

10-77

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD NATARELLI,

Plaintiff-Appellant

v.

VESID OFFICE,

Defendant-Appellee

UNITED STATES OF AMERICA,

Intervenor

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS INTERVENOR

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ISSUE PRESENTED

Whether the district court erred in reaching the merits of the Eleventh Amendment issue in light of its conclusion that plaintiff failed to state a cause of action under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C.

12131 *et seq.*

STATEMENT OF THE CASE

The pro se plaintiff in this case “alleges that employees of New York State Office of Vocational and Educational Services for Individuals with Disabilities (‘VESID’) discriminated against him based on his age and disability in wrongfully closing his case after approximately a year of working with him to develop or reach an individualized plan for employment.” R. 69 at 2.¹ Only one of the four examples he cites deals with disability discrimination: a claim that a senior counselor discriminated against him “based on his disability (which consisted of cancer, depression, and a generalized anxiety disorder) during two meetings with him.” R. 69 at 2 (district court’s summary of plaintiff’s claims).

The state filed a motion to dismiss plaintiff’s complaint, which the district court granted. Specifically, the district court concluded that (1) the abrogation of Eleventh Amendment immunity is invalid with respect to claims brought under Title II of the ADA, see R. 69 at 6-9; and (2) plaintiff failed to “allege[] facts plausibly suggesting that he was discriminated against *because of* his disability,” R. 69 at 10.

SUMMARY OF ARGUMENT

The district court failed to apply the procedure set forth by the Supreme Court in *United States v. Georgia*, 546 U.S. 151 (2006), for addressing Eleventh

¹ “R. __” refers to docket entries in the district court record.

Amendment questions relating to Title II of the ADA. Accordingly, it did not conduct the proper analysis with respect to this issue.

Having determined that plaintiff failed to state a claim under Title II of the ADA, the district court should have dismissed on that ground without reaching the Eleventh Amendment issue. If this Court concludes that plaintiff did not state a cause of action under Title II, then it should affirm on that ground and vacate the district court's Eleventh Amendment analysis. If, on the other hand, this Court concludes that plaintiff did state a cause of action under Title II, then it should remand the matter to the district court so that it may conduct a full abrogation analysis in the first instance. In either event, this Court should not permit the district court's current Eleventh Amendment analysis to stand.

ARGUMENT

THE DISTRICT COURT ERRED IN REACHING THE MERITS OF THE ELEVENTH AMENDMENT ISSUE IN LIGHT OF ITS CONCLUSION THAT PLAINTIFF FAILED TO STATE A CAUSE OF ACTION UNDER TITLE II OF THE ADA

The district court failed to follow the Supreme Court's decision in *United States v. Georgia*, 546 U.S. 151 (2006), and therefore did not conduct the proper Eleventh Amendment analysis. *Georgia* establishes a three-step process for analyzing Eleventh Amendment questions. Lower courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged

conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 546 U.S. at 159. See also *Buchanan v. Maine*, 469 F.3d 158, 172-173 (1st Cir. 2006) (applying the procedure set forth in *Georgia*); *Guttman v. Khalsa*, 446 F.3d 1027, 1035-1036 (10th Cir. 2006) (same).

In view of the foregoing, the district court's first step should have been to determine whether plaintiff alleged facts sufficient to state a claim under Title II of the ADA. Where, as here, a district court determines that a plaintiff failed to state a claim, it should dismiss on that ground and not reach the Eleventh Amendment issue. The district court in this case failed to follow this principle.

The United States takes no position as to whether plaintiff has stated a cause of action under Title II of the ADA. However, if this Court concludes that plaintiff did not state a cause of action under Title II, it should affirm on that ground and vacate the district court's Eleventh Amendment analysis. See *Zibbell v. Michigan Dep't of Human Servs.*, 313 F. App'x 843, 847-848 (6th Cir.) (holding that the district court erred in proceeding to address the Eleventh Amendment issue following dismissal of plaintiffs' claims, and vacating the district court's Eleventh Amendment ruling) (unpublished), cert. denied, 129 S. Ct. 2869 (2009).

If, on the other hand, this Court concludes that plaintiff did state a cause of action under Title II, then it should remand the matter to the district court so it can conduct a full abrogation analysis in the first instance. See *Guttman v. New Mexico*, 325 F. App'x 687, 692 (10th Cir. 2009) (unpublished) (returning the Eleventh Amendment issue to the district court rather than deciding it on appeal “because the district court is ‘best situated’ in the first instance to determine whether Title II abrogated sovereign immunity with respect to [plaintiff’s] claims”) (citing *Georgia*, 546 U.S. at 159).

If for some reason this Court concludes that it is necessary to reach the merits of the Eleventh Amendment issue on appeal, the United States respectfully requests an opportunity to file a supplemental brief addressing that issue.²

² This Court has not definitively settled the question whether its ruling in *Garcia v. SUNY Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), remains good law following the Supreme Court’s decisions in *Georgia* and *Tennessee v. Lane*, 541 U.S. 509 (2004). See *Bolmer v. Oliveira*, 594 F.3d 134, 147-148 & n.3 (2d Cir. 2010). The United States does not concede that *Garcia* is still good law, but does not believe the issue needs to be addressed at this stage of the case.

CONCLUSION

If this Court concludes that plaintiff did not state a cause of action under Title II, then it should affirm on that ground and vacate the district court's Eleventh Amendment analysis. If this Court concludes that plaintiff did state a cause of action under Title II, then it should remand the matter to the district court so it can conduct a full abrogation analysis in the first instance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains 1130 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Dirk C. Phillips
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Dated: March 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2011, an electronic copy of the BRIEF FOR THE UNITED STATES AS INTERVENOR was transmitted to the Court by means of the appellate CM/ECF system and that six hard copies of the same were sent by certified mail. Also, the following counsel of record is CM/ECF registered and will be served electronically: Andrew B. Ayers, Counsel for Defendant-Appellee.

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