United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7057 **September Term, 2019**

FILED ON: APRIL 21, 2020

MARKELLE SETH,
APPELLANT

v.

DISTRICT OF COLUMBIA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-01034)

Before: HENDERSON, ROGERS, and GARLAND, *Circuit Judges*

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the district court be **AFFIRMED**.

Markelle Seth is a District of Columbia resident with an intellectual disability. In 2014, the United States charged Seth with the production of child pornography, in violation of 18 U.S.C. § 2251(a). After a psychological evaluation and a competency hearing, a district court found Seth incompetent to stand trial and not restorable to competency in the foreseeable future. *United States v. Seth*, No. 14-608, slip op. at 1-2 (D.D.C. Dec. 22, 2016). Seth was remanded to the custody of the Attorney General of the United States, pursuant to the federal civil commitment scheme established by the Insanity Defense Reform Act (IDRA), which provides:

> If, after [a civil commitment] hearing, the court finds . . . that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person . . . , the court shall commit the person to the custody of the Attorney General. The Attorney

> General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment.

18 U.S.C. § 4246(d). At the ensuing federal civil commitment hearing, a district court found Seth to be dangerous if released unsupervised and determined that state placement for Seth was not available because the District of Columbia had not agreed to assume responsibility. Transcript of Competency Hearing at 46, *United States v. Seth*, No. 17-2090 (E.D.N.C. June 7, 2018). Seth remains federally civilly committed.

Seth sued the District of Columbia, the D.C. Department on Disability Services (DDS), and the Director of DDS in his official capacity (together, "the District"). Seth's complaint asserted claims -- based on several theories -- that the District's decision not to pursue his civil commitment violated his rights under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, the Rehabilitation Act, 29 U.S.C. § 794(a), and the District of Columbia Human Rights Act (DCHRA), D.C. CODE § 2-1402.73.[1] The district court dismissed the complaint for failure to state a claim on which relief could be granted. *Seth v. District of Columbia*, 2018 WL 4682023 (D.D.C. 2018). Seth then filed motions for reconsideration and for leave to file an amended complaint, which the district court denied. *Seth v. District of Columbia*, 2019 WL 2058670 (D.D.C. 2019). For the reasons set out below, we affirm.

Relying on *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), Seth argues that the District's failure to assume custody of him violated the ADA because it caused him to be unjustifiably isolated in federal custody rather than in a community-based treatment setting. *Olmstead* held that "unjustified institutional isolation of persons with disabilities is a form of discrimination" under the ADA, *id.* at 600, and that, in certain circumstances, the ADA may require a state to place "persons with mental disabilities in community settings rather than in institutions," *id.* at 587. In *Brown v. District of Columbia*, 928 F.3d 1070 (D.C. Cir. 2019), this court held that the District of Columbia violates the ADA "if it cares for a mentally or physically disabled individual in a nursing home notwithstanding, with reasonable modifications . . . , it could care for that individual in the community." *Id.* at 1073. And other courts have extended *Olmstead* to situations in which a plaintiff is isolated in a privately-run facility on which the state relies to provide services to individuals with disabilities. *See, e.g., Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 316-17 (E.D.N.Y. 2009).

But no court has extended *Olmstead* to encompass an unjustified-isolation claim against a state that does not have control or custody over the plaintiff. As the district court explained, the IDRA prefers state custody to federal custody, but the statute's "conditional language" does not "require[] the District to take custody of Seth." *Seth*, 2018 WL 4682023, at *14. Rather, the

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[1] Title II of the ADA and Section 504 of the Rehabilitation Act are interpreted consistently with each other. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1260 n.2 (D.C. Cir. 2008). The DCHRA is also interpreted in parallel with the ADA. *Grant v. May Dep't Stores*, 786 A.2d 580, 583-84 (D.C. 2001).

IDRA requires only that the Attorney General release Seth into the District's custody "if [the District] will assume responsibility for his custody, care, and treatment." 18 U.S.C. § 4246(d). Seth's theory would use the ADA to transform the IDRA's voluntary scheme into a mandatory one by allowing a plaintiff to bring an *Olmstead* claim against any state that declined to assume custody of him. Like the district court, we decline to extend *Olmstead* into this new territory. If Seth is unjustifiably isolated in federal custody, his *Olmstead* claim must be made against the federal government, which has him in its custody, not against the District, which does not. *See Seth*, 2018 WL 4682023, at *14 n.12 (detailing alternative avenues to relief).

Seth's failure-to-accommodate claim fails for similar reasons. The ADA requires a public entity to "make reasonable modifications [to its] policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i). To meet his initial burden of showing reasonableness, a plaintiff must establish that his proposed accommodation "seems reasonable on its face" such that it is reasonable "ordinarily or in the run of cases." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002). Seth's proposed accommodation -- civil commitment by the District -- is not facially reasonable. Like his unjustified-isolation claim, Seth's failure-to-accommodate claim would require the District to petition for the civil commitment of any federally committed individual, a result contemplated neither by the IDRA nor by the District's own civil commitment statute. *See* 18 U.S.C. § 4246(d); D.C. CODE §§ 7-1301.03(14C), 7-1303.04(b-1).

Seth's complaint also includes a disparate treatment claim. We agree with the district court that this, too, fails because Seth does not plausibly allege discriminatory intent by the District, as is required to prove unlawful disparate treatment. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1300, 1305 (D.C. Cir. 1998) (en banc). Neither Seth's original complaint nor his amended complaint contains allegations that plausibly suggest the District's decision not to initiate commitment and custody proceedings was made based on his disability. Accordingly, the district court properly dismissed Seth's disparate treatment claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009).

In addition, Seth raises a disparate impact claim, based on an allegation that the District provides community-based services to D.C. residents with mental illness more frequently than it provides such services to individuals (like Seth) with intellectual disabilities. This claim also fails because the former are not similarly situated to the latter. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003). The District is authorized to petition for civil commitment of any person with a mental illness who "is likely to injure himself or others." D.C. CODE §§ 21-541(a), 21-545(b)(2). By contrast, the District may petition for commitment of a person with intellectual disabilities only if he has been found incompetent to stand trial for a "crime of violence" or "sex offense," *id.* §§ 7-1301.03(14C), 7-1303.04(b-1), and a court will approve commitment only if the person "is likely to cause injury to others," *id.* § 7-1304.06a(d). Hence, the complaints' allegation is insufficient to state a claim for disparate impact.

Finally, the district court did not abuse its discretion by denying Seth's motions for reconsideration and for leave to file an amended complaint. The above analysis of Seth's allegations includes those made in his amended complaint. Because we have concluded that they fail to state a claim, granting leave to amend "could not possibly cure the deficiency" of the original complaint. *Brink v. Continental Ins. Co.*, 787 F.3d 1120, 1128 (D.C. Cir. 2015).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk