IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

GEORGE CROCKER,	)	Docket No. 00-13-P-C
Plaintiff,	)	**UNITED STATES' OBJECTIONS TO MAGISTRATE JUDGE'S MEMORANDUM DECISION ON MOTIONS TO STRIKE AND RECOMMENDED DECISION ON MOTIONS OF DEFENDANTS GAGNE AND LEWISTON POLICE DEPARTMENT FOR SUMMARY JUDGMENT AND MOTION OF PLAINTIFF FOR PARTIAL SUMMARY JUDGMENT**
v.	)	
LEWISTON POLICE DEPARTMENT, et al.,	)	
Defendants.	)	

PRELIMINARY STATEMENT

The United States, as amicus curiae, respectfully objects to the Magistrate Judge's "Memorandum Decision on Motions to Strike and Recommended Decision on Motions of Defendants Gagne and Lewiston Police Department for Summary Judgment and Motion of Plaintiff for Partial Summary Judgment" (hereinafter referred to as "the Magistrate's Recommendation"). The Magistrate's Recommendation mistakenly concluded that the arrest of the plaintiff, a deaf individual, did not constitute a service, program or activity protected by Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§12131-61, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, where, as here, the plaintiff was not wrongly arrested because of his disability but because, during his arrest, the defendants allegedly failed to make reasonable accommodations for him. As such, according to

the Magistrate, the defendant's failure to provide plaintiff with a sign language interpreter, telecommunications equipment and other appropriate auxiliary aids necessary for effective communication during the arrest did not establish a prima facie violation of these statutes.[1] This determination by the Magistrate is incorrect and should be reversed.

ARGUMENT

A. The Statutes and Regulations Require that Qualified Individuals Be Provided Reasonable Accommodations During An Arrest

The Magistrate recognized that both the ADA and Section 504 of the Rehabilitation Act prohibit the defendant police department from excluding the plaintiff, as a qualified individual, from participation in, or denial of benefits of, the defendant's services, programs or activities, see Magistrate's Recommendation at 6-7, 11-12. The Magistrate implicitly assumed that a person wrongly arrested because of his disability would be so excluded from the police department's services, programs or activities, in violation of the statutes. Id. at 12-13. However, he then created an exception to such protection in situations where defendants fail to provide reasonable accommodations for qualified individuals during arrests. Neither statute creates such an exception nor encourages such a narrow reading of its terms, nor did the Magistrate cite to any such language in support. In contrast, as set forth more fully in the United States' Memorandum as Amicus Curiae in Opposition of Defendants' Motions for Summary Judgement (hereinafter referred to as "the United States' Memorandum") at 2-4, both statutes are to be read broadly.

Moreover, the Magistrate's Recommendation was surprisingly silent regarding the import of the legislative history of these statutes. As set forth in the United States' Memorandum at 4-5,

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[1]The Magistrate went on to conclude that regardless of whether the plaintiff's arrest constitute a service, program or activity, the plaintiff suffered no exclusion or denial of benefits and failed to present any evidence of injury.

the legislative history of Title II of the ADA makes clear that both the ADA and the Rehabilitation Act prohibit discrimination against qualified individuals with respect to everything a public entity does, including all aspects of an arrest. The House Education and Labor Committee Report specifies that "Title II . . . makes all activities of State and local governments subject to the types of prohibitions against discrimination against a qualified individual with a disability included in Section 504." H.R. Rep. No. 101-485, 151 (1990)(emphasis added). In addition, during the legislative debate, Congressman Levine asserted that the ADA specifically addressed mistreatment by the police. He stated:

> One area that should be specifically addressed by the ADA's regulations should be the issue of nondiscrimination by police. Regretfully, it is not rare for persons with disabilities to be mistreated by police . . . Many times, deaf persons who are arrested are put in handcuffs. But many deaf persons use their hands to communicate, either through sign language or by writing a note to a nondisabled person who does not know sign language. The deaf person thus treated is completely unable to communicate.
>
> Although I have no doubt that police officers in these circumstances are acting in good faith, these mistakes are avoidable and should be considered illegal under the Americans With Disabilities Act. They constitute discrimination, as surely as forbidding entrance to a store or restaurant is discrimination.

136 Cong. Rec. H2599-01, H2633 (May 22, 1990)(statement of Rep. Levine). Clearly, Congress intended the protections of the ADA to encompass all aspects of an arrest, including the provision of reasonable accommodations to a qualified individual during an arrest. Yet the Magistrate's Recommendation inexplicably ignored this legislative history.

In addition, the United States Department of Justice, in its regulations and its interpretation thereof, has consistently interpreted Title II of the ADA and Section 504 of the Rehabilitation Act to include all operations and activities of a police department, including the provision of reasonable accommodations during an arrest. For example, Section 504's implementing regulations specify that the Rehabilitation Act applies to arrests - "the term

'program' means the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal assistance awarded, e.g., a police department or department of corrections." 28 C.F.R. 42.540(h) (emphasis added). The Title II implementing regulation states that Title II coverage extends to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. 35.102(a) (emphasis added).[2] Also, the 1994 Supplement to the Department's Title II Technical Assistance Manual, published in accordance with Section 12206 of the ADA, uses arrest situations as an example of when effective communication is critical to ensuring that a qualified individual receives the protections afforded him under the ADA:

> A municipal police department encounters many situations where effective communication with members of the public who are deaf or hard of hearing is critical. Such situations include interviewing suspects prior to arrest (when an officer is attempting to establish probable cause); interrogating arrestees; and interviewing victims or critical witnesses. In these situations, appropriate qualified interpreters must be provided when necessary to ensure effective communication.

Title II Technical Assistance Manual 1994 Supp. At II-7.1000(b)(3)(emphasis added).

However, the Magistrate's Recommendation accorded the Department of Justice's interpretation no deference, in contravention of the mandates of Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994), which requires that such regulations must be given

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[2] The summary to 28 C.F.R. Part 35 states:

> Subtitle A protects qualified individuals with disabilities from discrimination on the basis of disability in the services, programs, or activities of all State and local governments. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance. . . . This rule, therefore, adopts the general prohibitions of discrimination established under section 504, as well as the requirements for . . . providing equally effective communications.

See 56 FR 35694 (emphasis added).

"controlling weight," Bradgon v. Abbott, et al., 524 U.S. 624, 646 (1998), which mandates that the views of the Department of Justice, as the agency directed by Congress to issue implementing regulations for the ADA, are entitled to deference, as well as longstanding principles of administrative law urging deference to federal agency construction of the law and the regulations that implement it. See Olmstead v. Zimring, 527 U.S. 581, 582 (1999) (the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance); see also Auer v. Robbins, 519 U.S. 452, 461 (1997); St. Francis Health Care Ctr. v. Shalala, 205 F.3d 937, 943-944 (6th Cir. 1999); Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 584-85 (D.C. Cir. 1997). Therefore, this Court should defer to the Department's position that the ADA and the Rehabilitation Act require the provision of reasonable accommodations to qualified individuals during an arrest. However, should this Court find the requirements of the regulations to be ambiguous, this Court must defer to the United States' interpretation. See Christensen v. Harris County, 529 U.S. 576,120 S.Ct. 1655, 1663 (2000) (holding that an agency's interpretation of its own regulation is entitled to deference when the language of a regulation is ambiguous). As such, lack of such deference by the Magistrate is wrong.

B. Case Law Also Requires that Qualified Individuals Be Provided With Reasonable Accommodations During An Arrest

In 1998, the United States Supreme Court made abundantly clear that the ADA was applicable to inmates in state prisons, holding that:

> [T]he [ADA]'s language unmistakeably includes State prisons and prisoners within its coverage. . . . [T]he ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt. . . . Petitioners contend that the phrase "benefits of the services, programs, or activities of a public entity," creates an ambiguity, because state prisons do not provide prisoners with "benefits" of "programs, services, or activities" as those terms are ordinarily understood. We disagree. . . . The text of the ADA provides no basis for

> distinguishing these programs, services, and activities. . . . [Even] assuming . . . Congress did not "envisio[n] that the ADA would be applied to state prisoners," in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that a statute can be "'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"

Pennsylvania Dept. of Corrections, et al. v. Yeskey. 524 U.S. 206, 209, 210, 212 (1998) (emphasis added) (citations omitted).

Since Yeskey, most courts have held that the circumstances surrounding an arrest are covered by the ADA. In Gorman v. Bartch, 152 F.3d 907, 910 (8th Cir. 1998), the United States Court of Appeals for the Eighth Circuit, relying on Yeskey, reversed the lower court's finding, inter alia, that Congress had not intended to extend the ADA to police work, that "the ADA's terms do not apply to the circumstances surrounding Plaintiff's arrest," and that "[t]he general requirements, appearing in § 35.130 [of Title II's implementing regulation], also do not apply to policies for arresting individuals." Instead, the Eighth Circuit correctly interpreted Title II and Section 504 "broadly to include the ordinary operations of a public entity in order to carry out the purpose of prohibiting discrimination." Gorman, 152 F.3d at 913. That Court held that the local police department, when providing transportation to an arrestee, must comply with the ADA's mandates. Id. at 912-13.

Again, in Calloway v. Boro of Glassboro Dept. of Police, et al., 89 F.Supp.2d 543, 547 (D.N.J. 2000), the court, relying on Yeskey, Gorman, and the Department of Justice's implementing regulations, held that investigative questioning at a police station is an "activity" and "ordinary operation" of the police department and, thus, covered under Title II and Section 504. Calloway, 89 F.Supp.2d at 554-55. In Calloway, the plaintiff, a deaf and functionally illiterate woman, went to the police station to file a complaint for assault. At some point after the plaintiff's arrival at the police station, a police officer informed her that she had been accused of

criminal sexual contact and child endangerment. Id. at 547. After the police failed to locate a certified sign language interpreter to aid in the investigation, the County Prosecutor's Office contacted an acquaintance, an uncertified interpreter whom the plaintiff argued was unqualified to serve as an interpreter, to interpret for the plaintiff. Id. at 547-48. The police department and other defendants unsuccessfully argued, inter alia, that the plaintiff had failed to make out cognizable claims under Title II and Section 504. Id. at 550. The Court, however, unequivocally stated that "This Court expresses no hesitation in placing station-house investigative questioning, an 'ordinary operation of a public entity,' within the ambit of the Disability and Rehabilitation Acts." Id. at 555.[3]

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[3]In the Magistrate's Recommendation, he unduly limited the holdings of Calloway, Gorman and Hanson v. Sangamon County Sheriff's Dep't, 991 F. Supp. 1059, 1062-63 C.D. Ill. 1998)(applying the ADA to an arrestee's opportunity to post bond and make a telephone call.) The Magistrate distinguished each one by the particular facts surrounding the investigatory questions or arrest, so limiting their applicability. This interpretation establishes a piecemeal analysis under which the ADA's protections would be unduly restricted. Such an interpretation ignores the plain language of the ADA and the teachings of Yeskey, that the ADA is to be read broadly and covers all operations and activities of a police department, including the provision of reasonable accommodations during an arrest. Moreover, these cases further support a broad reading of the language of the statutes to protect qualified individuals during all aspects of an arrest.

The Magistrate also cites to Hainze v. Richards, 207 F. 3d 795 (5th Cir. 2000) for the proposition that a mentally ill plaintiff shot by police as he approached police with a knife, despite police orders to stop, did not have a cause of action under the ADA. Magistrate's Recommendation at 14. The holding in Hainze, however, is inapplicable to the present case. The Hainze court held only that "Title II does not apply to an officer's on-the-street responses to reported disturbances . . . prior to the officer's securing the scene and ensuring that there is no threat to human life . . . Once the area [is] secure and there [is] no threat to human safety, the [police department] would have been under a duty to reasonably accommodate [the arrestee's] disability . . . ." Hainze, 207 F. #d at 801-02 (emphasis added). In the present case, unlike in Hainze, there is no allegation that the area was not secure or that there was a threat to human safety. As such, as the Hainze court noted, the present defendant was under a duty to reasonably accommodate the plaintiff's disability, which it failed to do.

Furthermore, in McNally v. Prison Health Services, 46 F.Supp.2d 49 (D.Me. 1999), a case decided in this Court involving a prison inmate infected with HIV allegedly deprived of his HIV medication, the Court recognized the breadth of the Supreme Court's holding in Yeskey and relied on the Department of Justice's Section 504 and Title II implementing regulations in denying the defendant's summary judgment motion. This Court cited with approval the Department's Title II implementing regulation which makes clear that discriminatory treatment during arrests is covered under the statutes. McNally, 46 F.Supp.2d at 58.[4]

The Magistrate, while noting some of these decisions, failed to apply them to the present case and instead relied on two other cases, Gohier v. Enright, 186 F.3d 1216, 1220-21 (10th Cir. 1999), and Patrice v. Murphy, 43 F.Supp.2d 1156, 1157 (W.D. Wa. 1999), for the unusual proposition that the statutes draw distinctions between two types of discrimination claims arising out of arrest situations, only one of which is covered under Title II and Section 504. See Recommended Decision at 11-17. However, the Magistrate's reliance on Gohier was misplaced. The Magistrate erroneously cited Gohier for the proposition that "[f]ederal courts have generally recognized two distinct types of disability discrimination claims arising out of arrests," i.e. when the police arrest a person with a disability because of the disability ("wrongful arrest theory"), and when the police properly arrest a person with a disability but fail to reasonably accommodate the person's disability ("reasonable accommodation during arrest theory"). See id. at 12 (quoting

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[4]The appendix to Title II states:

> Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.

28 C.F.R. § 35, App. A, Subpart B, at 485 (2000)(emphasis added).

Gohier, 186 F.3d at 1220-21). However, the Gohier court expressly refused to determine if such a distinction was appropriate, stating:

> This court need not decide whether this case is better analyzed under a wrongful-arrest or reasonable-accommodation-during-arrest theory. Even assuming both theories are viable, the first does not apply to the facts of this case, and Gohier has expressly declined to invoke the second. Accordingly, this court merely clarifies that a broad rule categorically excluding arrests from the scope of Title II . . . is not the law. It remains an open question in this circuit whether to adopt either or both the wrongful-arrest theory . . . and the reasonable-accommodation-during-arrest theory . . . .

Gohier, 186 F.3d. at 1221.[5]

The Magistrate then cited Patrice for the proposition that the second type of arrest situation, a reasonable-accommodation-during-arrest theory, failed to state a viable cause of action under the ADA. See Magistrate's Recommendation at 15 (quoting Patrice, 43 F.Supp.2d at 1160). This district court decision, however, was wrongly decided. The court, in reaching its erroneous decision, neglected to consider the broad language of Title II, failed to consider the Supreme Court's decision in Yeskey, and instead relied primarily on pre-Yeskey decisions. Patrice, 43 F. Supp. 2d at 1158 (citing, e.g., Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997); Crawford v. Indiana Dept. of Corrections, 115 F.3d 481 (7th Cir. 1997); Rosen v. Montgomery County Maryland, 121 F.3d 154 (4th Cir. 1997)).[6] See also United States' Memorandum at 9-10.

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[5] The Court of Appeals for the Tenth Circuit recognized that facts in the case were "logically intermediate between the two archetypes envisioned by those [two] theories," and that arrests include several different scenarios. See Gohier, 186 F.3d at 1221; 1220 n.2.

[6] The Magistrate Judge incorrectly states that the court in Rosen v. Montgomery County Md., 121 F.3d 154 (4th Cir. 1997), "held that a drunk driving arrest was not a program or activity of the defendant county, of which the police department involved was apparently an agency, and that arrests did not come 'within the ADA's ambit.'" See Recommended Decision at 13. Rather, the Court of Appeals for the Fourth Circuit held that the plaintiff in Rosen lacked any discernible injury. Rosen, 121 F.3d at 158. While the Court did state that a drunk driving arrest, the essential eligibility requirements of which are weaving in traffic and being intoxicated, is "a stretch of the [ADA's] statutory language and of the underlying legislative intent," Rosen, 121

More importantly, the Magistrate Judge failed to follow the holding in Barber v. Guay, et al., 910 F.Supp. 790, 709 (D. Me.1995) and unduly limits the holding of Jackson v. Inhabitants of the Town of Sanford, et al., 1994 WL 589617, at *1 (D. Me. 1994), both cases decided in this Court. In Barber, the plaintiff, a qualified individual, brought suit regarding the circumstances surrounding his arrest, claiming he was denied proper police protection and fair treatment due to his psychological and alcohol problems. Barber, 910 F.Supp. at 802. The Barber court implicitly recognized that the ADA required that police provide reasonable accommodation during an arrest of a qualified individual, finding that the plaintiff had, in fact, stated a valid cause of action under the ADA. Id. However, the Magistrate, in his Recommendation, while citing Barber in support of his contention that federal courts generally recognize two types of disability discrimination claims arising out of arrests, Magistrate's Recommendation at 13, did not apply its holding to the present case nor did he explain why.

The Magistrate also summarily referred to the district court in Jackson, simply stating that the Jackson decision involved a situation where a plaintiff was wrongfully arrested because of his disability and so was discriminated against based upon his disability. Magistrate's Recommendation at 12. The Magistrate appears to use this decision to support his contention that the ADA and the Rehabilitation Act protect qualified individuals under a wrongful arrest theory but not under a reasonable-accommodation-during-arrest theory. However, the Magistrate failed to recognize that the District Court did not draw any such distinction and did not limit its holding to only those arrests that were improperly made *because of* a person's disability. Although the plaintiff in Jackson was indeed mistakenly arrested because of his disability, the

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F.3d at 157, this decision pre-dates the U.S. Supreme Court's decision in Yeskey. 524 U.S. 206 (1998), which reaffirms the ADA's broad coverage and so is clearly distinguishable. See discussion supra.

Court held that "Title II of the ADA clearly applies to acts of discrimination by a public entity against a disabled individual. The Town and its police force are a public entity and the plaintiff is a qualified individual with a disability. . . ." Jackson, 1994 WL 589617, at *6 (citations omitted). Both of these cases further support the United States' position that the ADA and the Rehabilitation Act require that qualified individuals be provided with reasonable accommodations during an arrest.

CONCLUSION

For the forgoing reasons, the United States, as amicus curiae, asks that this Court find that Title II of the ADA and Section 504 apply to all of a police department's operations, including plaintiff's arrest in this case.

Respectfully submitted,

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