

MAY 14 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ISC, INC., and VICTORIA BOHLKE,
decedent Russ Bohlke's personal
representative,

Plaintiffs - Appellants,

v.

STATE OF CALIFORNIA; et al.,

Defendants - Appellees.

No. 08-15374

DC No. CV 06-1667 MMC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted April 13, 2010
San Francisco, California

Before: KLEINFELD, TASHIMA, and THOMAS, Circuit Judges.

Appellants ISC, Inc., and Victoria Bohlke, acting as personal representative
of her husband, Russ Bohlke,¹ appeal the district court's order granting summary

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Cir. R. 36-3.

¹ Victoria Bohlke was substituted for plaintiff Russ Bohlke, pursuant to
Fed. R. App. P. 43(a)(1), after the latter died during the pendency of this appeal.

judgment to defendants in this matter. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and dismiss in part.

We agree with defendants that Bohlke's claims for injunctive relief are moot in light of his recent death. *See, e.g., Kennerly v. United States*, 721 F.2d 1252, 1260 (9th Cir. 1983). As to Bohlke's claims for damages – to the extent they remain at issue in this appeal² – we affirm the district court's order granting summary judgment to defendants.³ Damages are only available under Title II of the Americans with Disabilities Act (“ADA”) when a state defendant acted with deliberate indifference. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001). Bohlke provided the district court with no evidence of defendants' discriminatory intent in response to defendants' summary judgment motion. Accordingly, the district court properly granted summary judgment to defendants on the ADA damage claims.

² The State asserts that Bohlke abandoned his claims for damages before the district court. When asked for clarification at oral argument, Bohlke's counsel was unable to inform the court precisely which of Bohlke's claims remained at issue in this lawsuit and what relief Bohlke sought.

³ We review the district court's order granting summary judgment *de novo*, and may affirm on any basis supported by the record. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1047 (9th Cir. 2009).

We also hold that co-plaintiff ISC lacks standing to pursue Bohlke's claims. ISC bore the burden of establishing that it had standing to proceed in federal court. *Am. Fed'n of Gov't Employees Local 1 v. Stone*, 502 F.3d 1027, 1032 (9th Cir. 2007). Yet, the factual basis of ISC's organizational standing was neither pled in the complaint nor otherwise presented to the district court. The record therefore does not disclose whether any of ISC's other members will be injured by defendants' policies, or even if ISC has any other members at all. *See White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1038 (9th Cir. 2009) ("Some of the individual members of [the organization] must demonstrate that they will suffer an injury as a result of [the challenged action.]").

Accordingly, we affirm the district court's order granting summary judgment to defendants on Bohlke's damages claims, and dismiss the remainder of Bohlke's appeal. We also affirm as to ISC's appeal. Costs on appeal are awarded to appellees.⁴

AFFIRMED in part; DISMISSED in part.

⁴ In light of this memorandum disposition, we deny defendants-appellees' motion to dismiss this appeal as moot.