

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-80831-Hurley/Hopkins

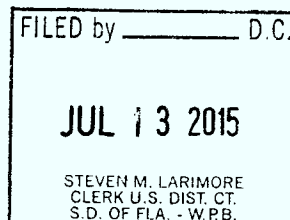
MARGARET WEISS and FELIX REYES,

Plaintiffs,

vs.

BETHESDA HEALTH, INC., and
BETHESDA HOSPITAL EAST,

Defendants.



**REPORT AND RECOMMENDATION ON
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (DE 5)**

THIS CAUSE is before this Court upon an Order referring Plaintiffs' Motion for Preliminary Injunction (DE 5) to the undersigned United States Magistrate Judge for a report and recommendation (DE 14). Defendants filed a Response to Plaintiffs' Motion (DE 19), and Plaintiffs replied (DE 24). The undersigned held a hearing on Plaintiffs' Motion on July 7, 2015 (DE 27). The matter is now ripe for this Court's review. For the reasons that follow, the undersigned **RECOMMENDS** that Plaintiffs' Motion (DE 5) be **DENIED**.

BACKGROUND

Plaintiffs Margaret Weiss and Felix Reyes are profoundly deaf and communicate primarily in American Sign Language. Ms. Weiss is pregnant with her second child, and Mr. Reyes is the child's father. Defendants Bethesda Health, Inc. and Bethesda Hospital East (collectively "Bethesda") operate a hospital in Boynton Beach, Florida. Plaintiffs initiated the instant action alleging that Bethesda has violated Title III of the Americans with Disabilities Act

(“ADA”), and § 504 of the Rehabilitation Act. Plaintiffs contend that when a deaf person visits Bethesda, Bethesda relies on Video Remote Interpreting (“VRI”) to communicate with him or her. VRI involves a system whereby an interpreter is provided from a remote location through a monitor and internet connection. Plaintiffs assert that Bethesda’s VRI system frequently malfunctions during which time deaf patients and visitors are prevented from effectively communicating with their medical providers. According to Plaintiffs, Bethesda’s insistence on using a VRI system that cannot ensure effective communication constitutes a violation of the ADA and the Rehabilitation Act. In the Complaint, Plaintiffs are seeking damages and a permanent injunction requiring Bethesda to provide Plaintiffs with an in-person interpreter and to cease discrimination against Plaintiffs and other deaf or hard of hearing patients.

Ms. Weiss’ second child is due on or around July 22, 2015. She contends that when she was pregnant with her first child in early 2014, she wanted to give birth at Bethesda because it was closest to her home and was where her doctor had admitting privileges, but she was told that Bethesda would not provide her with an in-person interpreter (DE 5-5). Because of concerns relating to her ability to fully communicate with Bethesda’s staff through VRI, Ms. Weiss decided to give birth at a hospital that was further away from her home, but which provided her with in-person interpreters for the duration of her hospital stay.

Since the birth of their first child, Ms. Weiss and Mr. Reyes have visited Bethesda on four occasions, December 31, 2014, April 5, 2015, April 14, 2015, and June 16, 2015. On the first two occasions, Plaintiffs went to Bethesda’s emergency room for medical issues relating to their first child. On the more recent two occasions, Plaintiffs went to Bethesda with the purpose of touring the hospital in anticipation of the birth of their second child. On all four occasions,

Plaintiffs contend that they experienced problems communicating through VRI, including problems initially connecting to an interpreter, problems with the VRI machine's screen being unclear or freezing, and trouble asking questions or understanding the questions of others (DE 5-5; 24-4; 24-5).

In light of the alleged failures of Bethesda's VRI system on these occasions, and because of expected complications of using VRI for labor and delivery, Plaintiffs filed the instant Motion on June 10, 2015 seeking a preliminary injunction to require Bethesda to provide them with an in-person interpreter for a hospital tour, the labor and delivery of their second child, and their related hospital stay. According to Plaintiffs, Bethesda's insistence on using VRI when VRI cannot ensure effective communication during a labor and delivery when someone may be lying prone, restrained with IVs or blocked from a close, clear line of sight with the VRI, in addition to the technical problems, is a violation of the ADA.

In response to Plaintiffs' Motion, Bethesda argues that its policy and practices for communicating with deaf individuals is in compliance with ADA requirements and the relevant regulations. When an interpreter is needed, Bethesda first uses VRI to provide live, qualified interpreters. If VRI does not provide effective communication in a given situation, it is Bethesda's policy to call for an in-person interpreter. According to Bethesda, by adhering to this policy, it has effectively communicated with Plaintiffs in the past. To support this claim, Bethesda provides a number of affidavits from hospital personnel who generally state that after some initial delays in setting up VRI, Plaintiffs appeared to have effectively communicated with Bethesda's staff, and that Plaintiffs indicated at the conclusion of each interaction that they had no more questions (DE 19-6; 19-7; 19-8; 19-10).

In reply, Plaintiffs contend that whether a form of communication is effective should be viewed from the plaintiff's perspective. And based on Plaintiffs' experiences with Bethesda's VRI system in the past, Bethesda will not be able to ensure that Plaintiffs are effectively communicated with unless they are provided with an in-person interpreter for the labor and delivery of their second child.

DISCUSSION

PRELIMINARY INJUNCTION STANDARD

As the party seeking injunctive relief, Plaintiffs bear the burden of establishing four elements: (1) that they have a substantial likelihood of success on the merits; (2) that a substantial likelihood of irreparable injury exists if the injunction is not granted; (3) that the threatened injury outweighs the potential harm to Bethesda; and, (4) that the injunction, if issued, will not be adverse to the public interest. *See Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002) (citations omitted). It is well established that a "preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the 'burden of persuasion' as to all four elements." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citations omitted). The grant or denial of such an extraordinary remedy is a decision within the discretion of the district court. *See Carillon Importers, Ltd. v. Frank Pesce Int'l Group, Ltd.*, 112 F.3d 1125, 1126 (11th Cir. 1997).

The first element necessary to obtain a preliminary injunction, substantial likelihood of success on the merits, is satisfied if "good reasons for anticipating [success] are demonstrated." *S. Wine & Spirits of Am., Inc. v. Simpkins*, 2011 WL 124631, *2 (S.D. Fla. Jan. 14, 2011). Merely advancing a colorable claim is insufficient. *See id.* Generally, the first element is the

most important because granting a motion for preliminary injunction would be inequitable if the movant has no chance of success on the merits. *See Butler v. Ala. Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224, 1229-30 (M.D. Fla. 2000). “If the movant is unable to establish a likelihood of success on the merits, a court need not consider the remaining conditions prerequisite to injunctive relief.” *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002) (citing *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001)).

LIKELIHOOD OF SUCCESS ON THE MERITS

In this case, Plaintiffs are seeking a preliminary injunction in accordance with Title III of the ADA. Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation” 42 U.S.C. § 12182(a). A violation of Title III can occur if a covered entity fails to “make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford . . . accommodations to individuals with disabilities.” *See Forbes v. St. Thomas Univ., Inc.*, 456 F. App’x 809, 812 (11th Cir. 2012) (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)).

To establish a Title III claim, a plaintiff must demonstrate that (1) he or she is an individual with a disability; (2) the defendant is a place of public accommodation; and (3) the defendant discriminated against the plaintiff within the meaning of the ADA. *See Norkunas v. Seahorse NB, LLC*, 444 Fed. Appx. 412, 416 (11th Cir. 2011) (citing 42 U.S.C. § 12182(a)). Here, it is undisputed that Plaintiffs are disabled under the ADA, and that Bethesda is a place of public accommodation. Instead, the issue before the Court is whether it is substantially likely that Bethesda will discriminate against Plaintiffs if Bethesda does not provide an in-person interpreter for the birth of Plaintiffs’ second child.

To determine what is required of Bethesda under the ADA, the Court looks to regulations relating to appropriate auxiliary aids and effective communication. “Because Congress explicitly authorized the Attorney General to promulgate regulations under the ADA, *see* 42 U.S.C. § 12134(a), the Court must give these regulations ‘legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.’” *Tugg v. Towey*, 864 F. Supp. 1201, 1205 n. 6 (S.D. Fla. 1994) (citing *United States v. Morton*, 467 U.S. 822, 834 (1984)).

The relevant federal regulation, 28 C.F.R. § 36.303, places a burden on places of public accommodation to furnish auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. The regulation further states:

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

28 C.F.R. § 36.303(c)(1)(ii).

In addition to the regulation which speaks to auxiliary aids generally, Appendix A to Part 36 specifically discusses whether and in what circumstances VRI is appropriate. *See* 28 C.F.R. § Pt. 36, App. A. The Appendix states:

After consideration of the comments and the Department’s own research and experience, the Department has determined that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. For example, VRI should be effective in many situations involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is available; however, VRI may not be effective in situations

involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals. To ensure that VRI is effective in situations where it is appropriate, the Department has established performance standards in § 36.303(f).

28 C.F.R. § Pt. 36, App. A.

After considering the standards set forth above, the Court finds for Plaintiffs to prevail on the merits, they would have to be able to show that Bethesda's VRI system is either technically ineffective or will not be effective for the labor and delivery of their second child.

1) Technical Effectiveness

The performance standards articulated in § 36.303(f) suggest that for a VRI system to ensure effective communication, it must provide:

- (1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
- (2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;
- (3) A clear, audible transmission of voices; and
- (4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

28 C.F.R. § 36.303(f).

In accordance with the first performance standard, Bethesda's VRI system provides real-time video and audio and meets reasonable bandwidth requirements, as evidenced by the fact that if it did not have the minimum bandwidth requirement, Bethesda would not have been able

to connect to VRI in the past.¹ Notwithstanding a few instances and the report of Plaintiffs' expert, Bethesda's VRI system has typically delivered high-quality video images since its implementation in January of 2011, and instances of blurriness, pixilation, or freezing on the VRI machine's screen are "extremely rare" (DE 19-16, p. 8). One of the issues Plaintiffs experienced, that the VRI machine times out, has since been fixed (DE 19-15). Otherwise, Bethesda provides the affidavits of several hospital employees to show that any problems with VRI are limited both in frequency and duration. For example, a registered nurse at Bethesda stated in his affidavit that he has "used the VRI many times" and "had never experienced any problems with the VRI before" (DE 19-11, pp. 1, 2). One of Bethesda's nursing supervisors stated that she has used VRI "many times without any problems or complaints" and that she "had a problem with it on only one other occasion," at which time an on-site interpreter was called in (DE 19-9, p. 1). Gary Ritson, Bethesda's Vice President of Risk Management, testified that he is the person who would be contacted about any problems related to the VRI machine, but is only aware of one malfunction with Bethesda's VRI since its 2011 implementation (DE 19-17, pp. 21, 26).

As to the second performance standard, Bethesda's VRI system is large enough to display the interpreter's face, arms, hands and fingers, as well as the upper body of the participating individual regardless of his or her body position. Dr. Stanley Shoenbach, founder of the company which provides Bethesda's VRI services, stated that a VRI system displays the "mid portion of the chest and up to the top of the head" (DE 19-16, p. 15). Moreover, Bethesda's VRI machine

¹ The preferred bandwidth for a VRI system is 256 kilobytes, but the system has a minimum requirement of 128 kilobytes (DE 19-16, p. 7). The minimum bandwidth requirement of 128 kilobytes provides reasonable quality for video streaming at fifteen frames per second (DE 19-16, p. 7), and the company Bethesda contracts with to provide its VRI services tests Bethesda's equipment remotely (DE 19-16, p. 11).

can be adjusted by hospital staff to tailor to the needs of the patient. For example, if a patient is in a particular situation in which an interpreter needs to see the entire body of the patient, the hospital staff would “use their judgement and adjust the distance of the screen from the patient to accommodate [the situation]” (DE 19-16, p. 15).

As to the third performance standard, there have been no allegations that Bethesda’s VRI machine does not provide a clear, audible transmission of voices. In addition to being used for American Sign Language interpretation for deaf individuals, VRI is also used by Bethesda for foreign language interpretation when non-English speakers visit its hospital (DE 19-17, p. 14). Since implementing VRI for foreign language interpretation, Bethesda has not had a single complaint from a foreign language speaking patient (DE 19-17, p. 15).

Bethesda satisfies the fourth performance standard by providing adequate training to its employees. Bethesda requires all of its clinicians to participate in computer based learning modules (“CBL”) at hire and during annual evaluations (DE 19-17, p. 9). In particular, Bethesda requires its clinicians to undergo a CBL entitled “Communicating with People Who Are Deaf or Hard of Hearing” (DE 19-17, p. 9). Employees are required to take a test at the end of the CBL to ensure they are properly trained in this particular type of communication (DE 19-17, p. 9). Further, Bethesda has provided the testimony of two nurses who are familiar with the VRI system and state that they feel comfortable using it (DE 19-9, p.1; 19-11, pp. 1, 2).

Plaintiffs contend that on multiple visits to Bethesda, the VRI system “would not work and [Bethesda’s] staff did not know how to operate it” (DE 5, p. 11). While Bethesda admits that Plaintiffs have experienced problems in the past, Bethesda has provided evidence to show that these problems are rare and has produced multiple employee statements which refute the severity

of Plaintiffs' claims. For example, following their April 15 tour, Plaintiffs allege that they were left with "many unanswered questions" (DE 5, p. 9). In contrast, Bethesda provides testimony of a Bethesda Maternal Family Health liaison, assistant nurse manager, and nurse, all of whom state that Ms. Weiss left the tour with all of her questions interpreted and answered (DE 19-6, p. 3; 19-8, p. 2; 19-10, p. 2). Additionally, Plaintiffs allege that on June 5, 2015, June McMahon, vice-president of the Florida Association of the Deaf, was not provided with effective communication during a recent out-patient procedure. However, one of Bethesda's nurses who was present while Ms. Weiss was communicating through the VRI stated that "I never saw the computer screen freeze or not work properly once it was connected" (DE 19-12, p. 2).

Because VRI cannot be expected to function perfectly every time it is used, Bethesda has a back-up VRI machine (DE 19-17, p. 19). The back-up is a laptop and thus more portable than the standard VRI system (DE 19-17, p. 24). If both machines are malfunctioning, then it is Bethesda's policy to request an on-site interpreter (DE 19-17, p. 20), which it has already done once for Ms. Weiss (DE 5-5). After considering this policy in light of the technical issues associated with Bethesda's VRI system, the Court finds that Bethesda provides a reasonable accommodation for deaf patients. That Bethesda maintains a policy of calling an in-person interpreter when the VRI fails, and in fact has done so for Ms. Weiss in the past, further supports this finding of reasonableness.

2) Effectiveness for the birth of Plaintiffs' child

This Court has already determined that VRI is not *per se* ineffective during childbirth. *See* Report and Recommendation on Plaintiff's Motion for Preliminary Injunction (DE 169) and Judge Hurley's Order Adopting Report and Recommendation and Denying Plaintiff's Motion for

Preliminary Injunction (DE 173) in *Sunderland, et al vs. Bethesda Health, Inc., and Bethesda Hospital, Inc.*, CASE NO: 9:13-80685-CIV-HURLEY/HOPKINS. Notwithstanding, Plaintiffs assert that there are circumstances particular to their situation which require an in-person interpreter. These circumstances include Ms. Weiss' expectations that she will be in various positions and will at times have her eyes closed which will prevent her from watching a screen, and that she anticipates screaming as she did during her first childbirth which will make it hard for a VRI to hear any instructions from her doctors² (DE 5-5).

As indicated above, the regulations provide that VRI may be appropriate in some circumstances and not in others. For example, VRI may be appropriate when urgent care is needed because an in-person interpreter may not be immediately available. *See* 28 C.F.R. § Pt. 36, App. A. In this case, Bethesda's VRI system is "readily available" and "very efficient" (DE 19-17, p. 15; 19-16, p. 4). In contrast, Gary Ritson testified that based on his experience, it takes "up to about two hours to get [an in-person interpreter] and many times the technical problem can be corrected before that" (DE 19-17, p. 20). On the one occasion in which an in-person interpreter was called previously for Ms. Weiss, that interpreter took approximately twenty six minutes to arrive (DE 24-8). To the extent that Bethesda's VRI policy allows almost immediate communication rather than a lapse between when an interpreter is called and when that interpreter arrives, Bethesda's policy better satisfies the timeliness consideration articulated in the regulations. *See* 28 C.F.R. § 36.303(c)(1)(ii).

² Ms. Weiss provided two affidavits, one dated June 9, 2015 (DE 5-5), and one dated July 2, 2015 (DE 24-4). In her earlier affidavit, she stated that she anticipates obtaining an epidural which would require her to move such that watching a VRI will be difficult (DE 5-5, p. 5). In her more recent affidavit, Ms. Weiss states that she plans on having a natural child birth (DE 24-4, p. 3). This unexplained discrepancy concerning a crucial aspect of Ms. Weiss' childbirth calls into question her credibility.

According to the regulations, one situation in which VRI might not be appropriate is when the patient is limited in an ability to see a screen. *See* 28 C.F.R. § Pt. 36, App. A. However, VRI might actually be more effective than an in-person interpreter in Plaintiffs' situation because Bethesda's portable VRI machine is a laptop computer which can fit in small places where an in-person interpreter might not be able to fit (DE 19-16, p. 4). Ms. Weiss explains that an in-person interpreter is preferable because during her first childbirth, her interpreter was able to crouch down and kneel on the floor (DE 5-5, p. 6), but there is no reason why the laptop VRI cannot be similarly positioned.

The regulations also provide that VRI might not be appropriate where the information exchanged is highly complex. *See* 28 C.F.R. § Pt. 36, App. A. Notwithstanding, Bethesda has the option of choosing its VRI interpreters based on an interpreter's skill in a particular medical area (DE 19-16, pp. 3, 9). Such an option has not been shown to be available for in-person interpreters. Likewise, through the company it contracts with to provide its VRI, Bethesda has the option of selecting either a male or female interpreter (DE 19-16, pp. 3, 9), which may afford a patient greater privacy than not having such an option. *See* 28 C.F.R. § 36.303(c)(1)(ii).

For the aforementioned reasons, the Court finds that Plaintiffs have not born their burden to prove that VRI cannot provide effective communication during the labor and delivery of Plaintiff's second child, and Plaintiffs have not shown that their particular circumstances are so unusual as to require that Bethesda deviate from its standard policy.

CONCLUSION

Bethesda's policy of providing its deaf patients with VRI services, coupled with its policy of providing an in-person interpreter if VRI fails or is otherwise inappropriate in a given

situation, is a reasonable accommodation that is technically effective and likely effective for Plaintiffs' particular circumstances. Because Bethesda's policy is reasonable, Bethesda does not discriminate against Plaintiffs by failing to provide them with the auxiliary aid of their choosing. Although the Court is not unsympathetic to the difficulties Plaintiffs have had at Bethesda, the Court is not convinced that Plaintiffs have shown that they are substantially likely to prevail. Accordingly, the Court is not required to consider the remaining conditions necessary to obtain injunctive relief. *See 1-800 Contacts, Inc.*, 299 F.3d at 1247.

RECOMMENDATION TO THE DISTRICT COURT

Based on the foregoing, **IT IS HEREBY RECOMMENDED** that the District Court **DENY** Plaintiffs' Motion for Preliminary Injunction (DE 5).

NOTICE OF RIGHT TO OBJECT

Due to the impending birth of Plaintiffs' second child, the parties shall serve and file written objections, if any, to this Report and Recommendation with the Honorable Daniel T.K. Hurley, Senior United States District Court Judge for the Southern District of Florida, no later than **Wednesday, July 16, 2015**. *See* 28 U.S.C. § 636(b)(1). Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. *See LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED in Chambers this 13 day of July, 2015 at West Palm Beach
in the Southern District of Florida.



JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE