STATE OF VERMONT

SUPERIOR COURT
Lamoille Unit

CIVIL DIVISION
Docket No. 21-CV-1018

TINA FLEURREY, et al.,
Plaintiffs

v.

VERMONT DEPARTMENT OF AGING AND INDEPENDENT LIVING, et al,
Defendants

DECISION
Motion to Dismiss (Motion #5)

STATE DEFENDANTS DAIL and HUTT'S MOTIONS TO DISMISS Counts IV, XII, & XIII

At issue in this motion are claims of negligence, violation of the Fourteenth Amendment and attached supervisory liability, and violation of the American Disabilities Act ("ADA"), all stemming from the death of Scott Fleurrey. Mr. Fleurrey drowned in a pond near a home at which he lived with a caretaker. Mr. Fleurry was placed in the home by Upper Valley Services, Inc. ("UVS"), a private non-profit corporation authorized by the Vermont Department of Disabilities, Aging and Independent Living ("DAIL") to provide services to disabled individuals. Defendants DAIL and its former commissioner Monica Hutt are two of numerous individuals and entities sued by Plaintiff Tina Fleurrey in the wake of Mr. Fleurrey's death. In this Motion, the two State Defendants, DAIL and Hutt, seek dismissal of the following claims against them:

Count IV: Plaintiff's negligence claim alleges that Defendant DAIL owed a duty of care to Mr. Fleurrey to keep him safe from harm, as DAIL knew or should have known that the pond posed an elevated risk of danger to Mr. Fleurrey on account of his disabilities and failed to take steps to reduce the danger.

Count XII: Plaintiff's Fourteenth Amendment claim alleges that Defendant Hutt intentionally failed to train DAIL employees and agents in the proper inspection of property used for the housing of disabled individuals. Due to her failure, no measures were taken to protect Mr. Fleurrey from the risk posed by the pond, and as a result Mr. Fleurrey's substantive due process right to be free from harm as an individual held in the State's custody was violated. The claim is that as it was Defendant Hutt's actions that led to the creation of the inadequate inspection procedures, Defendant Hutt is liable as a supervisor.

Count XIII: Plaintiff's ADA claim alleges that Defendant DAIL was in violation of Title II of the Americans with Disabilities Act by not providing Mr. Fleurrey with "the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d),

as the presence of the pond on the property rendered it an inappropriate setting for Mr. Fleurrey to live.

On July 16, 2021, Defendants DAIL and Hutt filed a motion to dismiss the relevant counts. On the claim of negligence, Defendant DAIL argues that it was a discretionary choice made by DAIL to inspect the property as part of its individualized safety planning procedures and it is not possible to sue due to sovereign immunity. In the alternate, DAIL asserts that state inspections do not create a tort duty of care where there is no custodial relationship with the plaintiff. On the Fourteenth Amendment claim, Defendant Hutt argues that qualified immunity bars the claim, and in the alternate that Defendant Hutt took no action that constituted personal involvement such that supervisor liability would be implicated. Finally, on the ADA claim, Defendant DAIL argues that Plaintiff misconstrued the language of 28 C.F.R. § 35.130(d), which is an antidiscrimination provision, not an environmental provision.

On August 20, 2021, Plaintiff filed a memorandum in opposition. Plaintiff argues that the inspection procedures were not a discretionary choice as UVS was required by DAIL to carry them out and that a tort duty of care did exist as there is a private analogue to the state inspection. Plaintiff also argues that Hutt is not entitled to qualified immunity because Mr. Fleurrey was in the custody of the state at the time of his death. Plaintiff additionally contends that Hutt as a supervisory official was aware of unconstitutional practices and allowed them to continue, exposing her to liability. Finally, Plaintiff argues that the ADA must be broadly construed and that the "appropriate to the needs" language is a separate requirement from the "most integrated setting" requirement.

On September 15, 2021, Defendants filed a reply to Plaintiff's memorandum in opposition. Defendants assert that DAIL's inspection procedures implemented as part of its broader individualized safety planning requirements were not negligently deployed, did not violate any rights, and were not discriminatory within the meaning of the ADA or the Fourteenth Amendment. Defendants further claim that Mr. Fleurrey was not in DAIL custody. Defendants also reassert their arguments regarding sovereign immunity, qualified immunity, and the ADA language, and additionally assert that stating a claim under Title II of the ADA requires a showing of intentional discrimination, not unreasonable conduct.

Alleged Facts

In relevant part, Plaintiff alleges that that Scott Fleurrey suffered from a variety of mental and physical disabilities. As a result of his disabilities, Mr. Fleurrey had limited capacity for self-care and to recognize danger. At the time of his death, Upper Valley Services, Inc. had provided Mr. Fleurrey with support for approximately 25 years. UVS is a private, not-for-profit entity authorized by the Vermont Department of Disabilities, Aging and Independent Living to provide services to disabled individuals. DAIL is part of the Vermont Agency of Human Services and provides services to disabled individuals. Monica Hutt was the Commissioner of DAIL at the time the events giving rise to this case occurred.

Around October 2019, UVS placed Mr. Fleurrey at a home on Elmore Road in Morristown, Vermont to live with a caretaker. A pond was located on the property approximately 100 feet from the house. Prior to placing Mr. Fleurrey at the home, Mr. Fleurrey entered into an Individual Support Agreement with UVS. The Agreement used forms and guidelines set by DAIL for evaluation and was tailored to Mr. Fleurrey's needs. In addition, a home safety inspection was conducted at the direction of UVS. The inspection followed generalized procedures and used an inspection form required by DAIL. The inspection form did not require an evaluation of outdoor dangers. Defendant Hutt knew of and approved of the guidelines, procedures, and forms used by UVS in forming the Agreement and conducting the inspection. The property passed the inspection. On April 28, 2019, Mr. Fleurrey was left unsupervised outside for several hours by his caretaker. While unattended, Mr. Fleurrey fell into the pond and drowned.

Standard of Review

Motions to dismiss for failure to state a claim are governed by V.R.C.P. 12(b)(6). Motions to dismiss are disfavored and rarely granted. *Gilman v. Maine Mutual Fire Ins. Co.*, 2003 VT 55, ¶ 14, 175 Vt. 554, 557 (mem.). When reviewing a motion to dismiss for failure to state a claim, the court "accepts all factual allegations pleaded in the complaint as true and all reasonable inferences from those facts." *Id.* (citing *Richards v. Town of Norwich*, 169 Vt. 44, 48-49 (1999)). Such a motion to dismiss should not be granted "unless it appears beyond doubt that there exist no circumstances or facts which would entitle [the plaintiff] to relief." *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446-47 (1985) (citation and quotations omitted).

Analysis

Count IV: Negligence Claim

Plaintiff claims that Defendant DAIL owed Mr. Fleurrey a duty of care to keep him safe from harm. Plaintiff asserts that this duty stems from the fact that Defendant DAIL provided services to Plaintiff. By failing to identify the danger the pond posed to Mr. Fleurrey and not implementing safety measures, Plaintiff alleges that Defendant DAIL breached its duty of care.

In order to succeed on a claim of negligence, Plaintiff must show that Defendant owed Plaintiff a legal duty, that the Defendant breached that duty, that the breach was the proximate cause of Plaintiff's injury, and that Plaintiff suffered actual damages. *Endres v. Endres*, 2008 VT 124, ¶ 11, 185 Vt. 63 (citation omitted). Establishing that a duty exists is "central to a negligence claim, and its existence is primarily a question of law." *Id.* (citation omitted). To determine whether a duty exists, courts consider "a variety of public policy considerations and relevant factors. It is a question of fairness that depends on, among other factors, the relationship of the parties, the nature of the risk, the public interest at stake, and the foreseeability of the harm." *Deveneau v. Wielt*, 2016 VT 21, ¶ 8, 201 Vt. 396, 144 A.3d 324 (quotation and alteration omitted).

Defendant DAIL serves disabled individuals by designating local non-profit corporations to provide direct care and support. 18 V.S.A. § 8907(a). UVS is one of those local agencies. The local agencies provide the tangible services, and individuals apply for those services through

the agencies. Defendant DAIL dictates the rules and procedures for applications and sets the certification standards for programs. 18 V.S.A. § 8726. As part of its promulgated rules, Defendant DAIL requires that local agencies collaboratively form Individual Support Agreements with the individuals they serve. Individual Support Agreement Guidelines, State of Vermont Developmental Disabilities Services Division (August 2016), https://ddsd.vermont.gov/sites/ddsd/files/documents/ISA_Guidelines.pdf. The Agreements address the specific needs of an individual, including level of supervision and safety restrictions. *Id.* at 16. The Agreements are distinct from the preplacement home inspection, which follows general guidelines for evaluating home safety and is not tailored to the needs of an individual. See Vermont Housing Safety and Accessibility Inspection Process Protocol, State of Vermont Developmental Disabilities Services Division (July 1, 2020), https://ddsd.vermont.gov/sites/ddsd/files/documents/Housing_Safety_And_Accessibility_Review_Process.pdf; Pre-Inspection Housing Standards Checklist, State of Vermont Developmental Disabilities Services Division (July 7, 2020), https://ddsd.vermont.gov/sites/ddsd/files/documents/Housing_Standards_Checklist.pdf.

The State and its agencies are immune from tort claims arising out of any "act or omission of an employee of the State . . . based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a State agency or employee of the State, whether or not the discretion involved is abused." 12 V.S.A. § 5601(e)(1). Whether a claim is barred by the discretionary exception is determined by a two-part test, adopted from *United States v. Gaubert*, 499 U.S. 315 (1991). *Stocker v. State*, 2021 VT 71, ¶ 24. First, the court must "determine whether the challenged act or omission involves an element of judgment or choice. . . . [and] [i]f a statute or regulation or policy specifically prescribes a course of action for an employee to follow, then the discretion requirement is not met." *Id.* (citation and quotation omitted). If the first prong is satisfied, the court then must "determine whether that judgment involved considerations of public policy which the discretionary function exception was designed to protect." *Id.*, ¶ 25 (citation and quotation omitted). "It is presumed that when a government agent is authorized to exercise discretion, their acts are grounded in policy when exercising that discretion." *Id.* (citation and quotation omitted).

If alleged negligence was not related to policy objectives, the test fails and the State is open to liability. See *id.* That an employee or agent of the State was required to perform acts as a result of a discretionary decision does not make the decision non-discretionary. See *Gaubert*, 499 U.S. at 324 ("[I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation.") (citation omitted).

The court concludes that no duty existed for Defendant DAIL to inspect for outdoor hazards. No caselaw or statutory authority stands for the existence of such a duty, nor does weighing the *Deveneau* factors compel the court to recognize one. The facts indicate that the pond was an open and obvious hazard, routinely present in the Vermont landscape, and such hazards ordinarily do not require warnings or safeguards. See Restatement (Second) of Torts § 343A. The foreseeability and risk of harm resulting from a standardized home inspection failing to account for outdoor hazards, where the inspection is conducted in tandem with comprehensive, personalized evaluations and placement with a caretaker, is minimal. Requiring that home inspections inquire into subjective risk factors of individuals to determine whether open and obvious conditions present heightened individualized personal risks would be contrary

to the public interest as invasive and onerous. Such a requirement would also be redundant, considering the personalized safety evaluations that go into the Individual Support Agreements that are also required by DAIL prior to home placement. Accordingly, the court does not recognize a duty of care on the part of DAIL to inspect for outdoor hazards.

Even assuming *arguendo* that DAIL did owe Mr. Fleurrey a duty of care, DAIL is immune from a claim of negligence. Applying the *Gaubert* test, the challenged inspection procedures involved choice, as DAIL created and promulgate such procedures under a broad allocation of authority by the Legislature. There is also no statute, regulation, or policy proscribing the form of procedure adopted by DAIL The creation of the procedures involved consideration of public policy as they were promulgated in accordance with DAIL's authority to provide services to disabled individuals under Title 18. Accordingly, the adoption of the home inspection procedures was a discretionary act and immune from suit for negligence.[1] That UVS was required to follow DAIL's promulgated procedures does not affect their discretionary nature. *Id.*

For the foregoing reasons, Defendants' motion to dismiss Count IV is granted.

Count XII: Violation of Fourteenth Amendment and Supervisory Liability Claims

Plaintiff alleges that Defendant Hutt violated Mr. Fleurrey's substantive due process rights under the Fourteenth Amendment as a person under the care, custody, and supervision of the State of Vermont. Specifically, Plaintiff asserts that Defendant Hutt intentionally failed to train DAIL employees in the proper inspection of property for dangers to disabled individuals and promulgated inspection procedures that did not account for outdoor hazards, and therefore bears responsibility via supervisory liability for Mr. Fleurrey's death.

The Fourteenth Amendment protects against "the exercise of power without any reasonable justification in the service of a legitimate government interest." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citation omitted). When dealing with executive action, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'" to find a violation of substantive due process. *Id.* (quoting *Collins v. Harper Heights*, 503 U.S. 115, 129 (1992)).

Government entities have an affirmative duty of care over someone held in custody, and the failure to provide that care may violate substantive due process. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200 (1989). State custody occurs when the State has imposed restraints on a person's liberty to the extent that it renders that person unable to care for himself. *Id.* at 200.

[1] For this reason, Plaintiff's private analogue argument fails, as discretionary acts are an exception to 12 V.S.A. § 5601(a).

Violations of due process rights may be remedied under 42 U.S.C. § 1983.[2] For a supervisor to be found liable under § 1983, there must be a showing of personal involvement in the alleged constitutional violation. *Ayers v. Coughlin*, 780 F.2d 205, 210 (2d Cir. 1985).

In the present case, Mr. Fleurrey was not in the custody of the State at any relevant point. All that has been factually alleged as establishing a relationship between Mr. Fleurrey and the State is that Mr. Fleurrey received services from UVS for roughly 25 years. Though it is authorized by DAIL to supply services to disabled individuals, UVS is a privately owned non-profit corporation. Likewise, the Elmore Road property is owned by a private corporation, and there is no allegation that Mr. Fleurrey's caretaker was a government employee. There is also no allegation that Mr. Fleurrey's liberties were in any way limited by his relationship with UVS. Receiving services from a private entity and residing on privately owned property with a caretaker is not tantamount to state custody, and therefore the State did not owe an affirmative duty of care to Mr. Fleurrey that would implicate substantive due process. Plaintiff's analogy to foster children living in private homes is unpersuasive, as foster children are in the custody of the State. See generally 33 V.S.A. §§ 4901–4906. Mr. Fleurrey was not in State custody.

Absent an affirmative duty of care, the question is whether Defendant Hutt's actions were sufficiently egregious to violate Mr. Fleurrey's rights in the absence of a custodial relationship. The court concludes that they were not. As alleged, the entirety of Defendant Hutt's involvement with Mr. Fleurrey's death is that she approved home inspection training and procedures that did not account for outdoor dangers. Without more, these actions do not rise to the level of shocking and arbitrary conduct proscribed by the Fourteenth Amendment, particularly considering the inspection procedures must be administered in tandem with a personalized evaluations of an individual's particular needs and risks. Cf. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate decisions* of government officials to deprive a person of life, liberty, or property.").

As the facts do not support the existence of constitutionally proscribed conduct, the court need not address the issue of supervisory liability.

For the foregoing reasons, Defendants' motion to dismiss Count XII is granted.

Count XIII: Americans with Disabilities Act Claim

Plaintiff alleges that the Americans with Disabilities Act required that Mr. Fleurrey be housed in a setting appropriate to his needs. The provision at issue states that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). Plaintiff claims that due to Mr. Fleurrey's inability to comprehend the risk of drowning, the presence of the unfenced pond rendered the Elmore Road property an inappropriate setting for Mr. Fleurrey's needs. Defendant contends that § 31.130(d) is concerned with antidiscrimination measures, not specific

[2] Plaintiff cites 42 U.S.C. § 1942 in her complaint, but based on the nature of Plaintiff's claim, the court presumes Plaintiff intended to cite § 1983.

environmental needs for individual disabled persons, and as there is no allegation that Mr. Fleurrey was discriminated against, no action may be maintained under the ADA.

The goal of statutory interpretation is to implement the Legislature's intent. *Wright v. Bradley*, 2006 VT 100, ¶ 7, 180 Vt. 383. In order to determine legislative intent, the court must first consider the plain meaning of a statute's words. *Wesco v. Sorrell*, 2004 VT 102, ¶ 14, 177 Vt. 287. If that plain meaning is clear, the analysis stops there. *Id.* However, plain meaning does not require the court to evaluate the statute in a vacuum, but should instead "examine and consider fairly, not just isolated sentences or phrases, but the whole and every part of the statute, together with other statutes standing in pari materia with it, as parts of a unified statutory system." *State v. Berard,* 2019 VT 65, ¶ 12, 220 A.3d 759; see also *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) ("It is a fundamental canon of statutory interpretation that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). "The Court will not insert an implied condition into a statute unless it is necessary in order to make the statute effective." *Doncaster v. Hane*, 2020 VT 22, ¶ 19, 212 Vt. 37 (citation and quotation omitted) (emphasis in original).

Read in its broader context, § 35.130(d) is found in a subsection of code setting forth rules prohibiting discrimination against disabled individuals by public entities. 28 C.F.R. § 35.130. All other provisions in § 35.130 concern antidiscrimination, and there is nothing to indicate that the subsection is intended to serve any broader purpose. Looking at the specific language of § 35.130(d), it likewise concerns antidiscrimination. Though Plaintiff focuses on the "appropriate to the needs" portion, arguing that it is a distinct requirement, there is nothing in the statute that indicates the latter clause is intended to be read separately from the "most integrated setting" language–it is "the most integrated setting appropriate to the needs," not "the most integrated setting" *and* "the setting most appropriate to the needs." Taken as a whole, § 35.130(d)'s concern is not that the personal environmental needs of a disabled individual are met, but instead that the disabled individual receives services in as integrated a setting as his or her disability allows.

Considering the language of the provision and the antidiscrimination context of the surrounding statutory scheme, the plain meaning of the statute is to require that disabled individuals not be marginalized or treated differently when receiving public services, to the extent allowed by their disabilities. See *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 585 (1999) ("[R]espondents could demonstrate discrimination by showing that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the *most integrated setting* appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities)." (emphasis added)).

Plaintiff has not alleged that Mr. Fleurrey was discriminated against by Defendant DAIL. As the cited portion of the ADA is only concerned with discrimination, no remedy may be granted under the provision.

For the foregoing reasons, Defendants' motion to dismiss Count XIII is granted.

Order

For the reasons set forth above, the State Defendants' Motion to Dismiss Counts IV, XII, and XIII is *granted*.

Electronically signed pursuant to V.R.E.F. 9(d) on January 6, 2022 at 8:18 AM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge