United States Court of Appeals for the Third Circuit

Case No: 12-3641

RHJ Medical Center, Inc.,

Plaintiff-Appellant,

v.

City of DuBois,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Pennsylvania, Case No. 09-131

Reply Brief of Appellant RHJ Medical Center, Inc.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Stripped of hyperbole, inaccurate factual and legal citations, and an erroneous view of governing standing and mitigation principles, the Brief of Appellee City of DuBois (the "City") fails to provide any support for the District Court's incorrect determinations.[1]

ARGUMENT

I. The District Court Erred in Finding that RHJ Lacked Standing under the ADA and the Rehabilitation Act Because the Record Establishes that the City Regarded RHJ's Patients as Disabled.

The City argues that (i) the standard of review governing RHJ's standing claim is "clearly erroneous;" (ii) RHJ waived its "regarded as" claim; (iii) the District Court correctly applied the legal test for RHJ's "regarded as" claim; (iv) the Department of Justice's comments to the regulations it promulgated on the "regarded as" prong constitute an "astounding circumvention of Supreme Court precedent;" and (v) the City did not regard RHJ's patients as disabled. The City is wrong on every count.

[1] The City's incessant use of words like "incredibly," "astounding," and "desperate" to describe RHJ's positions does nothing to advance its arguments. (*See, e.g.*, City Brief at 14, 16, 17, 25, 38, 61). Likewise, the City's ad hominem and unsupported attack on RHJ's counsel for his "flawed trial strategy" on an issue not before this Court is unnecessary and violates Local Rule 28.1(d). (*Id.* at 14, 16 –17).

A. RHJ's Standing Claim is Subject to De Novo Review.

The City acknowledges that "standing is subject to de novo review" but claims that the District Court's conclusion that RHJ lacked standing under the ADA and the Rehabilitation Act is subject to the "clear error" standard afforded factual determinations. (City Brief at 17). As support for this position, the City relies on *Williams v. Phila. Housing Auth. Police Dep't.*, 380 F.3d 751, 762 (3d Cir. 2004). However, *Williams* stands for the proposition that the district court's *factual* determinations underlying its standing decision are evaluated under "clear error." Whether those facts establish a "disability" necessary for standing under the ADA and the Rehabilitation Act is reviewed de novo. *Id.* at 762.

The facts relating to RHJ's "regarded as" disabled claim are undisputed, making the "clearly erroneous" standard inapplicable. *See, e.g., Xingzhang Chen v. Att'y Gen. of the U.S.*, 479 Fed. Appx. 428, 430 (3d Cir. 2012) ("Legal conclusions, including applications of law to undisputed facts of record, are reviewed de novo."); *Easley v. Snider*, 36 F.3d 297, 300 (3d Cir. 1994) ("In reviewing this appeal, the court exercises a plenary standard of review when applying legal precepts to undisputed facts.").

B. RHJ Did Not Waive its "Regarded As" Claim.

The City asserts that RHJ did not preserve its "regarded as" claim on appeal because it did not sufficiently raise the argument in the District Court. (City Brief

at 21–24). This is incorrect. The legal effect of the City's discriminatory views of RHJ's patients was a central issue at every stage of this litigation. As the City repeatedly mentions in its Brief, the District Court delivered an 84-page opinion denying the City's Motion for Judgment on the Pleadings with an extensive discussion of standing under the ADA and the Rehabilitation Act. (City Brief at 3, 12–14).

The District Court exhaustively detailed the two main cases that RHJ relies upon in this appeal to reflect its patients' major life activities: *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35 (2d Cir. 2002) and *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002). (A0085–A0088; A0096–A0097; A0106; A0110–A0111; A0118–A0120). The District Court specifically discussed the "regarded as" prong, (A0112–A0113), and, in reliance on *Reg'l Econ.*, stated that "the inability to live independently without suffering a relapse . . . limits the major life activity of 'caring for one's self'"—the same claim that RHJ makes here. (A0121; RHJ Brief at 28–32).

RHJ preserved its "regarded as" claim both at trial and in its post-trial submissions. At trial, RHJ presented witnesses and exhibits establishing the City's prejudicial perceptions of RHJ's patients, while the City tried to portray the prejudice as generalized and unrelated to RHJ's patients' drug addiction. (A0043).

In its Proposed Findings of Fact and Conclusions of Law, RHJ:

- stated that "[r]elying on unfounded fears, generalized prejudice, and illegitimate concerns" of RHJ's patients, the City kept RHJ out of DuBois, (A1798);

- identified "caring for oneself" as a major life activity that it was proceeding under, (A1846);

- cited to and explained the holdings of *Reg'l Econ* and *United States v. City of Baltimore*, 2012 U.S. Dist. LEXIS 26539 (D. Md. Feb. 29, 2012), decisions establishing that the inability to live independently without suffering a relapse is a major life activity, (A1848);

- stated that "[b]ased on the multitude of undisputed misperceptions and stereotypes from DuBois residents and officials concerning the patients RHJ was treating, RHJ easily satisfies the 'regarded as' prong," (A1850);

- outlined the same evidence of the City's discriminatory perceptions for its "regarded as" claim as RHJ set forth in its Opening Brief, (A1851; RHJ Brief at 28–36);

- cited to and quoted from *MX Group* for the proposition that a city's unfounded fears that a methadone clinic's patients will increase crime confers "regarded as" standing, the exact "criminality" argument RHJ made in its Opening Brief, (A1852; RHJ Brief at 35–36);

- directed the District Court to the Department of Justice's comments that describe the "regarded as" inference RHJ claims in its Opening Brief, (A1851; RHJ Brief at 36–37); and

- argued that the City prevented RHJ from locating at its desired location in DuBois for no legitimate reason. (A1819–A1822; A1825 –A1828).

In response, the City engaged in a thorough discussion of *Reg'l Econ.* and attempted to distinguish the case. (A1920–A1921). The City then attacked RHJ's

"regarded as" claim based on the same arguments it now asserts in this Court. (A1923–A1925; City Brief at 27–39).

The District Court's opinion confirms that the "regarded as" issue was presented below and not waived. The District Court concluded that the City prohibited RHJ from locating at its desired location for no legitimate reason but specifically rejected RHJ's "regarded as" claim based upon an improper legal standard. (A0042–A0044; A0050–A0055). Thus, RHJ has properly preserved its "regarded as" claim for review in this Court.

However, even assuming these explicit references are insufficient, waiver is inappropriate here because (i) there is a fully developed factual record; (ii) the arguments are legal in nature; (iii) RHJ's claims on appeal are "closely related to arguments that [RHJ] did raise in" the district court; and (iv) the City would suffer no surprise. *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 417–18 (3d Cir. 2011).[2]

[2] The cases cited by the City in support of waiver are distinguishable because, to the extent waiver was even discussed, each decision was made at summary judgment where the record in the district court was devoted to a specific major life activity that the plaintiff abandoned on appeal in favor of another major life activity that was never previously mentioned in the district court. (City Brief at 22, citing *Sinkler v. Midwest Prop. Management Ltd. Partnership*, 209 F.3d 678, 683 (7th Cir. 2000) (plaintiff "identified 'working' as the major life activity" before the district court but "now argues that her phobia limits her major life functions of . . . thinking, concentrating, and basic personal mobility"); *Mikruk v. U.S. Postal Service*, 115 Fed. Appx. 580, 582–83 (3d Cir. 2004) (same); *Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 188 (1st Cir. 2011) (no discussion of waiver); *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1216 (10th Cir. 2007) (same)).

C. The District Court Applied the Incorrect Legal Standard to RHJ's "Regarded As" Claim.

Contrary to the City's assertions, RHJ does not dispute that an individual can be disabled as a result of the attitude of others toward the individual's impairment. (City Brief at 19–20). RHJ's point in its Opening Brief was that the District Court impermissibly confined itself to considering whether RHJ's patients were in fact substantially limited. (RHJ Brief at 21, 23–24). The "regarded as" legal test required the District Court to focus on and evaluate whether the City perceived RHJ's patients as substantially limited in a major life activity when the City prevented RHJ from locating at its desired location based on discriminatory views. (*Id.* at 24–26). The District Court never conducted this analysis because it believed that discriminatory perceptions were "not sufficient on [their] own to satisfy the 'regarded as' definition of disability." (A0043). This conflicts with controlling law. *See, e.g., Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999) (holding that the "regarded as" prong is designed to cover individuals "rejected . . . because of the myths, fears and stereotypes associated with disabilities"). Therefore, the District Court applied the incorrect legal standard to RHJ's "regarded as" claim.

D. The "Regarded As" Inference is Appropriate in this Case.

According to the Department of Justice ("DOJ"), if a person is rejected by a public entity for no legitimate reason, the person qualifies for protection under the ADA and the Rehabilitation Act pursuant to the "regarded as" prong. (RHJ Brief

at 36–37). Rather than engage in meaningful analysis of the DOJ's comments to the regulations it promulgated on the "regarded as" prong, the City summarily dismisses the comments in a footnote as an "astounding circumvention of Supreme Court precedent." (City Brief at 24, n.5). The City never identifies the Supreme Court precedent to which it refers. This is because none exists. The Supreme Court has counseled that the DOJ's comments "warrant respect" and has cited to them in addressing the "regarded as" prong. *Olmstead v. L.C.*, 527 U.S. 581, 597–98 (1999); *Sutton*, 527 U.S. at 489–490. The City cannot avoid the persuasive force of the comments by denigrating them.

Equally unconvincing is the City's suggestion that RHJ is using the DOJ's comments to avoid its burden of proof. (City Brief at 24, n.5). The "regarded as" inference only comes into effect *after* the plaintiff establishes that the public entity rejected it for no legitimate reason. 28 C.F.R. § 36.104. As the District Court expressly found, RHJ carried this burden when it proved that the City prohibited RHJ from locating at its desired location for "no rational reason." (A0030–A0031; A0054–A0055). No more is necessary.

E. The City Regarded RHJ's Patients as Disabled.

The City argues that RHJ cannot establish its "regarded as" claim because (i) this case is controlled by the Fourth Circuit's decision in *A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356 (4th Cir. 2008) and (ii) the City was not associated

with the generalized prejudice exhibited by its own officials and residents. (City Brief at 27–39). Neither argument is persuasive.

1. *A Helping Hand* is Distinguishable.

In *A Helping Hand*, the district court granted a directed verdict to the plaintiff on the grounds that the County regarded its methadone patients as substantially limited "in the major life activities of working or obtaining employment, learning, thinking, caring for one's self, and interacting with others." *A Helping Hand*, 515 F.3d at 365, 367. The directed verdict was based on evidence that the County viewed the plaintiff's patients as criminals and undesirable neighbors. *Id.* at 367. On appeal, and after "drawing all reasonable inferences in favor of the County," the Fourth Circuit reversed finding that "although we have no difficulty concluding that a reasonable jury could have found that the community regarded the Clinic's clients as significantly impaired in one or more major life activities, we cannot conclude that this is the only outcome a reasonable jury could have reached." *Id.* at 368. The City contends that *A Helping Hand* requires this Court to defer to the District Court's ruling. (City Brief at 28).

However, *A Helping Hand* is distinguishable for two reasons. First, in *A Helping Hand*, there was no evidence that the County viewed the plaintiff's patients' addiction as substantially limiting their ability to care for themselves by

living independently from the influence of drugs. Thus, the plaintiff was forced to fit the square peg of criminality into the round hole of "the major life activities of working or obtaining employment, learning, thinking, caring for one's self, and interacting with others." 515 F.3d at 367. It was an imprecise fit because criminality, *by itself*, did not directly equate with any of the major life activities advanced by the plaintiff. As a result, the plaintiff's "regarded as" claim required an inference making a directed verdict inappropriate. *Id.* at 368 ("[I]t does not necessarily follow that because the clients were regarded as criminals and undesirable neighbors, they were also regarded as unable to learn, interact with others, or care for themselves—again, a jury could permissibly draw these inferences, but it need not do so.")

In contrast to *A Helping Hand*, this case *is* a precise fit because the inability to live independently from the influence of drugs directly equates to the major life activity of "caring for oneself." *See Reg'l Econ.*, 294 F.3d at 47–48. Therefore, unlike in *A Helping Hand*, there is no need for inference here. The undisputed facts demonstrate that the City viewed RHJ's patients as (i) unable to avoid overdoses; (ii) suffering from a "severe" condition; (iii) suicidal; (iv) in constant need of medical attention; and (v) in the City's own words on multiple occasions:

"**disabled**."[3] (RHJ Brief at 28–32; 37). On this evidentiary record, no reasonable fact-finder could conclude anything but that the City viewed RHJ's patients as substantially limited in the major life activity of "caring for oneself."

Second, *A Helping Hand* is distinguishable because the Fourth Circuit never addressed whether "productive social functioning" qualified as a "major life activity." Indeed, the plaintiff in *A Helping Hand* never advanced this theory, choosing instead to rely on major life activities that did not, on their face, encompass criminality. This is a crucial distinction because the Sixth Circuit found that "productive social functioning" was a major life activity that was substantially limited by equating methadone patients with criminality—the exact scenario present here. *See MX Group*, 293 F.3d at 342.

2. The City Perceived RHJ's Patients as Substantially Limited in their Ability to Care for Themselves and Function Productively in Society.

The City attempts to distance itself from the multitude of discriminatory and stereotypical comments that it expressly adopted on the basis of six ultimately-flawed arguments:

[3] Absent from the City's Brief is any discussion of the undisputed fact that the City repeatedly *admitted* that it viewed RHJ's patients as "**disabled**." (A1654) (City Solicitor on the City requiring RHJ to locate in the O-1 Office District: "We thought that was certainly the most convenient spot for our citizens with **disabilities** to receive proper treatment.") (RHJ Brief at 17; 36–37, citing A1351–A1354; A1364).

First, the City claims that its prejudice against RHJ does not mean that it viewed RHJ's patients as substantially limited in a major life activity. (City Brief at 29–32). However, the City was not just generally prejudiced against RHJ's patients. Rather, the City made stereotypical assumptions about the patients' addiction that informed every invalid action the City took against RHJ. (RHJ Brief at 28–32). These are exactly the type of stereotypical assumptions about substance abuse patients that the ADA and the Rehabilitation Act are designed to prevent. *See MX Group*, 293 F.3d at 342 ("[I]t is clear that insofar as the Rehabilitation Act or the ADA evinces a general recognition of substance abuse as a disease, discrimination on the basis of such a handicap is antithetical to one of the goals of the Act—to ensure that persons . . . are not victimized . . . by . . . *stereotypical assumptions concerning their handicap*.") (emphasis in original) (citation omitted).

Second, the City asserts that comments from DuBois resident Tina Anand ("Anand") about RHJ's patients should not be considered because she "was not a member of the City's government."[4] (City Brief at 30). Anand's comments are

[4] In passing and without providing any legal support, the City appears to contend that Anand's comments should be disregarded because RHJ did not appeal the District Court's failure to consider them. (City Brief at 30). The City has waived this argument. *Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) (finding waiver of issue in party's opening brief because "a passing reference to an issue . . . will not suffice to bring that issue before this court"); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (holding that party's failure to present legal argument in support of an issue in brief waives that issue on appeal). Nevertheless, the claim is meritless. Federal Rule of Appellate Procedure 3(c)

imputed to the City because the City adopted them in denying RHJ's application for a certificate of use and the District Court erred in refusing to consider them. (RHJ Brief at 29). Anand (i) believed that RHJ's patients would overdose and wanted RHJ's doctor to have privileges at the local hospital to deal with them when they did (A1461, A1463); and (ii) expressed her concern about security and "the violence that this will bring right into our town, right dead set DuBois." (A1464). The City adopted these comments by denying RHJ's application for a certificate of use on the grounds that RHJ lacked (i) a physician on site at all times; (ii) a physician on staff at the local hospital to care for RHJ's patients when they overdosed; (iii) an ambulance to transport patients who overdosed; and (iv) "on-site security." (A1569–1570; A1746) (the City admitting that it "viewed and voted to adopt the Findings and Fact and Conclusions of Law . . . denying RHJ's application for a certificate of use").

The City's attempt to distinguish RHJ's case law on imputation of public comments is unavailing. (City Brief at 30, n.7). The City claims that *Innovative Health System v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) does not apply because the public comments in that case were made in a discriminatory environment. (City Brief at 30, n.7). However, the District Court found that the

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only requires that a notice of appeal "designate the judgment, order or part thereof appealed from." The District Court refused to consider Anand's comments in its Findings of Fact and Conclusions of Law. (A0024). RHJ appealed from this decision. (A0002).

City's decision to prohibit RHJ from locating at its desired location was based on discriminatory opposition with no rational underpinning. (A0028; A0030–A0031; A0054–A0055; A1660). The City claims that *Pathways Psych. v. Town of Leonardtown*, 133 F. Supp. 2d 772, 783–84 (D. Md. 2001) does not apply because the decision involved a city agreeing with and responding to community opposition and fear. (City Brief at 30, n.7). But that is exactly what the City did here when it agreed with and responded to Anand's opposition and fears in its decision to deny RHJ's certificate of use application. (A1569–1570). Even the case the City principally relies upon in its "regarded as" argument makes clear that public comments can be imputed to governments when the government decision is based on those comments. *See A Helping Hand*, 515 F.3d at 366 ("[I]t is well-established that community views may be attributed to government bodies when the government acts in response to these views.") (citations omitted).

Third, the City asserts that comments from Dubois Zoning Hearing Board Solicitor Ben Blakley ("Blakley") about RHJ's patients should not be considered because "he was not associated with the City." (City Brief at 31, n.9). However, before the District Court, the City never once disputed RHJ's argument that Blakley was affiliated with the City. (A1815; A1908–A1943). Thus, the City has waived any such argument on appeal. *See Tri-M Grp.*, 638 F.3d at 416 (holding that arguments raised for the first time on appeal are waived). Regardless, Blakley

is now the DuBois Zoning Hearing Board Solicitor and was, at the very least, a city firefighter at the time he made his comments, (A0603–A0604; A1469–A1470), and his comments were expressly adopted by the City as grounds for the denial of RHJ's application for a certificate of use. (A1466–A1470; A1569–A1570).

Fourth, the City argues that this Court cannot attach any significance to the comments made by its officials and residents because "*many* of the questions were prompted by the 'Frequently Aked (sic) Questions'" literature distributed by RHJ at the public hearing on its certificate of use application. (City Brief at 31) (emphasis added). This is false as proven by the City's own supporting citation. RHJ's representative testified that only *one* question, not "many," was detailed in its literature, and that question related solely to property values—not to patients' addiction or their perceived criminality. (A0221–0224). The City produced no evidence that any resident or official who made stereotypical comments actually read RHJ's literature, and never even introduced the literature as an exhibit at trial.

Fifth, the City contends that the "caring for oneself" case law "cited by RHJ underscore its failures of proof" because the cases relate to individuals who "were found to be disabled—not regarded as disabled, as RHJ contends with its patients." (City Brief at 34). This is a distinction without a difference. The cases to which the City refers were cited for the proposition that the inability to live independently without relapsing into drugs substantially limits the major life activity of "caring

for oneself." (RHJ Brief at 28; 32). Whether RHJ's patients were actually disabled in this manner or whether the City just viewed them as such is immaterial under the ADA and the Rehabilitation Act. Both showings equally confer the necessary standing. *Sutton*, 527 U.S. at 489.

Sixth, the City asserts that RHJ cannot prove that the City regarded its patients as substantially limited in their ability to "function productively in society" because "RHJ's cited authority does not support its position that the ability to 'function productively in society' is a major life activity." (City Brief at 36). In doing so, the City disregards and misstates the clear language of *MX Group*, a case directly on-point that the City relegates to a footnote. (City Brief at 36, n.11). The City claims that *MX Group* addressed the major life activity of "interacting with others" and that when the plaintiff suggested that "'social productive functioning' constituted a 'major life activity,' the Sixth Circuit found that it did not know what the party meant." (*Id.*).

To the contrary, the Sixth Circuit expressly found that the city's statements about the methadone clinic's patients' perceived criminality, "at the very least, limited **the major life activity of productive social functioning**, as their status as recovering drug addicts was consistently equated with criminality." *MX Group*,

293 F.3d at 342 (emphasis added). This holding cannot be clearer, and the City cannot escape *MX Group* by misrepresenting what the Sixth Circuit actually held.[5]

II. The District Court Erred in Holding that RHJ Could Only Mitigate its Damages by Contacting DRMC About Leasing an Unlisted, Dissimilar Property in the O-1 Office District of DuBois.

The City argues that (i) the standard of review governing *all* of RHJ's mitigation arguments is "clearly erroneous;" (ii) the District Court correctly applied the legal test for failure to mitigate when it focused solely on the one reasonable action the City claimed RHJ could have pursued; (iii) the evidentiary record supports the District Court's factual finding that an alternative property was available for RHJ in the area the City unconstitutionally zoned it; (iv) RHJ was not prevented from taking steps necessary to mitigate its damages because a civil rights plaintiff has an obligation to mitigate its damages under *any* circumstances; and (v) RHJ waived its capitulation claim. Each argument is without merit.

[5] The City also contends that RHJ cannot establish its "regarded as" claim because it "did not provide any evidence about its patients, and the ADA and RA exclude addicts who continue to use or who very recently used narcotics." (City Brief at 25, n.6). The City ignores 42 U.S.C. § 12210(c) of the ADA and 29 U.S.C. § 705(20)(c)(iii) of the Rehabilitation Act, which provide that an individual currently using illegal drugs is still protected by the Acts if they are receiving services provided in connection with drug rehabilitation. It is undisputed that RHJ provides drug rehabilitation to its patients. (City Brief at 4).

A. The District Court's Misinterpretation of Mitigation Law is Subject to De Novo Review.

The City recognizes that "the trial court's interpretation of the law is subject to plenary review," but then appears to summarily lump RHJ's three legal arguments into the "clearly erroneous" standard enunciated in *Prusky v. Reliastar Life Ins. Co.*, 532 F.3d 252 (3d Cir. 2008). (City Brief at 40–41, n.12). RHJ concedes that the "clearly erroneous" standard of review governs RHJ's claim that the evidentiary record does not support the District Court's factual finding that RHJ could have reduced its damages. (RHJ Brief at 39). However, as the City's citation to *Prusky* aptly demonstrates, the "clearly erroneous" standard is limited to "whether the [plaintiff]'s actual efforts were reasonable under the circumstances" and has no application when a party is disputing the district court's interpretation of mitigation principles, as RHJ is doing here. (City Brief at 41, n.12).

B. The District Court Misinterpreted Mitigation Law By Focusing Solely on the One Reasonable Action the City Claimed RHJ Failed to Pursue.

Mitigation law requires a plaintiff to act reasonably which is not the same as taking *every reasonable action*. *Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat'l Bank of Evans City*, 611 F.2d 465, 471 (3d Cir. 1979). RHJ indisputably (i) explored alternative sites in the DuBois area for its methadone clinic (A0035); (ii) hired the only exclusive commercial broker in the DuBois area to locate an alternative property (A1060); (iii) entered into lease negotiations for the only

property its commercial broker was able to find (A0404–A0405; A0766–A0767); and (iv) was rejected by the owner because of the stigma associated with methadone treatment. (A0404; A0767–A0768; A0770; A0036). Based on these specific actions, the District Court was "persuaded" that RHJ undertook significant efforts to lease an alternative property in the DuBois area. (A0036). The District Court erred in finding that, despite this reasonable conduct, RHJ had to do more.

The City disagrees, contending that mitigation "is not dependent on a predicate finding that a plaintiff unreasonably failed to seek alternatives," and then proceeds to only cite cases where the court predicated its mitigation finding on the fact that the plaintiff unreasonably failed to seek alternatives. (City Brief at 43–45, citing *Le v. Univ. of Pennsylvania*, 321 F.3d 403, 407 (3d Cir. 2003) ("Le did not attempt to find other work for a significant period of time following his dismissal, and only half-heartedly began after the amended lawsuit was filed in 2000."); *Booker v. Taylor Milk Co.*, 64 F.3d 860, 864–65 (3d Cir. 1995) (finding that the plaintiff's actions demonstrated that he "was not reasonably diligent in an effort to secure employment" because the plaintiff failed to apply to any of the available minimum wage jobs in the thirty-three months following his discharge); *Waldorf v. Shuta*, 142 F.3d 601, 624 (3d Cir. 1998) (finding that the plaintiff's refusal to return to work after injury was sufficient to uphold the jury's determination that he unreasonably failed to mitigate his losses); *Clarke v. Whitney*, 975 F. Supp. 754,

760 (E.D. Pa. 1997) (finding that the specific action taken by the plaintiff to mitigate his damages was unreasonable because it required him to abandon his job search in favor of forming a business with no start-up capital); *Holocheck v. Luzerne County Head Start, Inc.*, 2007 WL 954308, at *13–14 (M.D. Pa. Mar. 28, 2007) (holding that the plaintiff's specific action in withdrawing from the labor market constituted an unreasonable failure to seek alternatives)). These cases do not support the City's position because, unlike the District Court, each decision focused on whether the specific actions taken by the plaintiff amounted to an unreasonable failure to seek alternatives.

The implications of the City's logic and the District Court's decision are significant. Under their approach, a discriminatory employer could satisfy his mitigation burden by pointing to a *single* available job that the employee failed to pursue regardless of how diligent the employee was in applying and interviewing for other positions. The employee could not mitigate her damages unless she applied for *every* possible position, advertised or not. This is not the law on mitigation. Rather, this is an improper shifting of the mitigation burden from the wrongdoer to the victim of discrimination. Yet, this is exactly what the District Court did here and what the City asks this Court to condone.

A closer look at the cases the City claims were decided "in this exact context" bears that out. (City Brief at 49–50). In *Wolfe v. The Village of Brice*,

Ohio, 997 F. Supp. 939 (S.D. Ohio 1998), the district court found that the defendant town did not satisfy its mitigation burden on summary judgment against an adult book store that was the victim of discriminatory zoning. *Wolfe*, 997 F.Supp. at 945. The *Wolfe* plaintiff failed to make any attempt to mitigate his damages by renting out his premises. *Id.* Nevertheless, the district court found that the defendant still "must present evidence that there were prospective tenants to which Plaintiff could have rented his premises at the same rate as his 1995 tenants . . . ."[6] *Id*. The City includes similar dicta from two other cases where the injured plaintiff took no mitigation steps. *See Bieter Co. v. Beatta Blomquist*, 987 F.2d 1319, 1329 (8th Cir. 1993) (the plaintiff refused to do anything with property after being prevented from his preferred development); *Video Int'l Prod. Inc. v. Warner-Amex Cable Comm., Inc.*, 858 F.2d 1075, 1087–88 (5th Cir. 1988) (the plaintiff did not attempt to re-open business after being shut down).

Nowhere in *Wolfe*, *Bieter*, or *Video Int'l* is there any indication that a defendant can satisfy its mitigation burden against a plaintiff that indisputably took affirmative steps to mitigate its damages by simply pointing to an additional action the plaintiff failed to take. Instead, these cases stand for the unremarkable proposition that when the plaintiff makes no attempt to mitigate its damages, there

[6] Applying the *Wolfe* dictum to this case undercuts the District Court's factual mitigation finding because the City failed to show that a suitable property existed in the O-1 Office District with the "same" rent as 994 Beaver Drive, RHJ's desired location. (A1282–A1283).

is no need to focus on its specific actions in making the mitigation determination. In such circumstances, it is enough that the defendant can point to one action that the plaintiff could have taken that would have been better than the plaintiff doing nothing. This reasoning has no application here.

A final argument raised by the City merits brief mention. The City implies that RHJ's "purposeful abandonment" of its property search "a mere eight months" after being unconstitutionally zoned out of its desired location for a second time by the City somehow factored into the District Court's mitigation decision. (City Brief at 45–47, 49, 56). It did not. There is no discussion anywhere in the District Court's damages analysis about RHJ's decision to move on with its business after eight months of diligent searching and two years of invalid City action. (A0056–A0060). The District Court's conclusion that RHJ failed to mitigate its damages was based solely on RHJ not pursing the single allegedly reasonable action the City identified. (*Id.*).

C. The Evidentiary Record Does Not Support the District Court's Factual Finding that an Alternative Property Existed for RHJ in the O-1 Office District During the Relevant Period.

In the attempt to support the District Court's finding that there was space available for RHJ in the O-1 Office District of DuBois after November 27, 2007, the City distorts the evidentiary record. The City's citations do not show that the former DRMC President testified about any specific properties meeting RHJ's

specifications. (City Brief at 55 n.21; 56, citing A1270–A1271; A1277–A1279). The former DRMC President's testimony was general in nature and the only specific properties he identified were (i) of an unknown or lesser square footage, (ii) in a residential area, and (iii) unavailable once RHJ's mitigation obligation arose. (RHJ Brief at 50–54).

The City deflects attention away from these evidentiary deficiencies by focusing two pages of its mitigation argument on a subject never addressed by the District Court and which has no relevance to any issue in this appeal: the City's subjective belief that RHJ "abandoned" injunctive relief at trial for "a windfall of monetary damages for the work it was no longer interest (sic) in performing." (City Brief at 57–58). This second ad hominem attack on RHJ without any supporting citation violates Local Rule 28.1(d) and demonstrates the City's hypocrisy. The City maintained throughout this litigation that RHJ was prohibited from obtaining any injunctive relief and was thus limited to damages: "Defendant argues that this Court cannot consistent with precepts of federalism, enter the sphere of local governance and order the City to grant RHJ a permit, as this would impermissibly interfere in the local governance of the City." (A0132) (internal citations omitted).

D. The City Prevented RHJ from Taking Steps Necessary to Mitigate its Damages.

The City argues that it did not interfere with RHJ's mitigation efforts on the basis of two cases holding that a civil rights plaintiff has an obligation to mitigate damages. (City Brief at 60–61). RHJ does not dispute this. RHJ's point is that when a defendant affirmatively prevents a plaintiff from taking steps necessary to avoid damages as the City did here, the plaintiff cannot be held responsible for failing to mitigate its damages. (RHJ Brief at 49–50).

The undeniable fact is that at the time its mitigation obligation arose, RHJ was unable to consider any properties in DuBois outside of the O-1 Office District. The zoning districts that the City prohibited RHJ from locating in were the only areas in DuBois that had property that met RHJ's specifications. (RHJ Brief at 49). The City's now unquestionable deprivation of RHJ's constitutional rights cannot be used to narrow the universe of RHJ's mitigation options. The City cannot and does not offer any response to this.

E. RHJ Did Not Waive its Capitulation Argument which is Supported by Law.

The City claims that RHJ waived its argument that it cannot be required to capitulate to the City's unconstitutional zoning demands in order to mitigate its damages. (City Brief at 61). However, this argument did not exist until the District Court made its decision. As the City recognized, it had the affirmative

burden to prove failure to mitigate. (City Brief at 41). Thus, RHJ simply responded to what the City argued.

The City never claimed that RHJ could only mitigate its damages by locating in the O-1 Office District. In fact, the City's trial presentation on mitigation centered on six dissimilar properties for RHJ that existed *outside* of DuBois, in Sandy Township. (A1842–A1843). It was only after the District Court properly rejected each of these six dissimilar properties that RHJ was effectively compelled to locate where the City unconstitutionally zoned it. Thus, the issue did not become ripe until the District Court's mitigation decision.[7]

The City challenges the merits of RHJ's capitulation argument on the basis of two unlawful arrest cases, neither of which are persuasive. (City Brief at 62–63). In *Gladden v. Roach*, 864 F.2d 1196 (5th Cir. 1989), the plaintiff did not make a capitulation argument and instead simply objected to jury instructions that he felt did not make clear "that only reasonable opportunities or reasonably available opportunities were to be considered for purposes of mitigation." 864 F.2d at 1200. In *Wells v. City of Chicago*, 2009 U.S. Dist. LEXIS 15792 (N.D. Ill. Feb. 25, 2009), the plaintiff did not make a capitulation argument and the district

[7] To the extent the City's argument can be deemed to imply that RHJ was required to locate in the O-1 Office District, RHJ's response in the District Court preserved its capitulation argument: "[t]he fact that hospitals are, in theory, a good location for methadone treatment centers does not mean that municipalities can force methadone treatment centers to *only* locate there through discriminatory zoning." (A1881).

court merely found that a question of fact existed as to whether he failed to mitigate his damages when he chose to remain incarcerated as a matter of principle. 2009 U.S. Dist. LEXIS 15792, at *29. Even so, these cases are not analogous to RHJ's situation because posting a bond to *free* oneself from unconstitutional demands is not equivalent to the leasing of property that *binds* oneself to unconstitutional demands.

CONCLUSION

In sum, the District Court erred in its standing and mitigation determinations. Therefore, RHJ requests that this Court: (i) reverse the decision of the District Court entering judgment in favor of the City on RHJ's claims under the ADA and the Rehabilitation Act; (ii) remand the case to the District Court for entry of judgment in favor of RHJ on RHJ's claims under the ADA and the Rehabilitation Act; (iii) reverse the decision of the District Court finding that RHJ failed to mitigate its damages after November 27, 2007; and (iv) remand the case to the District Court for a determination of the damages that RHJ is entitled to recover as a result of the City's violation of its constitutional rights.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify:

1) that Matthew Monsour and Kevin Batik are members of the bar of this Court.

2) that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,312 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3) that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point font.

4) that the text of the PDF copy and the hard copy of the brief are identical.

5) that a virus check was performed on the PDF copy of the brief using Symantec Endpoint Protection, version 11.0.7101.1056 and that no virus was detected.

6) that on February 8, 2013, I caused to be served two copies of this Brief via United States first class mail, postage prepaid, upon the following:

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7) that on February 8, 2013, the same day that I transmitted to the Court an electronic version of this Reply Brief, 10 copies of this Reply Brief were mailed, via United States, first-class mail, postage prepaid to:

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