permitted only in very limited circumstances, including to supervisors and managers in

What is going on here is that the AOC is making a "set-aside" for new lawyers based on tradition. But set-asides are of doubtful constitutionality and, therefore, must have no impact on Constitutionally or statutorily protected groups.

Mostly, it has a big and obvious impact on older lawyers. Women suffer very seriously too because, as a matter of biology and of fact, family duties fall more heavily on them -- no matter how supportive her mate may be. Minorities, who statistically have more debt than other grads, may have to work a few years before they would be economically able to endure the low salary for a year. Similarly, the disabled may have been flat out unable to do the job in the past and now, if "realbled," the AOC is going to turn them down from applying for the job because practiced law instead of collecting disability?

It is also bizarre that the AOC says the clerkship program is an educational program (Pa148): that throws the doors wide open to review. See Bowers, **infra p.XXXX.** This is why the State can only defend itself by showing policy letters which, *ipse dixit*, mean the policy is legal or has a rational basis. State's Exhibits 3 & 4, Pa461-467. This might be relevant if I

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connection with work restrictions or necessary accommodations. See Best Practices for the Employment of People with Disabilities in State Government, p. 26 (EEOC White Paper, 2005) (http://www.eeoc.gov/facts/final_states_best_practices_report.pdf#page=26) (with footnote citing to 42 U.S.C. § 12112(d)(3)(B), (C), and (4)(C); 29 C.F.R. § 1630.14(b)(1), (c)(1), and (d)(1)). This rule will also be violated if I seek accommodaitons with my potential future supervisor/manager – the judge.

were mounting a pure equal protection challenge but the equal protection challenge here, *ab initio*, is subsumed within the ADA, ADEA and LAD (disability and age) causes of action – which are more favorable. I think I can prove disparate impact.

Now on the age issue, the former AOC Chief said in one of the memos I was sent that he wants to save the clerkships for "young attorneys."[100] Pa463 (top of page). That is illegal! It makes out a *prima facie* case under both the LAD and the ADEA.

Point XII: Section 504 of The Rehabilitation Act Does Apply to This Case If the Entities Were Recipients of Federal Funds.

The State argued the EEOC enforces § 504. Here is what Justice Scalia had to say on the issue:

> Section 202 of the ADA [*i.e.* Title II] prohibits discrimination against the disabled by public entities; § 504 of the Rehabilitation Act [*185] prohibits discrimination against the disabled by recipients of federal funding, including private organizations, 29 U.S.C. § 794(b)(3). **Both provisions are enforceable through private causes of action.** Section 203 of the ADA declares that the "remedies, procedures, and rights set forth in [§ 505(a)(2) of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides" for violations of § 202. 42 U.S.C. § 12133. Section 505(a)(2) of the Rehabilitation Act,

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[100] Perhaps Judge Ciancia made was relying on an outdated EEOC Rule which exempted "Qualified Apprenticeship Programs" from the ADEA. See 29 C.F.R. 1625.13 (repealed 1996); see www.eeoc.gov/press/4-2-96.html. Judge Ciancia is not alone in not realizing this. The DCR only repealed its out-of-date rule, N.J.S.A. 13:5-1.3(A)(3)on July 1, 2006. Rosemarie Alito, in her seminal work, New Jersey Employment Law (2ND Ed.), also had two pages dedicated to these outdated ADEA and LAD Rules until a few months ago when I informed her of the error. See S. 4-21 (being corrected in 2010 pocket part).

> in turn, declares that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available" for violations of § 504, as added, 92 Stat. 2983, 29 U.S.C. § 794a(a)(2). …
>
> Although Title VI does not mention a private right of action, our prior decisions have found an implied right of action, e.g., Cannon v. University of Chicago, 441 U.S. 677, 703, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), and Congress has acknowledged this right in amendments to the statute, leaving it "beyond dispute that private individuals may sue to enforce" Title VI, Alexander v. Sandoval, 532 U.S. 275, 280, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001). …
>
> Barnes v. Gorman, 536 U.S. 181, 184-185 (U.S. 2002)

Section 504 is privately enforced: there is no EEOC exhaustion issue. On the funds issue, I assume New Jersey is out of luck[101] but maybe not Margate.

POINT XIII: EEOC Issues

The EEOC filings only apply to my ADA Title I and my ADEA causes of action based on employment theory. They do not affect the validity of my ADA Title II actions. Furthermore, my LAD causes of action are still valid under both employment and programmatic modification theories without regard to filings at the EEOC.

With regard to Margate, there is a sub-issue of when my 270 day period to file with the EEOC began. I think discovery rules should apply: I went to the EEOC within about 45 days of discovering my possible employee status on December 23, 2006).

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[101] The Master Plan admits, “As a recipient of Federal funds, the Judiciary is required to respond to a Single Audit Questionnaire

The EEOC filing was mainly aimed at the law clerk situation and Margate's failure to inform me I was an employee. With regard to the Complaint and the EEOC charge, I was amending the Complaint and I had an obligation under the Entire Controversy Doctrine (ECD) to file the law clerk matters. I should have made it clearer that I was holding back the ADA Title I cause of action from the First Amended Complaint. It would be very unfair not to allow me to bring the ADA Title I cause of action (for injunctive relief only) when I had a duty to amend the complaint to bring the new law clerk matter under the ECD.[102]

I forgot to put a new count in the Second Amended Complaint for the ADEA –- clearly something that can be fixed. This shows, however, that the ADEA action in the law clerk matter is an entirely new cause of action which was brought only after the EEOC gave me a right to sue letter.

Point XIV: The Post-Filing Claims for Retaliation for Original Suit Clearly Were Not Considered At All; Recall These Claims Can Be Valid Without Regard to the Merits of the Original Claims. (Not Raised Below).[103]

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of all the Judiciary's Federal grant programs." Pa543 (under Item D at the top of the page).

[102] It is important to note there were no Title I claims in the Original Complaint or in the First Amended Complaint – I did not evoke either Title I or the ADEA – I was waiting for those actions to clear their EEOC hurdles. As for the Original Complaint, the fact that I mentioned the ADA & § 504 in the same breath in Count II shows that Complaint was solely a Title II action (or I would have mentioned S. 501 if it were a Title I case.

On the issue that you can sue the court for retaliation for asserting your ADA rights where the Court then interferes with your Due Process Rights, I would mainly cite to this Sixth Circuit case upholding a large verdict in favor of the disabled plaintiff:

> The trial in the district court that resulted in the $ 400,000 damage award consisted of ten witnesses presented over four days. Much of the testimony described plaintiff's custody dispute over his daughter and the initial ex parte hearing in August 1992 that led to a state court order transferring custody of his daughter to her mother. This testimony about the custody dispute and the initial ex parte hearing is relevant only to the extent that it provides the context or background in which the facts concerning retaliation and exclusion were presented. On the retaliation claim, Mr. Thomas Kondzer, plaintiff's lawyer during the custody dispute and hearings held in 1992, testified that his client was presented with an "option" in December of 1992 by the presiding judge of the custody proceeding that required plaintiff to either give up his rights under the Disabilities Act or suffer a delay in the adjudication of the custody case. Testimony of Thomas Kondzer, Mar. 31, 1998, trial transcript at 173. Mr. Kondzer testified that the waiver "wasn't a waiver for that day. It was a total waiver." Id. at 243. According to Mr. Kondzer "the option was to withdraw the motion [for closed-captioning or real time transcription], waive your rights under the ADA and proceed today" or have the proceeding postponed. Id. With Mr. Kondzer's advice, the plaintiff refused to waive his Disabilities Act claim or withdraw his motion. After his refusal, the hearing was then discontinued and did not resume again until the fall of 1994, over a year and a half later. In fact, the parties stipulated in the court below that the judge presiding over the custody proceeding "gave the plaintiff two options. Plaintiff could withdraw his motion for a hearing accommodation and the court could proceed today, 'with the continued hearing' or [the judge] could, 'schedule a hearing to determine the extent of his hearing disability and what if any

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[103] Recall the post-filing retaliation claims were not even briefed below. Those motions were scheduled for a hearing a week or two later so this really was not even an issue below.

> accommodation needed to be made for that'." Stipulated Facts of the Parties, Apr. 1, 1998, trial transcript at 390-91. The long delay in the proceedings then ensued.

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808, 816-817 (6th Cir. Ohio 2002)

This case would also apply if this court prefers to see some of the discriminatory actions taken against me as retaliatory rather than being “original” discrimination.

Point XV: The AOC’s Decision to Exclude the Municipal Courts From Its ADA Complaint Procedures Violates the Constitution of This State. (Not Raised Below).

Our Constitution also demands, “The Chief Justice of the Supreme Court shall be the administrative head of **all** the courts in the State. He shall appoint an Administrative Director to serve at his pleasure.” New Jersey Constitution of 1948, Article VI, § VII, Paragraph 1 (emphasis added).

The AOC has excluded the Municipal Courts from its Discrimination Complaint Procedures probably to avoid liability. The Constitution, however, requires the AOC to control any aspect of the court system likely to affect a fundamental right.

ADA rights are likely to have such an effect so the AOC must retain investigatory and remedial powers. This is especially so given that many ADA-eligible court users are too poor or mentally disabled to realize their rights are being violated.

I am arguing this even though it is probably good for my position that Margate clearly has to be liable for ADA violations in its court if the AOC is letting them manage their

own affairs.[104] (Of course, I believe they are co-liable with the State always, but just in case the court disagrees.) If Margate is not liable as argued below, and the State has avoided liability by NOT supervising, then no "public entity" is liable for the violations. I think that clearly cannot be the case: at least one of the two entities has to be liable.

Finally, I do not think I need to belabor the serious Separation of Powers and Independence of the Judiciary issues if city councils have this kind of investigatory and remedial control over the municipal courts and judges.

Point XVI: The Unconstitutional Taxation Count in the Complaint Was Never Briefed So It Was Not Properly Dismissed. (Not an Issue Below).

This is a serious claim: the Supreme Court has no power to tax but it is imposing a professional service tax of 25 hours per year. This is worth about $5000 and it has absolutely no system to make sure the tax is imposed fairly under constitutional principles of taxation. This is particularly so when "the Madden list" has been eliminated.

There is statutory authority to impose the bar fees but the Madden tax has no authorization and has no monitoring, proportionality and complaint procedures. I have standing since I was a "go to" person for mandatory *pro bono* work which unconstitutionally imposed a significant opportunity cost.

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[104] The argument below was the Margate had zero control over the municipal court so it was not liable. Now the AOC is saying the

Conclusion

There are any number of cases that excoriate the Bar for failure "to step up" and represent the indigent – a great many of whom are also disabled, many seriously so. The State's duty to fulfill this obligation fell on me under the ethical rules – and I "stepped up" and did was required of me (while constantly asking for accommodation). Further, I have been severely punished – a great example to get others to "step up."

This entire case is ultimately about the government shirking the unfunded mandate it has imposed on society in general. This case comes down to whether the Courts, under this mandate, have to listen to our disabled citizens – however they present. Some of us may have serious mental issues like Client X. Some of us have various health or physical problems of various levels of obviousness. If the Courts do have to listen (and by listen I mean not ignore), how many times do we have to ask? In other settings, we may get dismissed a few times[105] but then our concerns are addressed (which doesn't mean that you get what you want) – due to fear of liability, if nothing else.

City has plenary control – and liability.

[105] There is a particular problem in judicial accommodation that experience has shown it is very difficult to go back multiple times to a judge for an answer. Clearly, where a judge is involved, the disabled person runs a much greater risk of BOTH being retaliated against for being persistent and that the retaliation will be particularly severe due to judges' lofty social status. This is especially so for lawyers. This is why I waited until I was sure I was a "goner" to file this case.

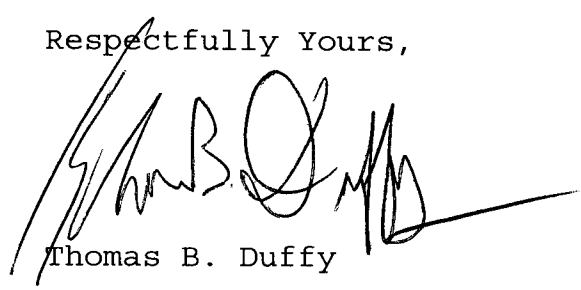
Bottom line: if this suit is dismissed, the Court System can do whatever it wants to people with disabilities. At least we will be on notice not make ourselves objects of ridicule for asking for accommodations - we won't bother.

If, however, Your Honors think this is not acceptable, I should be given a chance to do discovery (or have a special master, perhaps a retired member of this court as was done in Judge Schott's case, do an investigation). The causes of action are clear and have a great deal of merit - especially the disability accommodation and, unfortunately, retaliation claims. The "system" is broken and it needs to be "fixed" - that's what I am trying to do. Pa32 (Complaint, para. 6).

If Your Honors think this case is entirely my fault and wish to further make me an object of further ridicule, that's fine too, but please provide some guidance on what the rules would be if the plaintiff is not entirely at fault - such rules are a badly needed public good for the Public Good.

Thank you for your consideration and your kind accommodations in the production of this brief.

Respectfully Yours,



Thomas B. Duffy