SQUARE PEGS IN ROUND HOLES – POLICE OFFICERS AS HEALTHCARE WORKERS AND SOCIAL WORKERS

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Named an "Impact Player of the Year" by *Texas Lawyer* for his *en banc* victory in *Morgan v. Swanson,* 659 F.3d 359 (5th Cir. 2011) (the "Candy Cane Case"), Tom Brandt has consistently been recognized as one of Texas' top lawyers. Tom has earned the distinction of being ranked as AV Preeminent – the highest rating awarded by Martindale Hubbell. Tom has also frequently been listed as one of the state's "Super Lawyers" by *Texas Monthly* magazine.

Tom serves as head of the local government and employment law section at Fanning Harper Martinson Brandt & Kutchin, P.C. Tom's practice includes representation of cities, counties, school districts, public officials and private sector clients in the areas of civil rights and employment law and has included significant cases at every level of the state and federal courts, including numerous cases before the appellate courts, the Texas Supreme Court, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court.

In addition to his active litigation practice, Tom also performs general counsel services for several local government entities and private businesses and has been chosen to perform high-profile public integrity investigations. On two separate occasions, Tom was hired by a major city in the Metroplex to investigate allegations of wrongdoing by that city's police chief.

His legal career started as a Dallas prosecutor handling hundreds of cases. Quickly promoted to the federal litigation section of the Dallas City Attorney's office, Tom handled numerous trials and appeals in federal court involving a wide variety of civil rights cases, including excessive force, false arrest, race discrimination, class actions and constitutional challenges to the City's sexually-oriented business ordinance. He assisted in the preparation of briefs and the presentation of oral argument before the United States Supreme Court in the landmark case of *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Tom has been a leader in the legal profession for many years. He has served in every leadership post in the Dallas Chapter of the Federal Bar Association, including that of President from 1997-1998. Under his guidance, the Dallas Chapter received national recognition for its outstanding programs and activities. An active leader in the St. Thomas More Society, Tom has served as a board member since the late 1990s and as President from 1999-2001. A 1985 graduate with a joint degree (J.D./M.P.A.) from the University of Texas Law School and the Lyndon B. Johnson School of Public Affairs, Tom was awarded a prestigious Rotary Foundation Scholarship in 1988 to study international and comparative law in New Zealand.

Married since 1986, Tom and his wife have six children, whose activities keep them experts at scheduling and logistics.

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SQUARE PEGS IN ROUND HOLES – POLICE OFFICERS AS HEALTHCARE WORKERS AND SOCIAL WORKERS

I. INTRODUCTION

This paper is designed to address three questions. The first question is broad and philosophical while the next two questions are narrow and focused.

The three questions are as follows:

1. Do we tend to expect too much from law enforcement officers?
2. Does the ADA require law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody?
3. Should a governmental entity be vicariously liable under the ADA for the intentional discrimination of one of its employees?

II. DO WE TEND TO EXPECT TOO MUCH FROM LAW ENFORCEMENT OFFICERS?

We expect law enforcement officers to be brave, honest and to follow the law. We expect them to enforce the law without prejudice and to wield their authority in a reasonable and just manner. We expect them to be there for us when we need them and we expect them to be professional with us when they find that we may have pressed the gas pedal a little too hard. These are all reasonable expectations we have for law enforcement officers.

While there are certainly many reasonable expectations we have of law enforcement, *could it be that we, as a society, expect too much from law enforcement officers?* That is the question that this paper is intended to raise and explore, if not definitely answer.

Our answer to this question depends, of course, upon many things including what we mean by "too much." I would propose, for purposes of discussion that we keep an open mind with respect to the answer to this question. I would propose this for two main reasons. First, if you flatly answer the question with a "No", then there will be no point in discussing the topic any further and you will get nothing from the discussion except a small amount of MCLE credit. More importantly, though, I believe that we should consider the question because the proper role of law enforcement is vital to us all both as members of society in general and as lawyers in particular. If we are, in fact, expecting too much from law enforcement officers, then we are moving toward an unhealthy and unsustainable situation for all of us.

A. A Perspective from a Police Chief – Police are held to an "unreasonable standard."

David Brown served as the Chief of Police of the City of Dallas Police Department from 2010-2016. During his tenure as Chief of Police, he rose to national prominence following the tragic events of July 7, 2016. On that tragic day, Mr. Michah Johnson ambushed and killed five Dallas police officers and injured nine others. Mr. Johnson, an army veteran and an African American, was reportedly angry over police shootings of African American men and stated that he wanted to kill white people, especially white police officers. The officers who were killed and wounded were providing security for a demonstration which was organized to protest police shootings of minorities.

But even before the tragic events of July 7, 2016, Chief Brown spoke eloquently of what he referred to as "unreasonable standards" for police officers in our country. He stated:

> We're held to sometime unreasonable standards as police officers in this country. ….We expect officers to pursue car-jacking suspects and we expect them to put their lives on the line. … We expect them to do it perfectly every time, every time. The one time they don't do it perfectly, it costs them their job, possible criminal indictment and possible civil suits. …Today there's a copy out there chasing a violent, armed suspect, potentially, that may not go home, and we expect them to put their lives on the line, exhibit courage, but if they make a mistake, we're going to fire them, potentially prosecute them in criminal courts and they're facing jail, and then we're going to sue them for the money that they have. …That's a tough thing the public asks us to do. I just don't see a lot of volunteers going down dark alleys and chasing some of these very violent folks we have to chase and then to be – it's almost overbearing sometimes on what we ask these cops to do. It is almost, you know – we're recruiting folks from the human race who are flawed and are never going to be perfect, and this is where it may end up.
>
> David Brown, Former Chief of Police,
> Dallas Police Dept. Deposition
> November 19, 2014

B. What are some of the sources of our unreasonable expectations?

There are any number of possible reasons why we tend to expect too much from law enforcement officers. I would suggest that one of the primary reasons we tend to expect too much of law enforcement officers is that

we tend to expect too much from the law itself. I would suggest that another of the primary reasons we tend to expect too much from law enforcement officers is that we tend to expect too much of politics. A third possible reasons for why we tend to expect too much from law enforcement officers can, perhaps, best be described by the phrase "Cultural Climate Change." Each of these possible reasons will be explored briefly below.

1. We tend to expect too much from the law.

As lawyers, we have dedicated our professional lives to the practice of law, presumably because we believe that the rule of law is vital to the health of our society. But as beneficial and vital as the rule of law is to our society, it does not provide us with everything we need. Samuel Johnson stated it best when he wrote:

> "How small of all that human hearts endure, that part which laws or kings can cause or cure."
>
> Samuel Johnson

Because law is so important, we tend to forget that there are vast portions of our lives which laws neither cause nor cure. If we do, in fact, tend to expect too much from the law then it would logically seem to follow that we would also tend to expect too much from law enforcement officers.

2. We tend to expect too much from politics.

Just as we tend to expect too much of the law, we also, I believe, tend to expect too much of politics. This tendency was expressed best by G.K. Chesterton who said:

> "For at present we all tend to one mistake; we tend to make politics too important. We tend to forget how huge a part of man's life is the same under a Sultan and a Senate, under Nero or St. Louis. Daybreak is a never-ending glory, getting out of bed is a never-ending nuisance; food and friends will be welcomed; work and strangers must be accepted and endured; birds will go bedwards and children won't, to the end of the last evening."

3. Cultural Climate Change: Our Crumbling Cultural Consensus

Temperatures and tempers are rising. Global climate change is said to be caused by the increase in the earth's temperature. Cultural climate change, similarly, appears to be related to the heat of our current discourse. It seems that our cultural consensus crumbles a little more each day.

Our culture is changing rapidly – and not always for the better. We are losing common reference points, a common language, common symbols, common rituals, common myths, common heroes and common ideals. We are coarser with one another. We are less kind to one another. We are losing a healthy appreciation for our common humanity and replacing it with an unhealthy appreciation of individual rights and appetites. Borrowing from the Christian tradition, we have essentially changed the Lord's prayer first from "Our Father" to "My God" and finally just to "me" - with no prayer following.

Our cultural climate change means many things including the fact that, as we lose a common consensus of shared values and vision, we are progressively moving toward relationships with one another that no longer resemble family bonds of love but instead resemble relationship based on power. We seem to be moving much closer to the Hobbesian state of nature where the life of human beings is "solitary, poor, nasty, brutish, and short."

One of the negative results of our cultural climate change is, unfortunately, higher levels of anxiety, aggression, meaninglessness, and distance from family. We, as a society, are plagued with loneliness, emptiness, and alienation. Addiction, depression and suicide are symptoms of deeper problems. The pain we are feeling is real. Our perspective on that pain can, though, make all the difference. As C.S. Lewis wrote: "Pain insists upon being attended to. God whispers to us in our pleasures, speaks in our consciences, but shouts in our pains. It is his megaphone to rouse a deaf world." Our society is sick and we, as lawyers, as "doctors of society," should be working towards a healthy society. Perhaps we should start by, at least, being kind to one another.

C. The News is Not All Bad: We have become more accommodating to persons with disabilities.

In some ways, we seem to have become more accommodating while at the same time we seem to have become coarser. The specific tendency for accommodation I refer to concerns the statutory and wider cultural accommodations made with reference to persons with disabilities.

The passage of the Americans with Disabilities Act ("ADA") accomplished more than simply providing legal remedies for violation of its provisions. It marked a cultural shift away from an old view that tended to limit the contributions of disabled persons and toward a new view that enriches our whole society by accommodating those with disabilities.

It is this cultural/legal shift which we would like to explore in more detail. We would like to begin with a Supreme Court case which came very close to addressing an important question regarding the ADA and the extent to which police officers are required to accommodate persons they encounter. The case is *San Francisco v. Sheehan*.

In *Sheehan*, the United States Supreme Court came very close to addressing the following question: "Does the ADA require law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody?" After exploring the facts and implications of *Sheehan*, we would then like to explore in detail two lines of cases which address the following question: "Should a governmental entity be vicariously liable under the ADA for the intentional discrimination of one of its employees?" The first answer to the question (and the answer we believe is incorrect) comes primarily from the case of *Delano-Pyle v. Victoria County*. A second case, *Perez v. Doctors Hospital*, seems to have followed the rule of vicarious liability erroneously established in *Delano-Pyle*. The second answer to the question (and the answer we believe is correct) comes from two United States Supreme Court cases: *Gebser v. Lago Vista Indep. Sch. Dist.*, and *Barnes v. Gorman*. Based on these two Supreme Court cases, we contend that governmental entities should not be held vicariously liable under the ADA or the Rehabilitation Act ("RA") for the intentional discrimination of one of its employees.

III. DOES THE ADA REQUIRE LAW ENFORCEMENT OFFICERS TO PROVIDE ACCOMMODATIONS TO AN ARMED, VIOLENT, AND MENTALLY ILL SUSPECT IN THE COURSE OF BRINGING THE SUSPECT INTO CUSTODY?

In *City and County of San Francisco, California v. Sheehan*, 1355 S.Ct. 1765, 1773 (2015), the United States Supreme Court came very close to answering the following question: "Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." But for the fact that the City of San Francisco changed its position on the issue, the Supreme Court was prepared to decide the question. *Sheehan* illustrates that the question of the ADA's applicability to law enforcement situations is an important one which the Supreme Court will likely address if given the chance. Sheehan also gives us a hint as to what the eventual answer may turn out to be.

Synopsis of the *Sheehan* Case

Background

Ms. Sheehan was a resident of a group home. She suffered from a mental illness. Ms. Sheehan brought an action against the city and two police officers in their individual capacities, alleging violations of her rights under the Americans with Disabilities Act (ADA) and the Fourth Amendment.

District Court

The District Court entered summary judgment for defendants.

Ninth Circuit

The Ninth Circuit affirmed in part, reversed in part, and remanded.

The Supreme Court

The Supreme Court granted certiorari and held as follows:

(1) The writ on the question of what the ADA required would be dismissed as improvidently granted;
(2) the police officers' initial warrantless entry was lawful;
(3) the police officers were justified in using potentially deadly force, and
(4) the police officers were entitled to qualified immunity on resident's claim arising from their re-entry into her room.

The Supreme Court's Opinion

Ms. Sheehan's Situation

Ms. Teresa Sheehan is a woman who suffers from a schizoaffective disorder. In August of 2008, Ms. Sheehan lived in a group home for people who are dealing with mental illness. Although she shared common areas of the building with others, she had a private room.

A Visit from the Social Worker

On August 7, 2008, Mr. Heath Hodge, a social worker who supervised the counseling staff in the group home, attempted to visit Ms. Sheehan to conduct a welfare check. Mr. Hodge was concerned because Ms. Sheehan had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating.

Threats from Ms. Sheehan

Mr. Hodge knocked on Ms. Sheehan's door but received no answer. Mr. Hodge then used a key to enter her room and found Ms. Sheehan on her bed. Initially, she would not respond to questions. But then she sprang up, reportedly yelling, "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to." Mr. Hodge left without seeing whether Ms. Sheehan actually had a knife, and Ms. Sheehan slammed the door shut behind him.

The Social Worker Clears the Building
Having been threatened by her, Mr. Hodge realized that Ms. Sheehan required "some sort of intervention" but he also knew that he would need help. The first thing Mr. Hodge did was to clear the building of other people.

The Social Worker Completes an Application for Temporary Evaluation and Treatment
Mr. Hodge completed an application to have Ms. Sheehan detained for temporary evaluation and treatment. On the application to have Ms. Sheehan detained for temporary evaluation, Mr. Hodge checked off boxes indicating that Ms. Sheehan was a "threat to others" and "gravely disabled," but he did not mark that she was a danger to herself.

The Social Worker Calls the Police
Mr. Hodge called the police and asked them to help him take Ms. Sheehan to a secure facility.

The Police Respond
Officer Katherine Holder responded to the police dispatch and headed toward the group home. When she arrived, she reviewed the temporary-detention application and spoke with Mr. Hodge. Officer Holder then sought assistance from Sergeant Reynolds, a more experienced officer.

The Police Talk to a Nurse at the Hospital
After Sgt. Reynolds arrived and was brought up to speed, Officer Hodge spoke with a nurse at the psychiatric emergency services unit at San Francisco General Hospital who said that the hospital would be able to admit Ms. Sheehan.

The Police Knock and Announce
Accompanied by Mr. Hodge, the two officers (Officer Holder and Sgt. Reynolds) went to Ms. Sheehan's room, knocked on her door, announced who they were, and told Ms. Sheehan that "we want to help you."

The Police Enter Her Room the First Time
When Ms. Sheehan did not answer, the officers used Mr. Hodge's key to enter the room.

Ms. Sheehan: "I am going to kill you"
Ms. Sheehan reacted violently. She grabbed a kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling "I am going to kill you. I don't need help. Get out."

The Two Officers Retreat
The two officers, who did not have their weapons drawn, retreated to the hallway. Ms. Sheehan closed the door. Ms. Sheehan was now in her room and the two officers and Mr. Hodge were in the hallway.

The Officers Call for Backup
The two officers called for backup and sent Mr. Hodge downstairs to let in the reinforcements when they arrived.

The Two Officers are Concerned
The two officers (Officer Holder and Sgt. Reynolds) worried that Ms. Sheehan might gather more weapons or even try to flee through the back window, if there was a fire escape. When the door closed, all that Sgt. Reynolds and Officer Holder knew for sure was that Ms. Sheehan was unstable, she had just threatened to kill three people, and she had a weapon.

The Officers Have to Make a Decision
Sgt. Reynolds and Officer Holder had to make a decision. They could wait for backup (indeed, they already heard sirens), or they could quickly re-enter the room and try to subdue Ms. Sheehan before more time elapsed.

The Two Officers Did Not Accommodate Ms. Sheehan's Disability: Her Disability was a "Secondary Issue."
In making their decision, Sgt. Reynolds and Officer Holder did not pause to consider whether Ms. Sheehan's disability should be accommodated. Both officers obviously knew that Ms. Sheehan was not well, but in Sgt. Reynolds' words, that was "a secondary issue" given that they were "faced with a violent woman who had already threatened to kill her social worker" and threatened to kill "two uniformed police officers."

The Two Officers Re-Enter Ms. Sheehan's Room
Sgt. Reynolds and Officer Holder ultimately decided that Officer Holder – the larger officer – should push the door open while Sgt. Reynolds used pepper spray on Ms. Sheehan. With pistols drawn, the two officers moved in.

Ms. Sheehan Yells at the Officers: "Leave!"
When Ms. Sheehan, knife in hand, saw the officers, she again yelled for them to leave. Ms. Sheehan was not sure if she threatened to

kill them a second time but **conceded "that it was her intent to resist arrest and to use the knife."**

Sgt. Reynolds Used Pepper Spray to No Avail

Sgt. Reynolds began pepper-spraying Ms. Sheehan in the face, but Ms. Sheehan would not drop the knife.

The Officers Shoot Ms. Sheehan

When Ms. Sheehan was only a few feet away, Officer Holder shot her twice, but she did not collapse. Sgt. Reynolds then fired multiple shots. After Ms. Sheehan finally fell, a third officer (who had just arrived) kicked the knife out of her hand. Ms. Sheehan somehow survived.

Ms. Sheehan is Acquitted

Sometime later, Ms. Sheehan was prosecuted for assault with a deadly weapon, assault on a peace officer with a deadly weapon, and making criminal threats. The jury acquitted Ms. Sheehan of making threats but was unable to reach a verdict on the assault counts. The prosecutors decided not to retry Ms. Sheehan.

Ms. Sheehan Sues

Ms. Sheehan then brought suit, alleging, among other things, that San Francisco violated the Americans with Disabilities Act by subduing her in a manner that did not reasonably accommodate her disability. She also sued Sgt. Reynolds and Officer Holder in their personal capacities under Section 1983, for allegedly violating her Fourth Amendment rights.

The District Court

The district court granted the defendants' summary judgment. The district court held that officers making an arrest are not required "to first determine whether their actions would comply with the ADA before protecting themselves and others." The district court also held that the officers did not violate the Fourth Amendment.

The Ninth Circuit

The Ninth Circuit vacated in part. The Ninth Circuit panel held that because the ADA covers public "services, programs, or activities," the ADA's accommodation requirement should be read "to encompass anything a public entity does."

The Ninth Circuit agreed "that exigent circumstances inform the reasonableness analysis under the ADA, but concluded that **it was for a jury to decide whether San Francisco should have accommodated Sheehan by, for instance, "respecting her comfort zone, engaging in non-threatening communications and using the passage of time to defuse the situation rather than precipitating a deadly confrontation."**

The Ninth Circuit held that Sgt. Reynolds and Officer Holder's initial entry into Ms. Sheehan's room was lawful and that, after the officers opened the door for the second time, they reasonably used their firearms when the pepper spray failed to stop Ms. Sheehan's advance.

Nonetheless, **the panel also held that a jury could find that the officers "provoked" Sheehan by needlessly forcing the second confrontation**.

The panel further found that it was clearly established that an officer cannot "forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.

The U.S. Supreme Court Grants the Petition for a Writ of Certiorari

The City of San Francisco and the two officers petitioned for a writ of certiorari and asked the Supreme Court to review the following two questions.

1. Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.
2. Whether it was clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.

The Supreme Court granted the petition. 135 S.Ct. 702 (2014)

The ADA Issue

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

review asks whether this provision [Title II of the ADA] "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody."

San Francisco's New Position

The Supreme Court stated: "When we granted review, we understood this question to embody what appears to be the thrust of the argument that San Francisco made in the Ninth Circuit, namely that 'Title II *does not apply* to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.'"

The Supreme Court explained "Having persuaded us to grant certiorari, San Francisco chose to rely on a different argument than what is pressed below." *Sheehan*, 135 S.Ct. 1765, 1772. The Supreme Court concluded that "The argument that San Francisco now advances is predicated on the proposition that the ADA governs the manner in which a qualified individual with a disability is arrested." *Id*. at 1773. The *Sheehan* Court concluded "Whether the statutory language [of the ADA] applies to arrests is an important question that would benefit from briefing and an adversary presentation." *Id.* The Supreme Court ended the discussion of the ADA as follows:

Our decision not to decide whether the ADA applies to arrests is reinforced by the parties' failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers. Only public entities are subject to Title II . . . and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees . . . **But we have never decided whether that is correct, and we decline to do so here in the absence of adversarial briefing.**

Id at 1773-1774. (emphasis added)

The Fourth Amendment/Qualified Immunity Issue

The Supreme Court concluded that the two officers were entitled to qualified immunity from Ms. Sheehan's claim arising from their re-entry into her home.

IV. SHOULD A GOVERNMENTAL ENTITY BE VICARIOUSLY LIABLE UNDER THE ADA FOR THE INTENTIONAL DISCRIMINATION OF ONE OF ITS EMPLOYEES?

A. The Answer Given by *Delano-Pyle* and *Perez*

Delano-Pyle v. Victoria County, Texas, 302 F.3d 567 (5th Cir. 2002) was decided correctly in one respect and incorrectly in another. *Delano-Pyle* was correct when it held that "a plaintiff asserting a private cause of action for violation of the ADA or the [Rehabilitation Act ("RA")] may only recover compensatory damages upon a showing of intentional discrimination." *Delano-Pyle* was incorrect to the extent that it holds that a governmental entity can be held vicariously liable for the intentional discrimination of its employees.

In *Delano-Pyle*, a panel of the Fifth Circuit, under a plain error standard of review, held that a "plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination." 302 F.3d at 574. The Court did not define what it meant by "intentional discrimination." In the context of determining whether a plaintiff must show a policy, custom, or practice by a municipality in order to establish liability under the RA and Title II of the ADA, the Court rejected application of Section 1983 analysis and stated [wrongly] that "[t]here is no 'deliberate indifference' standard applicable to public entities for purposes of the ADA or the RA." *Id*. at 575.

Mr. Delano-Pyle's claims fell under Title II of the ADA, which pertains to discrimination in the provision of services, programs, or activities of a public entity, or discrimination by a public entity. However, in its analysis, the Fifth Circuit disregarded the distinctions among Title I, Title II, and Title III of the ADA. The Court's analysis depended upon language from Title I of the ADA, which pertains to disability-based discrimination in employment. *Id*. at 574 ("The definition of "employer" under the ADA specifically encompasses any agent of an employer covered by the statute." *citing* 42 U.S.C. § 12111, which is from Title I of the ADA.) Thus, the Court reasoned [wrongly] that intentional discrimination by an employee suffices to support a jury verdict finding of intentional discrimination against the employee's municipal employer. Additionally, the Court based some of its reasoning on language from Title III of the ADA, which pertains to public accommodations by private entities. *Id.* at 575 ("A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability." *citing* 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii), which is part of Title III of the

ADA.) Thus, the Court refused to require evidence of a policy, custom, or practice by a public entity.

The *Delano-Pyle* Court also disregarded the Supreme Court's prior holdings and analyses in *Gebser* and *Barnes*, in which the Supreme Court explained that the implied remedy for private claims pursuant to Spending Clause statutes must reflect the requirements provided for in the express remedies under those statutes. The Fifth Circuit in *Delano*-Pyle disregarded the fact that both Section 504 and Title II of the ADA incorporate the remedies, procedures, and rights set forth in Title VI, and that the express remedial scheme provided by Title VI, like that provided by Title IX, requires notice to an "appropriate person" and an opportunity to rectify any violation. Consequently, under prior Supreme Court precedent, the Fifth Circuit should have precluded recovery of money damages under Section 504 and Title II of the ADA absent a showing that "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Gebser*, 524 U.S. at 290; *see also*, *Barnes*, 536 U.S. at 187.

Synopsis of the *Delano-Pyle* Case

Mr. Delano-Pyle, an arrestee, sued Victoria County alleging that the county violated his rights under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) in failing to take into account his serious hearing impairment during the process of arresting him for driving while intoxicated. The case was tried before a jury and a judgment was entered for the arrestee. Victoria County appealed and the Fifth Circuit affirmed.

Factual and Procedural History of the *Delano-Pyle* Case

Mr. Aubary Delano-Pyle, who is severely hearing-impaired, was involved in a car accident on July 17, 1998. Mr. Delano-Pyle rear-ended another vehicle traveling on the shoulder of Highway 77 in Victoria County, Texas. Victoria County Sheriff Deputies Anthony Daniel and Dana Wager arrived at the scene of the accident in response to a report of an incoherent subject at the location. Shortly after the deputies arrived, Mr. Delano-Pyle informed them of his hearing disability. While investigating the accident, Deputy Daniel searched Mr. Delano-Pyle's vehicle and discovered Hydrocodone and Darvocet.

Despite his knowledge of Mr. Delano-Pyle's disability, Deputy Daniel proceeded to administer three sobriety tests without asking Mr. Delano-Pyle which form of communication would be effective for him. Deputy Daniel testified that, prior to administering the tests, he turned on the video camera in his patrol car, which is standard procedure when an officer suspects that there may be a need for an arrest.

The Walk and Turn Test

First, Deputy Daniel administered what is known as the "walk and turn" test. This test requires the individual to take nine steps, heel-to-toe, along a straight designated line while counting the steps out loud and watching his feet. After taking nine steps, the subject must then turn around and return to the starting point in the same manner. Deputy Daniel demonstrated the test for Mr. Delano-Pyle, however, Deputy Daniel had his back turned to Mr. Delano-Pyle while giving instructions. Mr. Delano-Pyle performed the task as demonstrated, but because he did not understand the instructions as communicated, he took more than nine steps before turning around.

The One-Leg Stand Test

Second, Deputy Daniel administered a test called the "one-leg stand." This test required Mr. Delano-Pyle to stand on one-leg and count to ten. The videotape revealed that Deputy Daniel demonstrated the task, but spoke very quickly when giving instructions. Again, Mr. Delano-Pyle was able to complete the task as demonstrated, however, he counted to fourteen, rather than ten.

The Finger-to-Nose Test

Lastly, Deputy Daniel conducted a finger-to-nose test. Deputy Daniel instructed Mr. Delano-Pyle to stand straight with his heels together, his arms at his sides, and his head tilted back. He further requested that Mr. Delano-Pyle touch the end of his nose with his index finger by bringing his arm and hand from his side directly to the end of his nose. In demonstrating this test, Deputy Daniel tilted his head back, extended his arms, and reached and touched his nose. With his head still tilted, Deputy Daniel requested that Mr. Delano-Pyle touch his nose six times. Mr. Delano-Pyle performed the task as demonstrated, however, due to his failure to understand Deputy Daniel's instructions, Mr. Delano-Pyle touched his nose approximately twenty-five times.

Deputy Daniel Arrests Mr. Delano-Pyle
Deputy Daniel concluded that Mr. Delano-Pyle was unable to complete the tests as instructed, and arrested him for driving while intoxicated. Mr. Delano-Pyle asserts that he did not understand the directions given by Deputy Daniel because he was unable to read his lips and, had he understood, he would have performed the tests as requested.

The Miranda Warning at the Scene
Prior to arresting Mr. Delano-Pyle, Deputy Daniel read him his Miranda warnings. When Deputy Daniel asked Mr. Delano-Pyle if he understood his rights as communicated to him, Mr. Delano-Pyle did not respond. Deputy Daniel testified that he was not sure if Mr. Delano-Pyle understood either the verbal instructions given by Deputy Daniel during the administration of the sobriety tests or the Miranda warnings given at the scene.

At the Police Station

A. Miranda Warning
At the police station, Deputy Daniel read Mr. Delano-Pyle his legal rights once again and wrote the Miranda warnings on a blackboard.

B. Interrogation
With the knowledge that Mr. Delano-Pyle is hearing-impaired and may not have understood his verbal communications, Deputy Daniel, nonetheless, interrogated him without any accommodations being made to ensure that Mr. Delano-Pyle understood the circumstances of his arrest.

C. The Blood Test
After the interrogation, Deputy Daniel requested that Mr. Delano-Pyle consent to a blood test. Mr. Delano-Pyle maintains that Deputy Daniel asked him six times before he finally agreed.

D. Mr. Delano-Pyle is Released
After passing the blood test, Mr. Delano-Pyle was released on July 19, 1998.

Mr. Delano-Pyle Files his Lawsuit
Mr. Delano-Pyle filed a lawsuit against Victoria County alleging violations of Title II of the ADA, Section 504 of the Rehabilitation Act ("RA"), Chapter 121 of the Texas Human Resources Code (THRC), and § 1983.

At Trial: Victoria County's Motion for JMOL
After Mr. Delano-Pyle rested his case, Victoria County moved for judgment as a matter of law pursuant to FRCP 50(a). The trial court granted its motion as to Mr. Delano-Pyle's § 1983 claim for denial of medical attention and unauthorized medical testing, but denied the County's motion as to Mr. Delano-Pyle's ADA, RA, and THRC claims. As to these claims, the district court ruled that a fact issue existed as to whether there was intentional discrimination or deliberate indifference in Victoria County's treatment of Mr. Delano-Pyle.

At Trial: No Renewed Motion for JMOL
Victoria County presented its case and the claims were submitted to the jury. Victoria County did not renew its motion for judgment as a matter of law.

The Jury's Verdict
The jury found that:

(1) Mr. Delano-Pyle, by reason of his hearing disability, was excluded from participation in, or denied the benefits of, the services, programs, or activities of a public entity, or otherwise subjected to discrimination by Victoria County;
(2) Victoria County's conduct was intentional; and
(3) Victoria County's exclusion, denial, or discrimination proximately caused damages to Mr. Delano-Pyle.

The jury awarded Mr. Delano-Pyle compensatory damages in the amount of $230,000.

Victoria County's Appeal
Victoria County appealed the denial of its judgment as a matter of law, but did not appeal the denial regarding the THRC claim.

The Standard of Review
"The Fifth Circuit concluded that Victoria County has waived any challenge on appeal to the sufficiency of the evidence supporting the jury's verdict." "Accordingly, we review any challenge to the sufficiency of the evidence only for plain error." Under the plain error standard, the Fifth Circuit will only reverse the jury's verdict if the judgment works a manifest miscarriage of justice. Such review requires this court to merely ascertain if the plaintiff has submitted *any* evidence in

support of his claim. If it is determined that no evidence supports the jury's verdict, the Fifth Circuit will not simply enter judgment for the defendant; instead, it must order a new trial.

The Fifth Circuit's Discussion of the Law

The following discussion of the law is taken directly from the Fifth Circuit's opinion in *Delano-Pyle*.

The ADA is a federal anti-discrimination statute designed to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. The RA was enacted "to ensure that handicapped individuals are not denied jobs or other benefits because of prejudiced attitudes or ignorance of others." The language in the ADA generally tracks the language set forth in the RA. In fact, the ADA expressly provides that "the remedies, procedures and rights" available under the RA are also accessible under the ADA. Thus, jurisprudence interpreting either section is applicable to both…A plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination. *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 264 (5th Cir.1984).

In the instant case, the jury instructions provided that, in order for Pyle to sustain a claim under the ADA or the RA, he must prove the following facts by a preponderance of the evidence: "First, that [he] was either: (1) excluded from participation in or denied the benefits of services, programs, or activities of [Victoria County], or (2) was subjected to discrimination by Victoria County. Second: That Victoria County's conduct was intentional."

In addressing this issue, Victoria County argues that we should apply analogous case law involving §1983 suits against municipalities…

Victoria County argues that Pyle has failed to produce any evidence of policies, customs, or practices implemented by the Sheriff, which violated Pyle's rights under the ADA or the RA. The ADA and RA impose liability upon certain employers for disability discrimination. **The definition of "employer" under the ADA specifically encompasses any agent of an employer covered by the statute. 42 U.S.C. § 12111 (1995).** In this case, Victoria County does not dispute that it is covered under the ADA. The Fourth, Seventh, Ninth, and Eleventh circuits have all agreed that when a plaintiff asserts a cause of action against an employer-municipality, under either the ADA or the RA, the public entity is liable for the vicarious acts of *any* of its employees as specifically provided by the ADA…Thus, the first element of a § 1983 claim – i.e.., a policymaker -- is not required under either the ADA or the RA…

Furthermore, while we have not yet spoken on the question of whether a policy of discrimination must be identified to sustain a claim under the ADA on the RA, the Fourth Circuit has considered the issue and has concluded that a policy is not required…We agree with our sister circuit on this point.

There is no "deliberate indifference" standard applicable to public entities for purposes of the ADA or the RA. However, in order to receive compensatory damages for violations of the Acts, a plaintiff must show intentional discrimination. *Carter*, 725 F.2d at 264. The facts addressed at trial support the jury's finding of intentional discrimination.

It is clear from the videotape of the accident that no matter how many times Deputy Daniel repeated himself and no matter how loudly he spoke, Mr. Delano-Pyle could not understand most of what he was saying…After conducting a thorough review of the record, we cannot conclude that there was no evidence produced to support the verdict. Therefore, the jury was not plainly erroneous in finding that Mr. Delano-Pyle sustained a claim under the ADA and the RA against Victoria County.

302 F.3d at 574-76 (emphasis added, citations omitted).

Having concluded that Victoria County waived its sufficiency of the evidence claim and finding no plain error, the Fifth Circuit affirmed the district court's judgment.

***Perez v. Doctors Hospital*, 624 Fed. App'x 180 (5th Cir. 2015)**

In a case involving claims under the RA and Title III of the ADA, the Fifth Circuit acknowledged that, in *Delano-Pyle*, the Court held that "to receive compensatory damages under the RA, a plaintiff must

offer proof of intentional discrimination." 624 Fed. App'x at 184. The Court also noted that, "We did not define what we meant by intent in *Delano–Pyle*." *Id.* The Court then acknowledged that other circuits have held that deliberate indifference suffices, but, explaining that the parties have not briefed the issue in any depth, the Court declined "to make new law on the nature of intent at this time." *Id*. The Court invited the district court, on remand, to "make the initial effort to define intent under this statutory scheme." *Id*. at 186.

Based on a record which demonstrated repeated failures/refusals to accommodate the plaintiffs' known hearing disabilities, the Court remanded the case to the district court, concluding that there is enough to show a dispute of material fact as to whether the hospital "intentionally, i.e., purposefully, discriminated." *Id*. at 184. In troubling language, the Court explained, "the evidence in each case [*Delano-Pyle* and *Perez*] could be seen as suggesting that the defendant's *agents* ignored clear indications that they were dealing with a hearing-impaired person with special communication needs." *Id*. at 185 (emphasis added).

B. The Answer Given by *Gebser* and *Barnes*

We contend that the Supreme Court's decisions in *Gebser* and *Barnes* preclude respondeat superior liability in Section 504/ADA (Title II) cases.

> ***Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998).**
>
> Synopsis of *Gebser v. Lago Vista ISD*
> In *Gebser*, a high school teacher engaged in a sexual relationship with a student. The high school student and her parents sued the school district, seeking money damages under Title IX for the teacher's sexual harassment of the student.
>
> The district court granted the school district's motion for summary judgment. The Fifth Circuit Court of Appeals upheld the district court's decision, as did the U.S. Supreme Court.
>
> The Supreme Court's Reasoning
> In *Gebser*, the Supreme Court established an analytical framework which applies equally to claims of discrimination under Section 504 and Title II of the ADA, due to the interlocking nature of these statutes, which the Court acknowledged in *Barnes*. The *Delano-Pyle* panel did not follow this analytical framework. [1] Instead, the *Delano-Pyle* panel employed reasoning which disregarded the distinctions among Titles I, II, and III of the ADA, and which disregarded the express incorporation of the remedies, procedures, and rights of Title VI into Section 504 and Title II of the ADA.
>
> The Supreme Court unequivocally rejected respondeat superior liability for a Title IX claim based on allegations of intentional discrimination by an employee of a governmental entity.
>
> Because the express remedial scheme under Title IX is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation, 20 U.S.C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines. An "appropriate person" under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.
>
> We think, moreover, that the response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable in damages *291 not for its own official decision but instead for its employees' independent actions.

[1] A circuit court panel is without power to disregard Supreme Court precedent. *Wilson v. Taylor*, 658 F.2d 1021, 1034-35 (5th Cir. 1981).

524 U.S. at 290–91.

This reasoning applies equally to claims under Section 504 and Title II of the ADA because:

1. the remedies, procedures, and rights from Title VI are applicable to claims under Section 504[2] and Title II of the ADA[3]; and
2. the express remedial scheme under Title VI is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation. 42 U.S. Code §2000d-1.

The link between Title IX (Prohibiting Sex Discrimination) and Section 504 and Title II of the ADA (Prohibiting Disability Discrimination) is Title VI (which prohibits race discrimination). Title II of the ADA (Prohibiting Disability Discrimination by Public Entities) expressly incorporates the remedies, procedures and rights from Section 504. Section 504 of the Rehabilitation Act (Prohibiting Disability Discrimination by those public entities who received federal funding) expressly incorporates the remedies, procedures and rights from Title IX.

***Barnes v. Gorman*, 536 U.S. 181 (2002)**

In *Barnes*, the Supreme Court applied reasoning from *Gebser* to a claim for punitive damages under Section 504 and Title II of the ADA. Applying the contract-law analogy which the Court employed in *Gebser*, the Court held that punitive damages are not available for claims under Title VI, Section 504, and Title II of the ADA, because a remedy under a Spending Clause statute constitutes appropriate relief "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." 536 U.S. at 187 (emphasis in original).

Justices Stevens, Ginsburg, and Breyer, in a concurring opinion, argued that Spending Clause analysis does not apply to claims under Title II of the ADA. The Court rejected this argument, explaining as follows:

Justice STEVENS believes that our analysis of Title VI does not carry over to the ADA because the latter is not Spending Clause legislation, and identifies "tortious conduct." Post, at 2104–2105, n. 2. Perhaps he thinks that it should not carry over, but that is a question for Congress, and Congress has unequivocally said otherwise. The ADA could not be clearer that the "remedies, procedures, and rights ... this subchapter provides" for violations of § 202 are the same as the "remedies, procedures, and rights set forth in" § 505(a)(2) of the Rehabilitation Act, which is Spending Clause legislation. 42 U.S.C. § 12133. Section 505(a)(2), in turn, explains that the "remedies, procedures, and rights set forth in title VI ... shall be available" for violations of § 504 of the Rehabilitation Act. 29 U.S.C. § 794a(a)(2). These explicit provisions make discussion of the ADA's status as a "non Spending Clause" tort statute quite irrelevant.

536 U.S. at 190, fn. 3.

In *Barnes*, the Court also explained that it had previously held, in *Gebser*, that a funding recipient may not be held liable for money damages under a statute, "if that statute implies that only violations brought to the attention of an official with power to correct them are actionable, not for conduct unknown to any such official." *Barnes*, 536 U.S. at 187. As explained above, Section 504 and Title II of the ADA fall within this category, because they incorporate the remedies of Title VI, and the express remedial scheme under Title VI is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation.

Synopsis of *Barnes v. Gorman*

Wheelchair-bound arrestee who was injured while being transported in a police van which was not equipped with wheelchair restraints brought action against members of city board of police commissioners, city police, chief, and officer who drove the van, alleging violation of the American with Disability Act (ADA) and the Rehabilitation Act (RA)

[2] Section 504 is found at 29 U.S. Code §794a(a)(2) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e–5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.")

[3] Title II of the ADA is found at 42 U.S. Code § 12133 ("The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.")

At Trial
The jury returned a verdict for the plaintiff of over $1 million in compensatory damages and $1.2 million in punitive damages. The district judge entered judgment on the verdict for compensatory damages but vacated as to punitive damages.

On Appeal
Both sides appealed to the Eighth Circuit which reversed and remanded.

At the Supreme Court
The Supreme Court held that punitive damages may not be awarded in private suits brought under the ADA and the Rehabilitation Act.

The Supreme Court's Reasoning
Section 202 of the ADA prohibits discrimination against the disabled by public entities. Section 504 of the Rehabilitation Act 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, 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). Thus, the remedies for violation of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which prohibits racial discrimination in federally funded programs and activities…

Title VI invokes Congress's power under the Spending Clause to place conditions on the grant of federal funds…

Although the Supreme Court has been careful not to imply that *all* contract-law rules apply to Spending Clause legislation…we have regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages. Thus, a recipient may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute (see *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 642 (1999)), but not for its failure to comply with vague language describing the objective of the statute (see *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24-25 (1981)); and, if the statute implies only violations brought to the attention of an official with power to correct them are actionable, not for conduct unknown to any such official. See *Gebser*, at 290…

Like Title IX, Title VI mentions no remedies – indeed, it fails to mention even a private right of action (hence the Supreme Court's decision finding an *implied* right of action in *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979))…

Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act.

536 U.S. at 184-89.