IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

SHEILA M. STEPHENS,	)	
	)	**Civil Action No. 3:99-cv-217**
Plaintiff	)	
	)	
v.	)	
	)	
UNIVERSITY OF TENNESSEE (KNOXVILLE),	)	
	)	
Defendant.	)	

UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS ON ELEVENTH AMENDMENT IMMUNITY GROUNDS

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TABLE OF CONTENTS

INTRODUCTION

The United States moves to intervene as of right in this action for the purpose of defending the constitutionality of the abrogation of states' Eleventh Amendment immunity in the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101 et seq. Plaintiff, Sheila Stephens, who works in the audio/visual library at the University of Tennessee at Knoxville, has filed suit in this Court alleging inter alia that the University intentionally discriminated against her in violation of the ADA when it passed her over for a promotion to a supervisory position on the basis of her disabilities, Graves Disease and Hepatitis C. Defendant University, an instrumentality of the State of Tennessee, has moved to dismiss her complaint, claiming that this Court does not have jurisdiction to hear the claim because the ADA's abrogation of states' sovereign immunity is unconstitutional, and, in the alternative, for summary judgment on the merits.

The vast majority of federal courts that have addressed the issue of states' Eleventh Amendment immunity to claims of unlawful discrimination under the ADA, including six circuit courts of appeal, have upheld the ADA's abrogation of that immunity.[1] Although the Sixth Circuit has yet to squarely address the issue, its rulings with respect to the same provision in other federal civil rights statutes suggest that it is likely to follow the majority rule. The United States

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[1] See Garrett v. University of Alabama at Birmingham Board of Trustees, 193 F.3d 1214, 1218 (11th Cir. 1999); Dare v. State of California, 191 F.3d 1167, 1175 (9th Cir. 1999); Martin v. Kansas, 190 F.3d 1120, 1128 (10th Cir. 1999); Muller v. Costello, 187 F.3d 298, 310 (2nd Cir. 1999); Seaborn v. Florida, 143 F.3d 1405, 1406 (11th Cir. 1998), cert. denied, 119 S.Ct. 1038, 143 L.Ed.2d 46 (1999); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir. 1998), petition for cert. pending as to the ADA issue, cert. granted as to the Age Discrimination in Employment Act (ADEA) issue, 119 S.Ct. 901, 119 S.Ct. 902 (Jan. 25, 1999); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998), cert. denied, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998); Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998); and Crawford v. Indiana Department of Corrections, 115 F.3d 481, 487 (7th Cir. 1997). See also Torres v. Puerto Rico Tourism Company, 175 F.3d 1, 6 n.7 (1st Cir. 1999) (stating in dicta that "we have considered the issue of Congress' authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the [abrogation] provision").

respectfully urges this Court to follow the majority of circuit courts in upholding the ADA's abrogation of states' immunity and to deny Defendant's motion to dismiss on that ground.

ARGUMENT

I. In Enacting the Americans with Disabilities Act, Congress Validly Abrogated States' Sovereign Immunity Pursuant to Its Power to Enforce the Equal Protection Clause of the Fourteenth Amendment

In the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., Congress expressly provided that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.[2] The United States Supreme Court has not ruled on the question of whether this abrogation of states' immunity was a valid exercise of Congress' power. However, six circuit courts of appeals have concluded that it is.[3] The Sixth Circuit is currently considering this issue in the appeals of six district court rulings, four of which upheld the abrogation provision and two of which did not.[4] All of these cases were

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[2] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." U.S. Const. amend. XI. The United States Supreme Court has broadened the meaning of this amendment to preclude suits in federal court against a state by its own citizens. See Hans v. Louisiana, 134 U.S. 1, 10 Sup.Ct. 504, 33 L.Ed. 842 (1890).

[3] See cases listed at footnote 1, above.

[4] See consolidated interlocutory appeals of district court denials of defendants' motions to dismiss: Parr v. Middle Tennessee State University, No. 3:98-cv-865 (M.D.Tenn. Nov. 20, 1998), appeal docketed, No. 98-6701 (6th Cir. Dec. 16, 1998); and Lane v. Tennessee No. 3:98-cv-865 (M.D.Tenn. Nov. 12, 1998), appeal docketed, No. 98-6730 (6th Cir. Dec. 18, 1998). Also consolidated for purposes of appeal are two cases dismissed on the defendant's motion, and two cases denying the defendant's motion to dismiss, respectively: Satterfield v. Tennessee, No. 3:97-cv-0478 (E.D. Tenn., May 8, 1998), appeal docketed, No. 98-5765 (6th Cir. June 9, 1998); Nihiser v. Ohio Environmental Protection Agency, 979 F.Supp. 1168 (S.D. Ohio Aug. 7, 1997), appeal docketed, No. 97-3933 (6th Cir. Aug. 19, 1997); Pomeroy v. Western Michigan University, No. 4:96-cv-135 (W.D. Mich. June 16, 1997), appeal docketed, No. 97-1751 (6th Cir. July 17, 1997); and Wright v. Luma Correctional Institution, No. 3:95-cv-7452 (N.D. Ohio Apr. 17, 1997), appeal docketed, No. 97-3587 (6th Cir. June 11, 1997).

submitted to the Court for decision, either on briefs or with argument, on October 26, 1999. This Court might consider staying its ruling on the defendant's motion to dismiss until the Sixth Circuit has ruled on the issue.

A. Congress Found That Discrimination Against People with Disabilities Was Severe and Extended to Every Aspect of Society

When Congress enacted the ADA, it made explicit findings of pervasive, nationwide discrimination against individuals with disabilities. Some of those findings were included in the text of the statute itself, such as the following:

> [H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> [D]iscrimination against individuals with disabilities persists in such crucial areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services...

42 U.S.C. § 12101(a)(2), (3). Among the principal areas in which Congress found a persistent pattern of discrimination on the basis of disability were areas traditionally dominated by the state, such as institutionalization, voting, education and transportation.

The ADA's legislative history is replete with findings of unconstitutional exclusion of, and discrimination against, people with disabilities.[5] Among many other findings, the evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public

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[5] The limits of this brief prevent us from incorporating a complete summary of the 14 hearings held by Congress at the Capitol, the 63 field hearings, the lengthy floor debates and the myriad reports submitted to Congress by the Executive Branch in the three years prior to the enactment of the ADA, as well as Congress' 30 years of experience with other statutes aimed at preventing discrimination against persons with disabilities. See Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393-94 nn. 1-4, 412 n. 133 (1991) (collecting citations); and Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387-89 (1991) (discussing other laws enacted to redress discrimination against persons with disabilities).

services and employment for no reason other than distaste for or fear of their disabilities.[6] The legislative record contains documented instances of exclusion of persons with disabilities from hospitals, theaters, restaurants, bookstores, and auction houses simply because of prejudice.[7] Indeed, the United States Commission on Civil Rights, after conducting a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on false stereotypes, and stigma associated with disabilities that cause people with disabilities to be "thought of as not quite human."[8] The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society.[9] Congress thus concluded that persons with disabilities were "faced with restrictions and limitations...resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7).

The many decades of ignorance, fear and misunderstanding created a tangled web of discrimination, which has resulted in, and has been reinforced by, isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more generally to the segregation of people with disabilities.[10] This segregation has resulted in part from government

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6 See S. Rep. No. 116, 101st Cong., 1st Sess. 6-8 (1989) (Senate Report) (citing instances of discrimination based on negative reactions to sight of disability); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report).

7 See Cook, supra n. 4, at 408-9.

8 U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities at 23-26, 99 (1983); see also Senate Report, supra n. 5, at 21.

9 See Senate Report, supra n. 5, at 16; House Report, supra n. 5, at 35, 41-43; Cook, supra n. 4, at 411.

10 See Senate Report, supra n. 5, at 11; U.S. Commission on Civil Rights, supra n. 7, at 43-45.

policies and practices in the "critical areas" listed by Congress in the statute. Together with private discrimination, these government policies and practices have produced a situation in which people with disabilities are largely poor, isolated and segregated. These findings indicate that Congress specifically considered the role of state and local governments in its assessment of the evidence of unconstitutional discrimination against people with disabilities.

Traditionally, people with disabilities have been excluded from participation in public life by a series of unnecessary barriers, from inaccessible public transportation to poorly designed government buildings. Even when people with disabilities had access to generally available goods and public services, often they could not afford them due to poverty. Over twenty percent of people with disabilities of working age live in poverty, more than twice the rate of other Americans.[11] Congress specifically found that this condition was linked to the extremely high unemployment rate among people with disabilities, which in turn was a result of discrimination in employment combined with inadequate education and transportation.[12]

This discrimination was clearly irrational, as people with disabilities who were able to overcome these barriers proved to be excellent workers.

> [T]here is consistent...empirical evidence to back up the claims...that handicapped persons are more stable workers, with lower turnover, less absenteeism, lower risks of accident, and more loyalty to and satisfaction with their jobs and employers than other workers of similar characteristics in similar jobs.[13]

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[11] See National Council on the Handicapped, On the Threshold of Independence 13-14 (1988).

[12] See Senate Report, supra n. 5, at 47; House Report, supra n. 5, at 37, 88; U.S. Commission on Civil Rights, supra n. 7, at 80.

[13] Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196, 208 (Monroe Berkowitz & M. Anne Hill eds., 1986). See also Senate Report, supra n. 5, at 28-29 (discussing studies that show job performance of employees with disabilities was as good as others); and House Report, supra n. 5, at 58-59 (same).

Given these facts, it is not surprising that surveys of both people with disabilities and employers revealed that discrimination was one of the primary reasons many people with disabilities did not have jobs:[14]

> [R]ecent studies suggest that prejudice against impaired persons is more intense than against other minorities. [One study] concludes that employer attitudes toward impaired workers are 'less favorable than those ... toward elderly individuals, minority group members, ex-convicts, and student radicals,' and [another study] finds that handicapped persons are victims of 'greater animosity and rejections than many other groups in society.'[15]

In addition, even when employed, people with disabilities received lower wages that could not be explained by any factor other than discrimination.[16]

Congress heard extensive testimony that employers irrationally and arbitrarily denied employment to individuals with disabilities:

> As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity.[17]

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[14] See Senate Report, supra n. 5, at 9; House Report, supra n. 5, at 33, 37; On the Threshold of Independence, supra n. 10, at 15.

[15] William G. Johnson, The Rehabilitation Act and Discrimination Against Handicapped Workers, in Disability and the Labor Market 242, 245, supra n. 12.

[16] See U.S. Commission on Civil Rights, supra n. 7, at 31-32; Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 8,581 (1991) (citing studies); and Johnson, supra n. 14, at 245 (same).

[17] House Report, supra n. 5 at 71; see also Americans with Disabilities Act: Hearing Before the House Comm. on Small Business, 101st Cong., 2d Sess. 128-134 (1990) (testimony of Arlene Mayerson) (collecting studies showing that employers reacted in a stereotyped and prejudiced manner to applicants with disabilities); and Advisory Commission on Intergovernmental Relations (ACIR), Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 21 (Apr. 1989) ("Researchers have shown that potential employers and coworkers have negative views and expectations about the productivity and reliance of workers with some form of mental or physical disability.").

There is no doubt that similar discrimination of a constitutional magnitude existed in government employment.[18] Nor is there any reason to believe that governmental entities were immune from the unfortunate reality that "[f]requently, employer prejudices exclude[d] handicapped persons from jobs."[19] Indeed, since many government buildings were inaccessible, there may have been reduced opportunity for such employment to begin with. Based on these studies, Congress could reasonably have found that government discrimination, in its provision of public services and employment, was a root cause of "people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6).

B. The ADA Was Enacted to Enforce the Equal Protection Clause and is Plainly Adapted to That Purpose

As a general proposition, the Eleventh Amendment protects states from being sued by individual citizens in federal court. However, this immunity is not absolute, and can, in certain circumstances, be waived by the state or abrogated by Congress. One such circumstance arises pursuant to the Fourteenth Amendment, which vests Congress with the power to enforce the Equal Protection Clause "by appropriate legislation." U.S. Const. Amend. XIV, Section 5. In Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), in which the United States Supreme Court upheld the abrogation of states' immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., the Court held that

> Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts...When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising

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[18] See Stephen L. Mikochik, The Constitution and the Americans with Disabilities Act: Some First Impressions, 64 Temp. L. Rev. 619, 624 n.33 (1991) (collecting relevant testimony).

[19] U.S. Commission on Civil Rights, supra n. 7, at 29.

> that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Id., 427 U.S. at 456.

In Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Supreme Court reaffirmed the holding in Fitzpatrick and articulated a two-part test to determine whether Congress has properly abrogated states' Eleventh Amendment immunity from suit in federal court: "first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power." Id. 517 U.S. at 55 (citations, quotations and brackets omitted). The explicit abrogation provision in the ADA is more than a sufficient expression of Congress' intent. With respect to the second element, Congress expressly provided that the ADA was intended "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment...in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The great majority of cases have held that the goal of enforcing the Equal Protection Clause pursuant to Section 5 provides a sufficient constitutional basis for Congress' application of the ADA to states.

Over a hundred years ago, the Supreme Court articulated its view of the broad reach of Section 5 of the Equal Protection Clause:

> [W]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex Parte Virginia, 100 U.S. 339 at 345-346, 10 Otto 339, 25 L.Ed. 676 (1879). Thus, in general, a statute will be "appropriate legislation" under Section 5 of the Fourteenth Amendment if it is "plainly adapted" to the goal of enforcing the Equal Protection Clause and consistent with "the

letter and spirit of the constitution." Katzenbach v. Morgan, 384 U.S. 641 at 651, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

After Seminole Tribe, the Supreme Court held in City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), that in order for legislation to be "plainly adapted" to the goal of enforcing the Fourteenth Amendment, it must be linked to constitutional violations, and its remedies must be "congruent and proportional" to the evils sought to be addressed. Id., 521 U.S. at 520. In that case, the Court confirmed that Congress has broad discretion to enact legislation to redress what it rationally perceives to be widespread constitutional injuries against individuals with disabilities, and explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. Id. at 517-518. Specifically, the Court held that Congress can prohibit activities that are not themselves unconstitutional in furtherance of its remedial scheme: "Legislation which deters or remedies constitutuional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutuional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" Id. at 518 (citing Fitzpatrick, 427 U.S. at 455).

In Boerne, the Supreme Court stressed that Congress' power had to be linked to constitutional injuries and that there must be a "congruence and proportionality" between the identified harms and the statutory remedy. Id. at 520. The Court acknowledged that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." Id. at 519-520.[20] Under this analysis, a majority of circuit

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[20] This line of reasoning was expressly reaffirmed in the recent Supreme Court decision in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S.Ct.

courts of appeal have found the ADA to be "congruent and proportional" to the pervasive discrimination on the basis of disability which it seeks to remedy, and thus a valid exercise of congressional power.[21]

C. In Enacting the ADA, Congress Was Acting Within The Constitutional Framework Set Down By the Supreme Court

The Equal Protection Clause prohibits invidious discrimination, that is "a classification whose relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne v. Cleburne Living Center, 473 U.S. 432 at 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In Cleburne, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [persons with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" Id. at 454 (Stevens, J., concurring); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making. As Justice Marshall explained, "lengthy and continuing isolation of [persons with disabilities has] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." Id. at 464; see also U.S. Commission on Civil Rights, supra n. 7, at 43-45. Thus, the Equal Protection

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2199, 144 L.Ed.2d 575 (1999), which relied on Boerne as the guide for its decision. See also Dare, supra, 191 F.3d at 1174 ("The Court's recent decision in Florida Prepaid clarifies the congruence and proportionality test outlined in [Boerne]").

[21] See cases listed at footnote 1, above. Crawford was decided before the Supreme Court's decision in Boerne, but its reasoning is fully consistent with that case.

Clause of its own force already proscribes treating persons with disabilities differently when the government has not put forward evidence justifying the difference or where the justification is based on mere negative attitudes. In this respect, the ADA is part of a long tradition of federal civil rights laws which prohibit arbitrary and irrational discrimination.

The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir. 1979), cert. denied, 444 U.S. 937, 100 S.Ct. 287, 62 L.Ed.2d 197 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more...major life activities." 42 U.S.C. 12102(2)(A). Thus, as to that life activity, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander v. Choate, 469 U.S. 287 at 298, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). The Constitution is not blind to this reality and instead, in certain circumstances, requires equal access rather than simply identical treatment. For "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431 at 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

Thus, there is a basis in constitutional law for recognition that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences. As the Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a

difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of rehearing en banc), reversed, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). Similarly, it is also a denial of equality when access to facilities, benefits, services and employment is denied because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

Bringing these principles together, the ADA seeks to make effective the right to be free from invidious discrimination by establishing a remedial scheme tailored to detecting and preventing those activities most likely to be the result of past or present discrimination. Viewed in light of the underlying Equal Protection principles, the ADA is appropriate preventive and remedial legislation. First, it is preventive in that it established a statutory scheme that attempts to detect government activities likely tainted by discrimination. By requiring the State to show on the record that distinctions it makes based on disability, or refusals to provide meaningful access to facilities, programs and services, are not the result of prejudice or stereotypes, but rather based on legitimate governmental objectives, it attempts to ensure that inaccurate stereotypes or irrational fear are not the true cause of the decision.

For example, a survey of state officials by the Advisory Commission on Intergovernmental Relations (ACIR) prior to the enactment of the ADA reported that 35% identified "negative attitudes about persons with disabilities" as a "serious impediment" to employing persons with disabilities in state government, and another 48% described them as a "moderate" impediment.[22] But as the Court explained in Cleburne, "mere negative attitudes...are

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[22] ACIR, supra n. 16, at 73.

not permissible bases" for making legitimate government decisions. Id. at 448. Thus, with the extensive evidence of negative employer attitudes in general, and government employer attitudes specifically, Congress had a strong basis in fact for determining that States were acting in an unconstitutional manner when it came to employing persons with disabilities. Moreover, Congress determined that a "clear and comprehensive national mandate for the elimination of discrimination" was necessary, 42 U.S.C. 12101(b)(1), because there was evidence that even when States had good policies on paper, "implementation has sometimes been impeded by negative attitudes and misconceptions about persons with disabilities and their performance capabilities" by those mid-level managers "who actually make hiring and promotion decisions."[23] Moreover, Congress' conclusion that public employers engage in the same discrimination as private employers is consistent with its coverage of public employers under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act.[24]

Second, the ADA is remedial in that it attempts to ensure that the interests of people with disabilities are given their due. Not surprisingly, given their profound segregation from the rest of society, see 42 U.S.C. 12101(a)(2), the needs of persons with disabilities were not taken into account when buildings were designed, standards were set, and rules were promulgated. Even when considered, their interests may not have been properly weighed, since "irrational fears or ignorance, traceable to the prolonged social and cultural isolation of [persons with disabilities] continue to stymie recognition of [their] dignity and individuality." Cleburne, 473 U.S. at 467 (Marshall, J.). Policies and criteria restricting access to government programs, services and

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[23] ACIR, supra n .16, at 75.

[24] See, e.g., Muller, supra, n. 1, at 310 ("The ADA targets particular practices — in this case, discrimination in employment — and provides a remedy following the time-tested model provided by the anti-employment discrimination provisions of Title VII of the Civil Rights Act of 1964").

employment are just as much a barrier to some as physical barriers are to others.

As Congress and the Supreme Court recognized, many of the problems faced today by persons with disabilities are a result of "thoughtlessness or indifference -- of benign neglect" to the interaction between those purportedly "neutral" rules and persons with disabilities.[25] As a result, Congress determined that for an entity to treat persons with disabilities as it did those without disabilities was not sufficient to eliminate the effects of years of segregation and to give persons with disabilities equally meaningful access to every aspect of society.[26] When persons with disabilities have been segregated, isolated, and denied effective participation in society, it is within the scope of Congress' remedial authority to conclude that affirmative measures are necessary to bring them into the mainstream.

D. The ADA Is a Congruent and Proportionate Response to Remedy and Prevent the Pervasive Discrimination Congress Found

Pursuant to this constitutional framework, the vast majority of cases have held that the ADA is a congruent and proportionate response to the pervasive discrimination Congress discovered and is therefore "appropriate" legislation to enforce the Equal Protection Clause. The recent Ninth Circuit decision in Dare upheld the ADA as congruent and proportional, noting that "Congress' enforcement authority is at its apex when fashioning remedies aimed at the core of the Fourteenth Amendment guarantee of Equal Protection." Id, supra n. 1, at 1174. That court also "reiterated the importance of deference to Congress in this analysis," because "[t]he Supreme Court has specifically found protections for people with disabilities to be an area in which

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[25] S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 at 6 (1989) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 at 29 (1990) (same) (House Report); 136 Cong. Rec. 10, 870 (1990) (Rep. Fish); id. at 11, 467 (Rep. Dullums).

[26] See 42 U.S.C. 12101(a)(5); see also U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 23-26 at 99 (1983).

Congressional judgment should be given great deference." Id. at 1175 (citing Cleburne, 473 U.S. at 442-43).

The Second Circuit held similarly in Muller v. Costello, highlighting the comprehensiveness of Congress' findings of pervasive discrimination against persons with disabilities and recognizing Boerne's dictate to allow Congress "wide latitude" to determine the extent of measures necessary to prevent and remedy such discrimination:

> In light of Congress' findings of the extent of discrimination against people with disabilities, and with due regard to the deference owed to Congress in making such judgments, we will not second-guess Congress' judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities.

Muller, supra n. 1, at 309 (citing Boerne, 521 U.S. at 519-20). Likewise, in Coolbaugh, the Fifth Circuit noted that the ADA was accompanied by express factual findings by Congress, based on an extensive legislative record, which were entitled to "substantial deference" in determining the scope of the constitutional violations. Id., supra n. 1, at 435. Given those findings, the Fifth Circuit held:

> In sum, the ADA represents Congress' considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled. We recognize that in some instances, the provisions of the ADA will "prohibit[] conduct which is not in itself unconstitutional and intrude[] into 'legislative spheres of autonomy previously reserved to the States.'" We cannot say, however, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the [City of Boerne v.] Flores proportionality test for legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions.

Id. at 437-38 (footnote and citations omitted).

II. The Two District Court Cases Relied Upon by Defendant Do Not Reflect the Current State of the Law and Have No Precedential Value to This Case

The Sixth Circuit has not yet definitively ruled on the question of the constitutionality of

the ADA's abrogation of states' Eleventh Amendment immunity. However, from its comments in several cases in which it has been presented with the issue but has declined to reach it, as well as its decisions in other cases in which the abrogation of states' sovereign immunity has been challenged, a trend in the court's analysis is suggested and it seems likely to join with the majority of the other circuits in upholding the constitutionality of the ADA. That trend is apparent at the district court level of this Circuit as well, where the constitutionality of the ADA's abrogation provision as applied to states has been upheld in twelve out of fifteen recent cases.[27]

A. Recent Rulings of the Sixth Circuit Support This Court's Finding That the Abrogation of States' Sovereign Immunity in the ADA is Constitutional

Despite the fact that it has never squarely decided the issue, the Sixth Circuit seems to have always presumed that the ADA's abrogation of states' immunity is constitutional.[28] Most

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[27] In addition to four of the cases currently pending with the Sixth Circuit, see footnote 4, above, the constitutionality of the ADA's abrogation provision has been upheld in at least eight other district court cases in this circuit: Johnson v. State Technology Center at Memphis, 24 F.Supp.2d 833 (W.D.Tenn. 1998); Thrope v. State of Ohio, 19 F.Supp.2d 816 (S.D.Ohio 1998); Meekison v. Voinovich, 17 F.Supp.2d 725 (S.D. Ohio 1998); Williams v. Ohio Department of Mental Health, 960 F.Supp. 1276 (S.D.Ohio 1997); Kaufman v. Carter, 952 F.Supp. 520, 531 (W.D. Mich. 1996); Niece v. Fitzner, 941 F.Supp. 1497 (E.D. Mich. 1996); Eisfelder v. Michigan Department of Natural Resources, 847 F.Supp. 78, 83 (W.D. Mich. 1993); and Martin v. Voinovich, 840 F.Supp. 1175, 1186-1187 (S.D. Ohio, 1993). See also People First of Tennessee v. Arlington Developmental Center, 878 F.Supp. 97, 101 (W.D. Tenn. 1992) (dismissing the claim on its merits but noting the parties' agreement that "the Eleventh Amendment is not a bar to claims arising under...the ADA").

[28] See, e.g., the Court's unreported decisions in Sears v. Commonwealth of Kentucky, 77 F.3d 483, 1996 WL 67769 (6th Cir., 1996) ("Congress abrogated states' Eleventh Amendment immunity in enacting the ADA..."); Davila v. Ohio Department of Human Services, 106 F.3d 400, 1997 WL 41198 (6th Cir., 1997) ("With respect to all claims other than those claims brought under Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act, the Eleventh Amendment bars the claims..."); and Martin v. Temple, 142 F.3d 435, 1998 WL 57303 (6th Cir., 1998) ("[T]here is merit to Martin's argument that the defendants are not protected, under Eleventh Amendment immunity, from her claims under the ADA and under the Rehabilitation Act..."). Copies of these rulings are attached to this brief.

recently, after simply noting the split in the circuits in Nelson v. Miller, 170 F.3d 641, 649 n.7 (6th Cir. 1999), the Sixth Circuit provided a hint as to its inclination on this issue in Key v. Grayson, 179 F.3d 996 (6th Cir. 1999). In that case, the court stated that although the question of the ADA's constitutionality "has yet to be conclusively determined...most courts that have discussed the issue have found that Congress properly acted within its Section 5 power when it abrogated states' immunity to suits under the ADA," citing the string of circuit court decisions which have upheld the ADA. Id. at 998 n. 1.

This is entirely consistent with the Sixth Circuit's recent decisions with respect to abrogation of Eleventh Amendment immunity in the context of other federal laws. In its pre-Boerne decision in Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir. 1996), the Sixth Circuit held that the abrogation provision in the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(d) (1978), which Congress had enacted pursuant to the Interstate Commerce Clause, could not be judicially interpreted as an enactment to enforce the Equal Protection Clause. In its holding that "there is no sufficiently strong logical connection between the aim of the act — to increase the wages and shorten the hours of certain employees — and central, obvious Fourteenth Amendment concerns," the court made the following comment:

> We think it best to 'regard as an enactment to enforce' the Equal Protection Clause, in the absence of explicit comment by Congress, only efforts to remedy discrimination against a class of persons that Fourteenth Amendment jurisprudence has already identified as deserving special protection. [Footnote:] Our opinion might be different if Congress made findings that a particular group needed legal protection to remedy some sort of invidious discrimination not directly addressed by federal precedent.

Id. at 209-210, 210 n. 4 (citing Katzenbach, 384 U.S. at 651.) In the context of the ADA, in sharp contrast to the FLSA, all three factors identified by the Court are met: Congress expressly enacted the ADA pursuant to the Equal Protection Clause of the Fourteenth Amendment; the Supreme

Court has identified the class of disabled persons as one which is capable of suffering unconstitutional, invidious discrimination in violation of the Equal Protection Clause, see, e.g., Cleburne, supra; and Congress made explicit and exhaustive findings of this discrimination and determined that the ADA was necessary preventative and remedial legislation.

However, the most instructive of the Sixth Circuit's recent rulings on the question of states' Eleventh Amendment immunity from suit under federal civil rights laws came in the age discrimination case of Coger v. Board of Regents, 154 F.3d 296 (6th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3364 (Nov. 16, 1998) (No. 98-821). In that case, faculty of Memphis State University sued the state under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq. In upholding the constitutionality of the ADEA's abrogation of states' immunity under the Supreme Court's rulings in Seminole Tribe and Boerne, the Sixth Circuit made at least three points which are equally applicable in the ADA context. First, the court specifically held that Congress' power to enforce the Equal Protection Clause extended to those classifications that are not otherwise subject to heightened judicial scrutiny (such as age or disability). "[T]he fact that age is not a suspect classification does not eliminate the Equal Protection Clause as a source authorizing Congress to prohibit age-based discrimination." Id. at 305. Second, in applying the Boerne "congruence and proportionality" test, the Sixth Circuit held that Congress' findings (embodied in both the text of the statute and the legislative history) cannot be ignored. To the contrary, they are "helpful in determining the extent of the threatened constitutional violations." Id. at 306. Third, the Sixth Circuit held that a statutory scheme that "attempts to prevent discrimination" by requiring "case-by-case determinations based on facts" is not a disproportionate remedy. Id. at 307. Thus, even though rational-basis review would permit the use of generalizations, requiring individualized assessments "does not render the statute so

disproportionate to its purpose that it represents an invalid exercise of Congress's enforcement power." Id.

B. The Western District's Ruling in Hedgepeth Does Not Support Defendant's Claim in This Case

The Western District of Tennessee has squarely addressed this issue only once, in Johnson v. State Technology Center at Memphis, 24 F.Supp.2d 833 (W.D. Tenn. 1998), and in that case it upheld the constitutionality of the ADA's abrogation provision.[29] In contrast, the case principally relied upon by Defendant, Hedgepeth v. Tennessee, 33 F.Supp.2d 668 (W.D. Tenn. 1998), did not reach the issue. In that case, disabled individuals challenged the state's assessment of fees for disabled parking placards pursuant to a Justice Department regulation that prohibits a state from imposing surcharges on individuals to subsidize its compliance with the ADA's requirements. The court determined that it could not reach the merits of the ADA claim because the fees constituted a state tax under the Tax Injunction Act, 28 U.S.C. § 1341, which divested the federal courts of subject matter jurisdiction in such cases. However, although it was "unnecessary to rule on defendants' argument that plaintiffs' claims against Tennessee are barred by the Eleventh Amendment," the court "address[ed] defendants' assertion for purposes of appellate review." Id. at 674. The court went on to discuss its views on the ADA claim, and there expressed the opinion that "Congress did not have the authority to enact the accommodation provisions of the ADA, and [therefore] did not effectively abrogate the states' Eleventh Amendment sovereign immunity with respect to those provisions." Id. at 677. The court reasoned that "since the accommodation provisions of the ADA are not limited to the prevention of discrimination and...apply where no

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[29] Id. at 844. Most recently, the Western District discussed the issue at length without indicating its opinion in Utilla v. City of Memphis, 40 F.Supp.2d 968 (W.D. Tenn. 1999) but found the question moot in that case.

discrimination has been practiced, they permit a remedy where there is no injury and are therefore disproportionate," and, moreover, they "give disabled individuals a preferential right...not previously recognized under the Equal Protection Clause, and thus exceed the scope of remedial legislation." Id. at 674-5.

However, the court specifically affirmed that, as distinguished from the requirement to provide reasonable accommodations, the general prohibition of discrimination on the basis of disability was properly within the scope of Congress' legislative power: "To the extent the disabled do not have equal access and opportunities because they are suffering from discrimination, the ADA prohibits such discrimination elsewhere in the Act. Equal protection mandates nothing further." Id. Plaintiff here is alleging that she was intentionally discriminated against by her employer, who, she alleges, acting on the basis of stereotypical beliefs and prejudices, erroneously concluded that her disabilities precluded her advancement; she does not believe that she requires, nor did she ever request, any kind of accommodation.[30] Therefore, far from supporting Defendant's position, the discussion in Hedgepeth, to the extent it carries any persuasive weight at all, actually supports Plaintiff's claim by reaffirming the validity of the ADA as applied to discrimination cases such as this one.[31]

Whereas Hedgepeth did not actually reach the ADA issue, another judge in the same district had earlier issued a more comprehensive ruling in Johnson, in which the court upheld the

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[30] Although the United States disagrees with the Hedgepeth court's distinction between the "accommodation provisions" and the other substantive requirements of the ADA, the fact that the court specifically distinguished the ADA's prohibition of the kind of intentional discrimination suffered by Plaintiff in this case certainly eliminates it as support for Defendant's position.

[31] The decision in Hedgepeth was also appealed to the Sixth Circuit, see No. 99-5166 (6th Cir. February 11, 1999), but as it was decided on other grounds, the Court is holding the ADA issue in abeyance pending its decision in the other six cases. See footnote 4, above.

constitutionality of the ADA's abrogation of states' immunity. In Johnson, the court relied upon the Sixth Circuit's post-Boerne ruling in Coger to find it "quite likely that the Sixth Circuit will adopt a similar position" with respect to the ADA:

> Although Coger was limited to the ADEA and did not address the provisions presently before this court, it seems clear that the analytical machinery applied by the Sixth Circuit to the ADEA question when applied to the ADA and Rehabilitation Act will produce a similar result — validation of Congressional power to abrogate the Eleventh Amendment.

Johnson, supra, at 843. The Johnson court went on to agree with "the clear majority of courts that have addressed this issue [and] have determined that Congress properly exercised its Section 5 power in abrogating state immunity under the ADA and the Rehabilitation Act." Id. at 839.

C. This Court's Ruling in Satterfield Has No Precedential Value In This Case

Before the Sixth Circuit issued its decision in Coger, another judge in this Court issued an unreported ruling in Satterfield v. Tennessee, 1998 U.S. Dist. LEXIS 21410 (E.D. Tenn. March 31, 1998) granting the defendant's motion to dismiss on the ground that the ADA's abrogation provision was unconstitutional. The court reasoned that because "the ADA protects a class of individuals -- the disabled -- who enjoy no heightened constitutional protections" under the Equal Protection Clause, it was "difficult to find that the ADA...find[s its'] constitutional authority in the Enforcement Clause of the Fourteenth Amendment." Satterfield at *14-15. As noted above, this reasoning was specifically rejected by the Sixth Circuit in the later case of Coger, which held that although a given classification (like age, in the ADEA, or disability, in the ADA) is not subject to heightened judicial scrutiny under the Equal Protection Clause, Congress still retains the authority to prohibit age-based or disability-based discrimination pursuant to the Fourteenth Amendment. Coger, supra, at 305. In any case, as a district court opinion (not to mention an unreported one), Satterfield has no precedential value in this case.

CONCLUSION

For the foregoing reasons, the United States respectfully urges this Court to follow the majority of circuit courts in upholding the ADA's abrogation of states' immunity and to deny Defendant's motion to dismiss on this ground.

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Respectfully submitted,

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