IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KIMBERLY PLETCHER, et al. Consolidated Plaintiffs, v. GIANT EAGLE, INC. and C&J Grocery CO., LLC, Defendants.	)	Case No. 2:20-cv-754 NBF

CONSOLIDATED PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

AND NOW, COME Plaintiffs, by and through their attorneys, Thomas B. Anderson, Esquire and Thomson, Rhodes & Cowie, P.C., and file this Sur-reply in Opposition to Defendants' Motion to Dismiss.

I. Argument

The Covid-19 pandemic may have impacted every aspect of American life, but it has not invalidated the ADA. To paraphrase the recent words of Judge Stickman, even in 2020, during the COVID-19 emergency, legal rights and obligations are not suspended. "In an emergency, even a vigilant public may let down its guard over its [legal rights] only to find that [legal rights], once relinquished are hard to recoup and that restrictions-while expedient in the face of an emergency situation may persist long after immediate danger has passed." Cty. of Butler v. Wolf, No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 167544 at *3 (W.D. Pa. Sept. 14, 2020).

Defendants begin their reply brief with the statement that Plaintiffs cannot justify claims that seek to make Giant Eagle less safe. This statement evinces a complete misunderstanding of, or a disregard for, Defendants' legal obligations under the ADA. The ADA remains in full force

and effect in Pennsylvania and Plaintiffs have properly alleged that Defendants violated the law. It is Defendants who cannot justify their policy, or their illegal actions set forth in Plaintiffs' complaint.

In the Third Circuit, affirmative defenses may be raised in a Rule 12(b)(6) motion to dismiss, only when a defect in the complaint appears on the face of the complaint, such as the statute of limitations or the statute of frauds. Adler v. Eng'rs, Inc. v. Dranoff Props., 2014 U.S. Dist. LEXIS 153497 at *33-34, 2014 WL 5475189 (D.N.J. Oct. 29, 2014), quoting ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994) (citations omitted). In this case, there are no defects on the face of the complaint. There is no dispute that the Plaintiffs have alleged facts establishing all the elements of their causes of action.

Defendants have jumped the gun and improperly raised affirmative defenses in their Motion to Dismiss ("legitimate and necessary safety requirement" and "direct threat") that will require Defendants to produce substantial evidence in order to meet their burden of proving these defenses. The allegations in the complaint in no way support or establish the affirmative defenses raised by the defendants. To the contrary, on the face of the complaint, Defendants' affirmative defenses have no merit.

Defendants argue that Plaintiffs cannot obtain any relief in this case because Defendants intend to assert a safety rule defense. However, Defendants' argument is misplaced and premature.

Under Title III of the ADA, discrimination includes:

> the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability … from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered….

42 U.S.C. § 12182(b)(2)(A)(i). A safety rule or policy that does not comply with 28 C.F.R. § 36.301, may be challenged under what is called the "improper criteria theory." Masci v. Six Flags Theme Parks, Inc., 2014 U.S. Dist. LEXIS 178666 at *26-27, 2014 WL 7409952 (D.N.J. Dec. 31, 2104). Under the improper criteria theory, the plaintiff challenges the defendant's policy or safety rule on the basis that the defendant implemented a rule that was not based upon the actual risk at hand, but rather the rule was based upon speculation, stereotypes or generalizations. Id. The defendant must show that the criteria "is necessary for the provision of the … accommodations being offered." Id. at *26-27, quoting 42 U.S.C. § 12182(b)(2)(A)(i). Only "'legitimate safety requirements that are necessary for safe operation' excuse the use of discriminatory criteria." Bench v. Six. Flags Over Texas, Inc., No. 13-cv-705, 2014 U.S. Dist. LEXIS 179313 at *15 (N.D. Tex. July 3, 2014).

In this case, Defendants essentially argue: Trust us; our mask policy is a legitimate and necessary safety requirement that allows us to discriminate against people with disabilities that prevent them from wearing masks and allegations in the complaint to the contrary must not be considered. Defendants' motion and briefs ignore the clear published orders and guidelines of the Public Health authorities quoted in the complaint, as well as the ADA regulations, and instead summarily ask this Honorable Court to take at face value the validity of defenses that have not been pleaded and upon which defendants have produced no evidence.

Defendants misapprehend the safety rule defense because that defense is not available when the plaintiffs' claims are based upon a failure-to-modify theory. The safety rule defense "cannot be used against a failure-to-modify theory under the ADA." Bench, No. 13-cv-705, 2014 U.S. Dist. LEXIS 179313 at *15, *27-28 (A public accommodation cannot avoid its

obligations under the ADA by making up safety requirements and claiming the requirements are necessary by arguing "Trust us on this one. Somebody said we needed to do it."). The reason the safety rule defense is not applicable in failure-to-modify cases is because while the ADA regulations allow a public accommodation to adopt legitimate and necessary safety rules (28 C.F.R. § 36.301(b)) , the regulations also state that policies "shall" be modified to allow full and equal enjoyment of the public accommodation (28 C.F.R. § 36.302). Courts cannot condone disability discrimination based upon purportedly legitimate safety requirements imposed by public accommodations unless the defendant proves that its safety rule was "necessary." Masci, 2014 U.S. Dist. LEXIS 178666 at *33-34. "When a disabled individual is singled out and discriminated on the very basis of his disability, the Court must necessarily [be] wary of simply trusting [the public accommodation]." Id. at *34.

Defendants rely heavily on the Masci case, however, Defendants fail to mention that the Masci Court denied the defendant's motion for summary judgment because the defendant did not adduce evidence meeting its burden of proof that its "safety requirement" was *necessary* for the safe operation of the rides and that the rule was not based on speculation, stereotypes, or generalizations, rather than the actual risk. Id. at *31-33. The Masci Court rejected the defendant's request to "blindly trust Six Flags instead of actually requiring Six Flags to prove that the ridership requirements were indeed necessary." Id. at *33.

Defendants cannot validly argue in this case that their policy was legitimate or necessary because it has no policy in three (3) neighboring states, yet Giant Eagle has continued to sell groceries in all three of those states without any mask or face covering requirements. If Giant Eagle's mask policy in Pennsylvania was truly legitimate and necessary for the safe operation of its grocery stores, Giant Eagle would have adopted and enforced the same policy in all its stores,

in all states. If the policy was legitimate and necessary, it would apply to Giant Eagle customers in Fayette County, Pennsylvania and their neighbors in Monongalia County, West Virginia. Masks would not be required in Giant Eagle stores in Erie County in Pennsylvania, but not required across the state line in Ashtabula County, Ohio. The arbitrary adoption and enforcement of this policy on one side of a state line, but not the other, clearly establishes that the policy was unnecessary.

Defendants have cited several irrelevant sources in their briefs in an effort to convince this Honorable Court to blindly accept as gospel their defense, however, Defendants have not cited the Pennsylvania Human Relations Commission's Guidance entitled "Disability Protections of the Pennsylvania Human Relations Act & Order of the Secretary of Pennsylvania Department of Health Universal Face Covering Requirement" that was published on July 1, 2020. www.phrc.pa.gov/Documents/PHRC Guidance on COVID-19 and Universal Face Covering Order.pdf. The PHRC guidance discusses the Pennsylvania mask requirement and its exceptions and then states: "Accommodations could include, but are not necessarily limited to, **entry to a public space or place of employment without a face covering**…" Id. at p.1 (emphasis added). The PHRC's guidance, is further evidence that Giant Eagle's no-exception policy is illegal, illegitimate, and unnecessary and its defenses discussed in its motion to dismiss have no merit.

In Matheis v. CSL Plasma, Inc., 936 F.3d 171, 174 (3d Cir. 2019), summary judgment for the defendant was reversed because the defendant failed to meet its burden under 28 C.F.R. § 36.301(b) of showing that its safety rule was "based on actual risks and not on mere speculation, stereo types or generalizations about individuals with disabilities." Id. The Matheis Court ruled that the evidence adduced by the defendant during discovery did not meet its burden of showing that its safety rule was valid under §36.301(b). Id. at 181. The defendant did not adduce

evidence that its policy was based on "actual risk and not based on speculation, stereotypes, or generalizations." Accordingly, the defendant was not entitled to summary judgment.

Defendants' Direct threat defense fairs no better. The ADA "regulations make clear that a public accommodation may not simply speculate as to the existence of a direct threat by an individual." Masci, 2014 U.S. Dist. LEXIS 178666 at *28. The public accommodation

> must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

Id., quoting 28 C.F.R. § 36.208(b). The direct threat defense does not "apply if the public accommodation can make reasonable modifications for the individual." Bench, No. 13-cv-705, 2014 U.S. Dist. LEXIS 179313 at *15. If a defendant asserts a direct threat defense it has the burden of showing that it made an "individualized assessment, based on… current medical knowledge or on other best available objective evidence." Id. at *27. "Whether one is a direct threat is a complicated, fact-intensive determination…. To determine whether a particular individual performing a particular act poses a direct threat to others requires weighing all of the evidence about the nature of the risk and potential harm." Id. at * 28, quoting Rizzo v. Children's World Learning Ctr., Inc., 84 F.3d 758, 764 (5th Cir. 1996).

Plaintiffs' complaint clearly alleges that the defendants made no individualized assessments. Doc. 32, ¶ 290. Plaintiffs allege they were not a direct threat to anyone. Id. Most importantly, Plaintiffs allege that Giant Eagle's no-exception policy was not based on objective evidence because the policy is in direct conflict with the CDC, Pennsylvania Health Secretary, and Pennsylvania Department of Health's Orders, guidelines and publications. Id. Defendants will have the burden of proving that their policy and their actions complied with 28 C.F.R. §

36.208. Defendants will also have to produce evidence explaining how and why they decided Plaintiffs were a direct threat to others, while unmasked customers across the state lines posed no threat warranting a mask policy. Accordingly, Defendants' direct threat argument in support of their Rule 12(b)(6) is not a proper foundation for a motion to dismiss.

IV. CONCLUSION

Plaintiffs have pleaded facts establishing all elements of their claims and accepting all the allegations as true, Plaintiffs are clearly entitled to the relief they seek. Therefore, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

THOMSON, RHODES & COWIE, P.C.

Dated September 22, 2020

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