IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

PEGGY HARNOIS	)	
	)	
Plaintiff,	)	**Civil No. 98-CV-67-B**
	)	
v.	)	
	)	
CHRISTY'S MARKET, INC.,	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF AMICUS CURIAE THE UNITED STATES IN OPPOSITION TO DEFENDANT CHRISTY'S MARKET, INC.'S MOTION TO DISMISS

INTRODUCTION

Plaintiff Peggy Harnois is a person with a disability who uses a wheelchair. She has filed a complaint alleging that defendant Christy's Market, Inc., has violated title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 through 12189, by failing to remove architectural barriers to access at several Christy's Market locations in Maine. Among other things, she alleges that Christy's Market locations fail to provide parking that is accessible to people with disabilities, that there are no accessible routes to the entrances to Christy's Markets (due to a lack of curb cuts and curb ramps), that the entrances to Christy's Markets are inaccessible, and that aisles within Christy's Markets are inaccessible.

The defendant has filed a motion to dismiss Ms. Harnois' claim under Fed. R. Civ. P. 12(b)(1), arguing that this court lacks subject matter jurisdiction of the claim because Ms.

Harnois failed to notify relevant state authorities of her claim thirty days before filing this action. The defendant's position rests on an erroneous reading of title III of the ADA, and should be rejected.[1]

ARGUMENT

The Plain Language of Title III of the ADA Makes Clear that Plaintiffs Are Not Required to Pursue Administrative Remedies Before Filing Suit In Federal Court.

Title III of the ADA, 42 U.S.C. § 12181 through 12189, prohibits discrimination on the basis of disability. Among other things, it requires private entities that own, operate, or lease public accommodations to remove architectural barriers to access to their facilities, when removing those barriers is readily achievable. 42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(iv). This and the other provisions of title III are enforced both by the Attorney General, who is specifically authorized to investigate complaints of non-compliance and bring actions to enforce the statute, 42 U.S.C. § 12188(b), and by private citizens, who are also authorized to institute civil actions to vindicate their rights. 42 U.S.C. § 12188(a)(1).

The authority for suits by private citizens is found in section 308(a)(1) of the ADA, which provides that

> [t]he remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of

[1]Christy's Market also argues that the venue of this action should be transferred to Portland. The United States expresses no opinion on the defendant's arguments as to venue.

> disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183.

Id. Section 2000a-3(a) of title 42 is the codified version of section 204(a) of the Civil Rights Act of 1964. It provides that

> [w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court, may in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

42 U.S.C. § 2000a-3(a).

Thus, the "remedy" adopted for title III of the ADA is a civil action for injunctive relief. The "procedures" it provides are intervention by the Attorney General in a case certified by the Attorney General to be of "general public importance," and, "[u]pon application by the complainant and in such circumstances as the court may deem just," appointment of an attorney for the complainant and the commencement of suit without the payment of fees, costs, or security. Neither the "remedies" nor the "procedures" include any requirement of notice to any state or local authority.

The notice requirement that Christy's Market seeks to impose comes from a different provision of the Civil Rights Act — namely, section 204(c) (codified as 42 U.S.C. § 2000a-3(c)).

That provision does require that in states or other political subdivisions with statutes that offer civil rights protections, a plaintiff must notify the relevant state or local agency at least thirty days before bringing an action on a claim arising under the Civil Rights Act. 42 U.S.C § 2000a-3(c).[2] The problem with the argument advanced by Christy's Market is that title III of the ADA specifically incorporates only section 204(a) of the Civil Rights Act, and not section 204(c). Indeed, there is no mention of section 204(c) anywhere in the ADA. Despite this fact, Christy's Market nonetheless argues that the requirements and procedures of section 204(c) should also be added to the ADA.

In any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." Robinson v. Shell Oil Co., 519 U.S. 337, ___, 117 S. Ct. 843, 849 (1997). The Supreme Court has made clear "time and again that courts must presume that a legislature says in a statute what it means and

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[2]Section 204(c) of the Civil Rights Act provides that

> [i]n the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this section before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

42 U.S.C. § 2000a-3(c).

means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992). Here, the language could not be more plain: Congress specifically incorporated only one provision from section 204 of the Civil Rights Act — section 204(a) — and omitted the rest. There is no reason to believe that Congress did not do so intentionally.

Indeed, it is well-settled that when one statute is modeled on another, but omits a specific provision contained in the original, "a strong presumption exists that the legislature intended to omit that provision." Kirchner v. Chattanooga Choo Choo, 10 F.3d 737, 738-739 (10th Cir. 1993) citing Bank of America v. Webster, 439, 691, 692 (9th Cir. 1971); Crane Co. v. Richardson Constr. Co., 312 F.2d 269, 270 (5th Cir. 1973). *See also* Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947) (in construing a statute, "[o]ne must also listen attentively to what it does not say").[3]

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[3]The legislative history of the ADA also makes clear that there are no prerequisites to filing a federal action under title III. A colloquy between Senator Harkin, one of the primary sponsors of the ADA and the floor manager of the bill, and Senator Bumpers, a co-sponsor, indicates that pursuit of administrative remedies is not required in suits under title III.

> MR. BUMPERS. * * * if somebody who is disabled goes into a place of business, and we will just use this hypothetical example, and they say, "You do not have a ramp out here and I am in a wheelchair and I just went to the restroom here and it is not suitable for wheelchair occupants," are they permitted at that point to bring an action administratively against the owner of that business, or do they have to give the owner some notice prior to pursuing a legal remedy?
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> MR. HARKIN. First of all, Senator, there would be no

Title III of the ADA is not simply a carbon-copy of title II of the Civil Rights Act of 1964. While both prohibit discrimination by public accommodations, Congress recognized that discrimination based upon disability is manifested in ways that are distinct from discrimination on the basis of race, color, religion or national origin, and chose to address them in a different way. Rather than simply amending title II of the Civil Rights Act to add disability as a prohibited basis for discrimination, Congress enacted a comprehensive statute addressing a variety of issues — including issues such as architectural and communication barriers to access, 42 U.S.C. § 12182(b)(2)(A)(iv), provision of auxiliary aids and services, 42 U.S.C. § 12182(b)(2)(A)(iii), and requirements for accommodations for people with disabilities when they are taking courses or examinations for licenses or other professional certifications, 42 U.S.C. § 12189 — that were not relevant to the kinds of discrimination prohibited by the Civil Rights Act. The ADA has broader coverage of public accommodations, and also

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> administrative remedy in that kind of a situation. The administrative remedies only apply in the employment situation. In the situation you are talking about --
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> MR. BUMPERS. That is true. So one does not have to pursue or exhaust his administrative remedies in title III if it is title III that is the public accommodations.

135 Cong. Rec. 19859 (1989). *See also* Grubbs v. Medical Facilities of America, Inc., 1994 WL 791708 (W.D. Va. 1994) (noting that the legislative history of the ADA "indicates that Congress did not intend to require exhaustion of administrative remedies for persons with disabilities").

covers other types of entitites. *Compare* 42 U.S.C. § 2000a(b) (covering four categories of public accommodations) *with* 42 U.S.C. 12181(7) (covering twelve categories of public accommodations), 42 U.S.C. § 12183 (obligations imposed on commercial facilities), and 42 U.S.C. § 12184 (coverage of public transportation services provided by private entities).

The Third Circuit faced an analogous situation in Sperling v. Hoffmann-La Roche, Inc., 24 F.3d 463 (3rd Cir. 1994). There the issue was whether the filing of a representative complaint under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), tolled the statute of limitations for unnamed employees to become members of the opt-in class. At the time the action was filed, the ADEA expressly incorporated the statute of limitations contained in Section 6 of the Portal-to-Portal Act, 29 U.S.C. § 255. 29 U.S.C. § 626(e)(1) (1991). The employer argued that the tolling question should be governed by Section 7 of the Portal-to-Portal Act, 29 U.S.C. § 256, which was not incorporated specifically into the ADEA. Section 7 would have required employees who wished to opt in to do so within the Section 6 statute of limitations. The Court of Appeals noted that "incorporation of selected provisions into section 7(b) of [the] ADEA indicates that Congress deliberately left out those provisions not incorporated." Sperling, 24 F.3d at 470. The court stated that its decision was "a fairly routine application of the traditional rule of statutory construction pithily

captured in the Latin maxim expressio unius est exclusio alterius." Id. That principle applies equally here.

Indeed, in construing the requirements of the enforcement provisions of title III, several other federal courts have held that plaintiffs are not required to pursue state administrative remedies prior to filing an action to enforce title III of the ADA. One of the most recent decisions was issued by another district court in the First Circuit, in Bercovitch v. Baldwin School, 964 F. Supp. 597 (D.P.R. 1997). There, as here, the defendants contended that section 204(c) of the Civil Rights Act is also applicable to claims under title III of the ADA. Id. at 605. As the court noted, however,

> [n]owhere in Title III of the ADA, however, is specific reference to this section ever made. Given that Congress specifically referred to § 2000a-3(a) when outlining the available remedies under Title III, we believe that, had it wanted to make written notice to state authorities a requirement under this title, it would have explicitly done so.

Id. Other courts have come to the same conclusion. *See* Coalition of Montanans Concerned with Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1169 (D. Mont. 1997) (in case arising under title III, court noted that "plaintiffs need not exhaust their administrative remedies" before bringing suit); Grubbs v. Medical Facilities of America, Inc., 1994 WL 791708, *2-3 (W.D. Va. 1994) (exhaustion of administrative remedies not required under ADA); Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, slip op. at 5-11 (D. Colo. Civil No. 96-WY-2492-AJ, Mar. 3, 1997) (title III

adopts only portions of section 204 of the Civil Rights Act, and plaintiffs are not required to provide notice to administrative agencies or exhaust administrative remedies before bringing claims under title III) (copy attached as Exhibit 1). *Cf.* Devlin v. Arizona Youth Soccer Ass'n, 1996 WL 118445, *2 (D. Ariz. 1996) (no requirement of exhaustion under title II of the ADA).

The cases cited by Christy's Market, on the other hand, are largely inapposite. For instance, Christy's Market first points to a case decided in 1993 by the Seventh Circuit Court of Appeals, Stearns v. Baur's Opera House, Inc., 3 F.3d 1142 (7th Cir. 1993). That case, however, has nothing to do with title III of the ADA; it deals only with a claim under the Civil Rights Act of 1964 — and there is no question that the notice requirement applies to such a claim.[4] Indeed, in 1996, in a case arising under title III of the ADA, the Seventh Circuit made clear that there are no prerequisites to filing suit under title III. In Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547 (7th Cir. 1996), a physician sought certain accommodations in taking the oral portion of the exam for board certification in plastic surgery; when he did not receive the accommodations he sought, he first appealed to the Board of Plastic Surgery, and

[4]Similarly, White v. Denny's Inc., 918 F. Supp. 1418 (D. Colo. 1996), cited by Christy's Market, also deals with claims arising under the Civil Rights Act, and has nothing to say about which portions of the Civil Rights Act are incorporated into title III of the ADA.

after that appeal failed, filed suit in federal court. Id. at 549. His action was dismissed on grounds that it was time-barred. Id. In upholding that decision, the Seventh Circuit observed that

> [u]nlike an EEOC investigation . . ., internal appeals are not part of the ADA statutory procedure and do not toll the time for filing suit. Because there is no first obligation to pursue administrative remedies, Soignier had to file suit within two years of the accrual date . . . .

Id. at 553 (citation omitted, emphasis added).

Christy's Market also relies on Daigle v. Friendly Ice Cream Corp., 957 F. Supp. 8 (D.N.H. 1997), in which the court posits, without discussion, that the notice requirement of section 204(c) of the Civil Rights Act is "made applicable to the ADA by 42 U.S.C. § 12188(a)(1)." Id. at 9. Given that plaintiff Daigle was proceeding *pro se*, however, it appears that the court did not have the benefit of any argument from the plaintiff as to which provisions of the Civil Rights Act were incorporated into title III of the ADA. In any event, in the absence of any explanation of how the court reached the conclusion that section 12188(a)(1) of the ADA incorporated not just section 204(a), but also section 204(c), the opinion is simply not persuasive.

The only other case cited by Christy's Market is Mayes v. Allison, 983 F. Supp. 923 (D. Nev. 1997), in which the court concluded that the language of title III was ambiguous as to which portions of the Civil Rights Act were incorporated into the ADA. Id. at 925. The court concluded that the statutory language was ambiguous because other federal courts had split on

the question of whether the ADA incorporated just section 204(a), or more of section 204, including section 204(c). One of the opinions it cited, however, for the proposition that the courts were divided on this question, was the Daigle opinion — which, as noted above, involved a *pro se* plaintiff who appears to have failed to provide the court with any helpful argument on the scope of what is incorporated into the ADA.

Although not cited by Christy's Market, one other federal court has held that the ADA incorporates not just the remedies and procedures of section 204(a) of the Civil Rights Act, but also the notice requirement of section 204(c). Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148 (D. Colo. 1996). Although never articulated, the underlying rationale of the Howard court seems to be that by incorporating section 204(a), Congress must necessarily have intended to incorporate the rest of section 204 as well. Even a brief examination of the other portions of section 204, however, makes clear that Congress could not have meant to incorporate all of section 204 into the ADA. For instance, section 204(d), which applies in those situations in which there is no state or local law prohibiting the discrimination at issue, allows a court in which a civil action is commenced pursuant to section 204(a) to refer the matter to the Community Relations Service ("CRS") for a limited time, if it believes there is a "reasonable possibility of obtaining voluntary compliance." 42 U.S.C. § 2000a-3(d). In adopting the ADA, however, Congress did not expand the jurisdiction of the CRS

to allow it to mediate issues of discrimination based on disability,[5] and it is clear that Congress did not intend to incorporate section 204(d) into title III.

Similarly, section 204(b), which allows a court to award attorney's fees to a prevailing party in an action brought under section 204(a), was certainly not meant to be incorporated into title III. Congress inserted a separate provision into the ADA specifically addressing the availability of attorney's fees, a provision which is applicable to all civil actions and administrative proceedings brought pursuant to the ADA. Inclusion of section 204(b) of the Civil Rights Act would clearly be redundant. Given that Congress has so clearly chosen to incorporate only section 204(a) of the Civil Rights Act into title III, there simply is no merit in the argument that other portions of section 204 — including the notice requirement — have also (silently) been incorporated.

[5]The CRS is only authorized to investigate, hear, mediate, and otherwise provide assistance in disputes arising under title II of the Civil Rights Act involving questions of discrimination based on race, color, or national origin. *See* 42 U.S.C. §§ 2000a-4, 2000g, 2000g-1. It has no authority to address disputes involving questions of discrimination based on disability.

CONCLUSION

For the reasons set forth above, this court should deny defendant Christy's Market Inc.'s motion to dismiss.

Respectfully submitted,

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