No. 97-2780

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAJOR ROGERS,

Plaintiff-Appellant

v.

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL;
SOUTH CAROLINA BUDGET AND CONTROL BOARD,
Office of Insurance Services,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. 12131-12134, prohibits discrimination on the basis of disability by public entities. The Attorney General has promulgated regulations to implement Title II that prohibit public entities from discriminating against qualified persons by reason of disability in employment practices. Appellees have raised as an alternative ground for affirmance of the district court's decision the argument that Title II does not prohibit discrimination in employee benefits. If this Court reaches that issue, its decision could have a significant impact upon the Attorney General's enforcement responsibilities.

The United States has filed briefs as amicus curiae on this issue in Bledsoe v. Palm Beach County Soil & Water Conservation

District, 133 F.3d 816 (11th Cir. 1998), Decker v. University of Houston, No. 97-20502 (5th Cir.); and Zimmerman v. Oregon Dep't of Justice, No. 97-36101 (9th Cir.).

STATEMENT OF THE CASE

1. Statutory Scheme. The ADA was intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Act is divided into five titles.[1]

Title I prohibits discrimination on the basis of disability by employers, including governments, governmental agencies, and political subdivisions, who are engaged in an industry affecting commerce and who have 15 or more employees for each working day in each of 20 or more calendar weeks.[2] In accordance with Section 107(a) of the ADA, 42 U.S.C. 12117(a), enforcement of Title I parallels that of Title VII of the Civil Rights Act of 1964, including the requirement that persons alleging discrimination file a charge with the EEOC. See 42 U.S.C. 2000e-5.

[1/] In addition to Titles I and II, which are described in detail infra in the text, the statute prohibits discrimination in public accommodations and services provided by private entities (Title III) and telecommunications (Title IV). Title V covers a diverse group of miscellaneous matters.

[2/] Title I also applies to employment agencies, labor organizations, and joint labor-management committees. Like Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), "employer" excludes the United States, corporations wholly owned by the government of the United States, Indian tribes, and tax-exempt bona fide private membership clubs (other than labor organizations). 42 U.S.C. 12111(5)(B).

Title II basically extends the protections provided by Section 504 of the Rehabilitation Act of 1973[3] to all programs, activities, and services of state or local governments or instrumentalities or agencies thereof, regardless of whether such entities receive Federal financial assistance. H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 84 (1990); Ethridge v. Alabama, 860 F. Supp. 808, 812 n.6 (M.D. Ala. 1994); Wagner v. Texas A & M Univ., 939 F. Supp. 1297, 1309 (S.D. Tex. 1996). Title II states (42 U.S.C. 12132):

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Persons alleging discrimination under this section of the Act have the remedies, procedures, and rights set forth in Section 505 of the Rehabilitation Act, 29 U.S.C. 794a.[4] See Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993).

2. Facts. Plaintiff Major Roberts was employed by the South Carolina Department of Health and Environmental Control

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[3/] Section 504, 29 U.S.C. 794(a), provides in relevant part:
> No otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

[4/] Section 505(a)(2), which sets out procedures for enforcement of Section 504 of the Rehabilitation Act of 1973, incorporates by reference the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d - 2000d-4).

(DHEC) for approximately 22 years as a maintenance engineer.[5] His employment benefits included a Long Term Disability Plan and a pension plan.

Plaintiff was diagnosed with stress and anxiety/panic attacks and applied for disability benefits through the Long Term Disability Plan based upon a psychological disability. The Plan provides only one year of disability benefits for mental and/or nervous disorders. For physical disabilities, however, the Plan provides benefits to the age of 65.

Plaintiff received one year of disability benefits and then brought suit against his employer and the state pension board pursuant to Title II of the ADA and Section 504. He alleged that the Long Term Disability Plan discriminates against individuals with mental disorders.

The defendants filed a motion to dismiss in which they argued that the "safe harbor" provision of the ADA exempts the substantive content of insurance policies from coverage by the ADA. That provision states that Titles I through IV of the ADA "shall not be construed to prohibit or restrict" a benefit plan "based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law," and that are not "used as a subterfuge to evade the purposes of [title] I and III" of the Act. 42 U.S.C. 12201(c). Defendants

[5/] These factual allegations, which come from the complaint, are taken as true for purposes of the motion to dismiss.

also argued that discrimination based on disability in employee benefits is covered only by Title I of the ADA, not Title II.

A magistrate recommended that the motion to dismiss be granted. The district court engaged in a de novo review of the magistrate's recommendation, and, on December 17, 1997, dismissed the complaint.

3. The Decision of the District Court. The district court noted that this Court in Doe v. University of Maryland Medical Systems Corp., 50 F.3d 1261, 1264-1265 (1995), "implicit[ly]" ruled that Title II encompasses a claim for employment discrimination, and found that the decision in Doe is "bolster[ed]" by the Title II regulations. Rogers v. Department of Health & Envtl. Control, 985 F. Supp. 635, 637-638 and n.2 (D.S.C. 1997).

It concluded, however, that the complaint failed to state a claim under either Title II or Section 504 because the ADA prohibits discrimination between the disabled and the nondisabled and does not prohibit discrimination between individuals with different disabilities. 985 F. Supp. at 639. In so ruling, the district court relied heavily upon the analysis of the en banc Sixth Circuit in Parker v. Metropolitan Life Insurance Co., 121 F.3d 1006 (1997), cert. denied, 118 S. Ct. 871 (1998). Parker involved claims under Title I of the ADA against plaintiff's employer, Schering-Plough, and under Title III against the insurance company that provided long term disability insurance to Schering-Plough employees. The court in Parker concluded that

where all employees, both disabled and non-disabled, receive the same access to a long term disability policy provided by an employer, neither the employer nor the insurance company discriminates between the disabled and non-disabled.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination by reason of disability in all programs and activities receiving Federal financial assistance. The purpose of Title II of the ADA is to extend the prohibitions of discrimination based on disability in Section 504 to all activities of state and local governments, regardless of whether those activities receive federal financial assistance. Congress modeled Title II's language on Section 504, and on Title IX of the Education Amendments of 1972, which prohibits sex discrimination in Federally-assisted employment activities. At the time Congress enacted the ADA, both Section 504 and Title IX had been held by the Supreme Court to prohibit discrimination _in employment_ by recipients of federal financial assistance. _Consolidated Rail Corp._ v. _Darrone_, 465 U.S. 624 (1984); _North Haven Bd. of Educ._ v. _Bell_, 456 U.S. 512 (1982). In addition, in Section 204 of Title II, Congress explicitly required that regulations implementing Title II be consistent with the Section 504 coordination regulations, which expressly reach employment practices.

The legislative history also clearly shows that Congress intended Title II to cover employment practices. The

authoritative committee reports state that "the forms of discrimination prohibited by section 202 [are] identical to those * * * in the applicable provisions of Titles I and III" of the ADA, H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 84 (1990), and Title I covers solely employment issues.

Contrary to appellees' arguments (Br. 22-30), construing Title II to reach employment discrimination with respect to public employers does not make Title I redundant. Rather, Congress intended Title II to be an alternative remedy, continuing in effect procedures previously provided by Section 504 that are not included in Title I. See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 n.26 (1982). Moreover, Title II was modeled on Section 504, and Congress did not intend to introduce an exhaustion requirement in Section 202 where none existed under Section 504.

ARGUMENT

TITLE II OF THE ADA REACHES EMPLOYMENT PRACTICES OF PUBLIC ENTITIES

Appellees rely upon the reasoning of the district court in Bledsoe v. Palm Beach County Soil & Water Conservation District, 942 F. Supp. 1439 (S.D. Fla. 1996), in arguing that Title II does not prohibit employment discrimination based upon disability. On January 22, 1998, the Eleventh Circuit issued a decision reversing the district court's judgment. Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816. The court of appeals held that its "review of the statutory language of Title II, the Department of Justice's ('DOJ') regulations, [the

11th] circuit's [prior] reference to the issue, and other courts' resolution of the issue, persuade[d it] that Title II of the ADA does encompass public employment discrimination." Id. at 820. The strong weight of authority, including this Court's decision in Doe v. University of Maryland Medical Systems Corporation, 50 F.3d 1261 (4th Cir. 1995), supports coverage of employment under Title II.[6] In Doe, this Court stated that an individual could establish a violation of Title II, and of Section 504 of the Rehabilitation Act, by proving that he has a disability, is otherwise qualified for the employment or benefit in question, and that he was excluded from the employment or benefit due to discrimination solely on the basis of disability. 50 F.3d at 1264-1265. The defendant in Doe apparently did not dispute that employment discrimination based upon disability is prohibited by

[6] The majority of courts addressing the issue have concluded (or assumed without discussion) that Title II prohibits employment discrimination based upon disability. See Saylor v. Ridge, 989 F. Supp. 680, 687-688 (E.D. Pa. 1998); Dominguez v. City of Council Bluffs, 974 F. Supp. 732, 736-737 (S.D. Iowa 1997); Benedum v. Franklin Township Recycling Ctr., No. 95-1343, 1996 WL 679402 (W.D. Pa., Sept. 12, 1996); Davoll v. Webb, 943 F. Supp. 1289, 1297 (D. Colo. 1996); Wagner v. Texas A & M Univ., 939 F. Supp. 1297, 1309 (S.D. Tex. 1996); Graboski v. Guiliani, 937 F. Supp. 258, 268-269 (S.D.N.Y. 1996), aff'd on other grounds, 142 F.3d 58 (2d Cir. 1998); Silk v. City of Chicago, No. 95-C-0143, 1996 WL 312074, *10 (N.D. Ill. June 7, 1996); Bruton v. Southeastern Pa. Transp. Auth., No. 94-CV-3111, 1994 WL 470277, *2 (E.D. Pa. Aug. 19, 1994); Ethridge v. Alabama, 847 F. Supp. 903, 906 (M.D. Ala. 1993), and 860 F. Supp. 808, 812 (M.D. Ala. 1994); Eisfelder v. Michigan Dep't of Natural Resources, 847 F. Supp. 78, 83 (W.D. Mich. 1993); Finley v. Giacobbe, 827 F. Supp. 215, 219-220 n.3 (S.D.N.Y. 1993); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993); Bell v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago, No. 92-C-5197, 1993 WL 398612, *4 (N.D. Ill. Oct. 6, 1993); see also Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528-1529 (11th Cir. 1997).

Title II, and this Court therefore was not required to make that determination. Rather, it assumed that employment is covered. This case presents an opportunity for the Court to hold explicitly that employment is covered.

A. Employment Coverage Is Clear From The Plain Language And Structure Of Title II.

1. Section 202. Discriminatory employment practices easily fall within the plain language of Section 202. That section (42 U.S.C. 12132) states:

> [n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The Supreme Court in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), interpreted similar language in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., to encompass claims of employment discrimination. Section 901(a) of Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

The Court in North Haven began by noting that "[s]ection 901(a)'s broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students. Under that provision, employees, like other 'persons,' may not be 'excluded from participation in,' 'denied the benefits of,' or 'subjected to discrimination under'

education programs receiving federal financial support." 456 U.S. at 520. Here, instead of "person," Section 202 of the ADA uses the term "otherwise qualified individual" to describe the class intended to be protected. That term is narrower in some respects, because an individual with a disability must be "otherwise qualified" despite the disability in order to be protected by Section 202. But nothing about the term suggests that employees are excluded from the broad category of "otherwise qualified individual[s]." Thus, Section 202, like the nearly identical Section 901(a) of Title IX, covers employment. See North Haven, 456 U.S. at 538 (program-specific language of Title IX should be given a similar construction as virtually identical language in Title VI of the Civil Rights Act of 1964).

Two years after North Haven, the Court interpreted similar language in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, as protecting employees from discrimination based upon disability in Federally financed programs and activities. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). At the time Darrone was decided, Section 504 stated:

> No otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In Darrone, the Court held that it was "unquestionable" that the original language of Section 504 was intended to reach employment discrimination, especially because "enhancing employment of the handicapped" was a major focus of the

Rehabilitation Act. 465 U.S. at 632. Because Congress, in enacting Title II of the ADA, was extending the protections of Section 504 to all programs, activities and services of public entities, regardless of whether such entities receive Federal financial assistance, the Court's analysis in Darrone clearly demonstrates that Section 202, with language nearly identical to, and indeed modeled on, Section 504, covers employment. See Bledsoe, 133 F.3d at 821 ("significant that Congress intended Title II to work in the same manner as Section 504 * * *, because Section 504 was * * * focused on employment discrimination").

In holding that "employment coverage is clear from the language and structure of Title II," 133 F.3d at 822, the court of appeals in Bledsoe also relied on the prohibition in the final clause of the section, which protects qualified individuals with a disability from being "subjected to discrimination by any such entity," 42 U.S.C. 12132 (emphasis added). The appellate court in Bledsoe said that the final clause is not tied directly to the "services, programs, or activities" of the public entity and clearly reaches any discrimination, including employment discrimination. 133 F.3d at 821-822.[7] The court in Bledsoe also relied on the observation of the Second Circuit in Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997), that "'the language of Title II's

[7] The court of appeals thus rejected the Bledsoe district court's conclusion (942 F. Supp. at 1443), that the phrase "'services, programs, or activities, * * * understood as a whole, focus[es] on a public[] entity's outputs rather than its imputs [sic].'" 133 F.3d at 821.

antidiscrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context * * *." 133 F.3d at 822.

2. Section 204. Section 204 also demonstrates that Congress intended Title II to reach employment. Section 204(b) states that, with certain exceptions not relevant here, "regulations [to implement Title II] shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations * * * applicable to recipients of Federal financial assistance under section 794 of title 29 [Section 504]." 42 U.S.C. 12134(b). At the time Congress drafted Title II, the coordination regulations to which Congress specifically cited expressly prohibited discrimination on the basis of disability in employment practices. See 28 C.F.R. 41.52-41.55. Accordingly, Congress referred in Section 204(b) specifically to regulations that expressly reach employment practices.

B. The Legislative History Of Title II Demonstrates That Congress Intended To Prohibit Employment Discrimination.

In our view, the plain language of Section 202 so clearly includes employment discrimination that there is no need to refer to the legislative history of the ADA. Resort to the legislative history, if necessary, further demonstrates that Title II reaches employment. As appellees acknowledge (Br. 29), the court of

appeals in Bledsoe found that the "[e]xtensive legislative commentary regarding the applicability of Title II to employment discrimination * * * is so pervasive as to belie any contention that Title II does not apply to employment actions." 133 F.3d at 821.

In promulgating Title II regulations covering employment, the Justice Department relied upon statements in the House report. 56 Fed. Reg. 8545 (Feb. 28, 1991). The Report stated that Title II "essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments." H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 84 (1990). See Ethridge v. Alabama, 847 F. Supp. 903, 906 (M.D. Ala. 1993). It stated that Congress's intention was that (H.R. Rep. No. 101-485(II) at 84):

> the forms of discrimination prohibited by section 202 [be] identical to those set out in the applicable provisions of titles I and III of this legislation. Thus, for example, the construction of "discrimination" set forth in section 102(b) and (c) and section 302(b) should be incorporated in the regulations implementing [Title II].

Subsections 102(b) and (c) of Title I, to which Congress referred, specify the forms of employment discrimination prohibited by Title I. This portion of the Report shows that Congress intended Title II to prohibit those same types of discriminatory employment practices. In other words, it demonstrates that Congress intended the very duplication that the district court in Bledsoe interpreted as redundancy (942 F. Supp. at 1445). See discussion infra at pp. 16-19.

The House Report next noted that Section 204 of the ADA requires that regulations issued to implement Section 202 be consistent with the existing Section 504 regulations. H.R. Rep. No. 101-485(II) at 84. It states (ibid.; emphasis added):

> Thus, the requirements of th[e Section 504] regulations apply as well [to Title II], including any requirements such as program access that go beyond titles I and III. In addition, activities which do not fit into the employment or public accommodations context are governed by the analogous section 504 regulations.

In addition, the House Judiciary Committee Report states (H.R. Rep. No. 101-485(III), 101st Cong., 2d Sess. 50 (1990) (emphasis added)):

> The general prohibitions set forth in the Section 504 regulations, are applicable to all programs and activities in title II. The specific sections on employment and program access in existing facilities are subject to the "undue hardship" and "undue burden" provisions of the regulations which are incorporated in Section 204. No other limitation should be implied in other areas.

The Judiciary Committee Report also states that "[i]n the area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a 'reasonable accommodation' that does not constitute an 'undue hardship.'" Ibid. (emphasis added).[8]

These directives in the House Reports clearly indicate

[8/] Appellees isolate this statement from the legislative history as though it was the sole support relied upon by the appellate court in Bledsoe and contend that such reliance is misplaced (Br. 29). It is appellees, however, who are mistaken. This statement was directed to the substantive scope of Title II, not, as appellees contend (Br. 29), to the section of Title II that incorporates the "remedies, procedures, and rights set forth in section 794a of title 29." 42 U.S.C. 12133.

Congress's intention that Title II reach employment discrimination. "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969). Such reports are "particularly good indicator[s] of congressional intent." Pierpont v. Barnes, 94 F.3d 813, 817 (2d Cir. 1996), cert. denied, 117 S. Ct. 1691 (1997).

C. The District Court Decisions Relied Upon By Appellees Contain Erroneous Analyses And Should Not Be Followed

Appellees rely (Br. 24-31) on the district court decisions in Bledsoe, supra; Decker v. University of Houston, 970 F. Supp. 575 (S.D. Tex. 1997); and Zimmerman v. Oregon Dep't. of Justice, 983 F. Supp. 1327 (D. Or. 1997), in arguing that employee benefits are not covered under Title II.[9] Appellees rely on two basic arguments used by these three district courts to support their decisions that Title II does not prohibit employment discrimination based upon disability. They are that (1) recognizing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees; and (2) permitting employees of public entities to bring an action under Title II without exhausting the administrative remedies required under Title I of the ADA creates

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[9] As appellees acknowledge (Br. 28), the district court decision in Bledsoe has been reversed by the Eleventh Circuit. Appeals are pending in both Decker, No. 97-20502 (5th Cir.), and Zimmerman, No. 97-36101 (9th Cir.). Oral argument was heard in Decker on February 3, 1998. Briefing is not yet completed in Zimmerman.

an anomalous situation that would undermine the administrative scheme. As we demonstrate herein, however, this Court should follow the appellate court decision in Bledsoe rather than the flawed reasoning of the district courts in Bledsoe, Decker, and Zimmerman.

First, there is no "redundancy" in the ADA. Titles I and II, while both reaching employment, create different remedial avenues in response to Congress's directive to afford complainants those distinct remedial paths. Complaints filed under Title I follow the administrative scheme of Title VII of the Civil Rights Act of 1964; complaints under Title II follow the administrative scheme of Section 504 of the Rehabilitation Act of 1973, which does not require exhaustion of any administrative remedy.[10] The ADA Title II regulations promulgated by the Attorney General rely upon the clear directive of the House Committee report that the "administrative enforcement of section 202 of the [ADA] should closely parallel the Federal government's experience with section 504." The Report specifically states that "it is not the Committee's intent

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[10/] Under Section 504, individuals with disabilities who alleged employment discrimination by recipients of Federal financial assistance were able, at their option, to have their complaints investigated and conciliated by Federal agencies or to file immediately in court and bypass administrative action on their complaints. Congress therefore preserved such an option under the ADA, substituting for the fund termination sanction available under Section 504 a referral of cases to the Department of Justice for possible lawsuit. See H.R. Rep. No. 101-485 (II) at 98 (envisioning that the Department of Justice would "identify appropriate Federal agencies to oversee compliance activities for State and local governments"). This congressional vision has been implemented by regulation. 28 C.F.R. 35.190.

that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action" under Section 202. H.R. Rep. No. 104-485 (II), 101st Cong., 2d Sess. 98 (1990). See also S. Rep. No. 101-116, 101st Cong., 1st Sess. 57-58 (1989).

One reason Title II was enacted without a requirement of exhaustion is that, prior to the enactment of the ADA, individuals who were employed by entities covered by Section 504, i.e., recipients of Federal financial assistance, could either file complaints, including complaints alleging employment discrimination, with the appropriate federal funding agency to begin an administrative investigation, or choose to go to court without exhausting that administrative process. The legislative history of Title II of the ADA establishes that Congress did not intend to require exhaustion where none had been required before, and so Title II provided an avenue for an employment claim without an exhaustion requirement.

Thus, the different treatment of employment claims brought under Titles I and II is the direct result of conscious choices made by Congress. It certainly does not create an anomalous or "redundant" situation resolvable only by excluding employment totally from Title II.

Appellees rely (Br. 25-26) on statements in the district court in Bledsoe that if employment discrimination is covered under Title II it results in a "'completely bewildering '" statutory scheme under which private employers with fewer than 15

employees are excluded from Title I coverage, while public employers must comply with Title II regardless of how few individuals they employ. 942 F. Supp. At 1445-1446. Since the Section 504 regulations on which Congress directed the Attorney General to model the Title II regulations not only reach employment but do not limit coverage based upon the size of the employer, the Department concluded that Title II was written to cover employment practices of all public entities, regardless of the size of the employer. 28 C.F.R. Pt. 35, App. A, Subpt. C. See Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993); Bruton v. Southeastern Pa. Transp. Auth., No. 94-CV-3111, 1994 WL 470277 (E.D. Pa. Aug. 19, 1994). The regulations are thus consistent with Congress's apparent intent to exclude small private employers, but not small public employers. That policy decision may well be based upon the view that public employers should be on the forefront of eliminating employment discrimination based upon disability. It may also reflect cost considerations that affect small private employers more than small public entities. In any event, the plain language of Title II, and its legislative history, make clear that Title II was intended to cover employment practices of all public entities, resulting in an Act that reaches all public employers but excludes very small private employers. While a court may disagree with the wisdom of Congress's choices, the language and legislative history of the ADA make exceedingly clear that Congress's choice was to cover employment practices

under Title II.[11]

D. Section 107(a) Of The ADA, 42 U.S.C. 12117(a), Does Not Require A Title II Complainant To Exhaust The Administrative Remedies Provided In Title I.

A number of defendants in Title II cases have argued that, even if employment claims are covered by Title II, individuals bringing their claim under Title II must still exhaust the Title I procedures. In so arguing, these defendants have focused on the language of Section 107(a) of the ADA, which states that the Title VII "powers, remedies, and procedures" apply to "any person alleging discrimination on the basis of disability in violation of any provision of this chapter * * * concerning employment (emphasis added)"[12] Section 107(a) does not, however, require a

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[11]/ Appellees argue (Br. 29) that the Eleventh Circuit in Bledsoe "acknowledged * * * [that] the [Department of Justice Title II] regulations have not been approved by Congress and have no effect." This argument misstates the Eleventh Circuit's opinion. The court in Bledsoe stated that Congress demonstrated its agreement with the Attorney General's interpretation of Title II when the Senate gave unanimous consent to publication of regulations adopting that interpretation as applied to covered employees within the legislative branch. 133 F.3d at 822. A footnote in the Bledsoe opinion noted that, pursuant to 2 U.S.C. 1384(d)(3), those regulations do not become effective until they are approved by Congress and published in the Congressional Record. Id. at 822 n.6. That footnote refers to regulations promulgated under the Congressional Accountability Act of 1995, 2 U.S.C. 1301 et seq. (CAA), not to the Title II regulations promulgated by the Attorney General. While the CAA regulations do require congressional approval, the ADA regulations do not.

[12]/ Section 107(a), 42 U.S.C. 12117(a), provides:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title [42 U.S.C.] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this

plaintiff filing an employment claim under Title II to exhaust the administrative remedies of Title I.

The district courts that have considered this argument have uniformly, and, in our view properly, rejected it. See Winfrey v. City of Chicago, 957 F. Supp. 1014, 1022-1023 (N.D. Ill. 1997); Wagner v. Texas A & M Univ., 939 F. Supp. 1297, 1310 (S.D. Tex. 1996); Silk v. City of Chicago, No. 95-C-0143, 1996 WL 312074 (N.D. Ill. June 7, 1996). To begin with, Section 107(a) is unclear because it refers to provisions of "this chapter" concerning employment, but then refers solely to regulations promulgated under Title I (42 U.S.C. 12116). But, the language of Section 202 (and its implementing regulations) reach all actions, including employment. Thus, even considering Section 107(a) in isolation, the courts that have considered this argument have found Section 107(a) "not expressive of clear Congressional intent" to apply Title I procedures to Title II claims. Wagner, 939 F. Supp. at 1310; see also Winfrey, 957 F. Supp. at 1022-1023; Silk, 1996 WL 312074 at *13.

Moreover, "[t]he plain meaning that [a court should] seek to discern is the plain meaning of the whole statute, not of isolated sentences." Beecham v. United States, 511 U.S. 368, 372 (1994). Here, Section 107(a) is in direct conflict with Section 203 of the ADA, which provides (42 U.S.C. 12133, emphasis

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chapter, or regulations promulgated under section 12116 of this title, concerning employment.

added):[13]

> The remedies, procedures, and rights set forth in section 794a of title 29[[14]] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title [42 U.S.C.].

Section 203 clearly provides that Title II complaints are enforced in accordance with the procedures of Section 504. Well-settled law establishes that individuals alleging employment discrimination under Section 504 have the right to file a complaint in federal court without exhausting any administrative remedy. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984); Cannon v. University of Chicago, 441 U.S. 677, 706 n.41

13/ If interpreted to mean that every ADA employment complaint must follow the Title I administrative procedures, Section 107(a) also conflicts with portions of Title V. As originally enacted, Section 509 (42 U.S.C. 12209) provided that the rights and protections of the ADA applied to employment by the Senate and the House of Representatives. But ADA complaints by congressional employees were administered in accordance with certain Senate and House resolutions, not by the procedures of Title I. See 42 U.S.C. 12209 (a)(3) and (b)(2)(B). Thus although Section 509 as originally enacted was a "provision of this chapter [the ADA] * * * concerning employment," it, like Title II (which follows Section 504 of the Rehabilitation Act), incorporated procedures other than those of Title I.

The applicability of the rights and protections of the ADA to Congress is now governed by the Congressional Accountability Act of 1995, Pub. L. 104-1 (104th Cong., 1st Sess.). Section 201(c)(3) of that Act amended 42 U.S.C. 12209 to delete subsections (a) and (b), which were replaced by new procedures codified at 2 U.S.C. 1301 et seq.. See especially 2 U.S.C. 1331(d).

14/ Section 203 provides Title II complainants the remedies, procedures, and rights provided to Section 504 complainants, i.e., Section 505(a)(2), 29 U.S.C. 794a(a)(2). Section 505(a)(1), 29 U.S.C. 794a(a)(1), on the other hand, applies solely to complaints by Federal employees under Section 501, 29 U.S.C. 791.

(1979). The ADA specifically preserves that right. 42 U.S.C. 12201(b). In other words, Section 504 is the baseline against which Title II remedies, rights, and procedures are measured. See Bledsoe, 133 F.3d at 821 ("Congress intended Title II to work in the same manner as Section 504"). As the court in Silk recognized, 1996 WL 312074 at *13,

> given the parallel enforcement structure of the ADA and the small overlap of Title I and Title II employment discrimination claims, this court concludes that if Congress had truly intended to subject all ADA employment discrimination claims to Title I's enforcement scheme, section 12133 would have limited application of the Rehabilitation Act's procedures etc. to all violations of section 12132, except employment discrimination claims. In the absence of this language, the defendants' argument fails.

The interpretation that Section 107(a) limits employment actions to Title I also conflicts with Section 204 of the ADA, 42 U.S.C. 12134(b), which directed the Attorney General to promulgate regulations consistent with the existing Section 504 coordination regulations. See 28 C.F.R. 41.5. See Cannon v. University of Chicago, 441 U.S. 677, 706 n.41 (1979) (private right of action permitted without exhausting administrative remedies). See also Bledsoe, 133 F.3d at 824. As the Supreme Court has stated, "'[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" Department of Revenue v. ACF Indus., 510 U.S. 332, 343 (1994), quoting United Sav. Ass'n v. Timbers of Inwood Forest

Assocs., 484 U.S. 365, 371 (1988).[15]

Finally, the legislative history of the ADA supports our interpretation on the issue of exhaustion of administrative remedies under Title II. In resolving the apparent conflict between the language of Section 107(a) and that of Section 203 in favor of permitting Title II employment actions to proceed without use of Title I procedures, the Attorney General properly consulted the legislative history. Administrator, Fed. Aviation Admin. v. Robertson, 422 U.S. 255, 262-263 (1975); Garcia v. United States, 469 U.S. 70, 76 n.3 (1984). The authoritative committee reports clearly state that the exhaustion requirement of Title I does not apply to Title II (it was "not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action"). H.R. Rep. No. 101-485(II) at 98. See also S. Rep. No. 101-116 at 57-58.

The regulations promulgated by the Attorney General are entitled to "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron,

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[15]/ The apparent clash between Section 107(a) and Sections 203 and 204 can be reconciled, however, by construing the language used in Section 107(a) -- "any provision of this chapter * * * concerning employment" -- as limited to Title I. Indications that this is the case are that, not only is Section 107(a) contained within Title I, but it also refers only to regulations promulgated under Title I. In addition, its reference to a provision "concerning employment" most closely describes Title I, which concerns solely employment, as opposed to Title II, which more broadly prohibits any form of discrimination based on disability in public services and programs, including employment.

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Since the regulations stating that exhaustion of administrative remedies is not required under Title II (28 C.F.R. Pt. 35, App. A § 35.172) are consistent with the statute as a whole and well-grounded in the legislative history, they should be given controlling weight here. Section 107(a) does not compel the holding that individuals filing employment claims under Title II must use the procedures of Title I.

This interpretation is fully consistent with separate Title II regulations that have been raised in other cases as suggesting that Title II complainants must exhaust Title I administrative procedures. 28 C.F.R. 35.140 states:

> (b)(1) For purposes of [part 35 of the regulations], the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.
>
> (2) For the purposes of [part 35], the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

These regulations are intended to impose the substantive requirements of Title I upon a Title II employment claim where that public entity involved is also covered by Title I. They do not address the procedural requirements. Part 1630 of the EEOC

regulations referenced in 28 C.F.R. 35.140(b)(1) contain only the substantive regulations implementing Title I. The procedural requirements, including the requirement for exhaustion of administrative remedies, are contained in 29 C.F.R. Pt. 1641. Thus, as the district court in Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1280 (W.D. Wis. 1993), correctly concluded, it is "unlikely that if the Department of Justice had meant the procedural requirements of Title I of the Act to apply to claims of employment discrimination brought under Title II, it would have referred explicitly to only the part of the [EEOC] regulations governing substantive requirements imposed on defendants and neglected to refer to the part of the regulations that address procedural requirements imposed on plaintiffs." See also Silk, 1996 WL 312074, at *12; Dertz v. City of Chicago, 912 F. Supp. 319, 324 (N.D. Ill. 1995); and Ethridge, 860 F. Supp. at 813.[16]

[16/] Appellees quote an additional argument from the district court opinion in Decker, which relies on the Government Employee Rights Act of 1991, 2 U.S.C. 1201-1220, in concluding that Congress could not have intended to allow employees of public entities to file suits under Title II without exhausting the administrative remedies of Title I of the ADA. See Brief at 27. That reliance is misplaced.

The GERA was enacted one year after the ADA in part to provide a cause of action alleging employment discrimination based upon race, sex, religion, age, and disability for certain policymaking or confidential State employees who are precluded from bringing suit under Title VII (see 42 U.S.C. 2000e(f)). The GERA requires such an employee to file a claim with the EEOC, which issues a final order that is subject only to limited review by a court. See 2 U.S.C. 1220. The district court in Decker concluded (970 F. Supp. at 578) that Congress would not have established such a limited administrative process regarding

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's holding that employment discrimination complaints may be brought under Title II of the ADA.

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politically sensitive employees if such employees already had the right to bring a private suit under Title II without exhausting administrative remedies of any kind. That conclusion is undermined, however, by the fact (apparently not considered by the district court in Decker) that such employees are not exempt from coverage under Title I, as they are under Title VII. The existence of the GERA remedy thus does not add anything to the court's analysis.