UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-2492-AJ

COLORADO CROSS-DISABILITY COALITION

and

KEVIN W. WILLIAMS,
for himself and all others similarly situated,

Plaintiffs,

v.

NINE WEST GROUP, INC.

and

HERMANSON FAMILY LIMITED PARTNERSHIP I,

Defendants.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

I. BACKGROUND

On October 25, 1996, plaintiffs Colorado Cross-Disability Coalition and Kevin W. Williams, a person who is a tetraplegic and uses an electric wheelchair for mobility, filed this action against defendants Nine West Group Inc., the operator of a retail shoe store located at 1439 Larimer Street in Denver, Colorado, and the Hermanson Family Limited Partnership I ("Hermanson"), the owner of the building located at the Larimer Street address. Plaintiffs allege that the entrance to the building at that location is inaccessible to persons who use wheelchairs in violation of the barrier removal and alterations provisions of

Title III of the ADA, 42 U.S.C. §§ 12182(2)(A)(iv) and 12183(a)(2). Plaintiffs also allege violations of Colorado law prohibiting discrimination in public accommodations, C.R.S §§ 24-34-601 et seq.[1]

On December 6, 1996, defendant Hermanson filed a motion to dismiss plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that plaintiffs have failed to exhaust administrative remedies under both Title III of the ADA and Colorado law. In support of its motion to dismiss the ADA claim, defendant primarily relies on a decision of this court in Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148, 1150 (D. Colo. 1996) and Bechtel v. East Penn School Dist. of Lehigh County, Civ. A. No. 93-4898, 1994 WL 791708 at *3 (E.D. Pa. Jan. 4, 1994). The defendant essentially contends that the ADA enforcement provision, 42 U.S.C. § 12188, incorporates not only the remedies and procedures of Subsection 204(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), to which it specifically refers, but also Subsection 204(c) of the 1964 Act, 42 U.S.C. § 2000a-3(c), and that Subsection 204(c) requires exhaustion of available state and local administrative remedies.

Because the United States has important regulatory and enforcement responsibilities under Title III of the ADA and

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[1] Plaintiffs allege that by failing to provide a ramp to the entrance to the Nine West store, the Defendants have violated Colorado law that prohibits discrimination on the basis of disability by places of public accommodation. CRS §§ 24-34-601. The United States takes no position with regard to the defendant's motion to dismiss the state law claim.

believes that the court's ruling in the Howard case with regard to the exhaustion of administrative remedies in Title III cases is incorrect, the United States has sought permission to file this memorandum as amicus curiae urging that this court deny the defendant's motion.

II. **ARGUMENT**

The defendant's argument that plaintiff must exhaust state administrative remedies before filing a claim under Title III of the ADA is based upon an erroneous interpretation of the ADA. The plain language of the enforcement provision of Title III of the ADA, 42 U.S.C. § 12188, imposes no such requirement. In providing individuals who suffer discrimination based on disability by a place of public accommodation the remedies and procedures provided in Subsection 204(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), Congress did not intend to engraft upon Title III of the ADA other provisions of Section 204 that have no applicability to the unique statutory scheme created by the ADA.

To impose a requirement that individuals alleging discrimination based upon disability must first invoke state administrative remedies prior to bringing a federal action under Title III of the ADA is to introduce an unwarranted barrier to the prompt vindication of rights protected by the ADA. Because Subsection 204(c) of the 1964 Act gives the district court in which an action is filed pursuant to 204(a) the authority to "stay proceedings in such civil action pending the termination of

State or local enforcement proceedings," 42 U.S.C. § 2000a-3(c), such a requirement could cause a substantial delay in obtaining appropriate relief under Title III. Where it is apparent from the plain language of the statute that Congress did not intend to impose such a delay, this court should not create such a procedural requirement.

A. The Plain Language Of The ADA Does Not Require Invocation Of State Administrative Remedies Prior To Bringing Suit In Federal Court

In any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." Staples v. United States, 114 S. Ct. 1793, 1797 (1994). The Supreme Court has instructed "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992).

Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12181, et seq., provides that

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Included within the definition of "public accommodation" is a "clothing store. . . or other sales or rental establishment." 42 U.S.C. § 12181(7)(E).

Congress intended the nondiscrimination provisions of Title III to be enforced both by persons who are themselves subjected

to discrimination on the basis of disability, 42 U.S.C. § 12188(a), and by the Attorney General, 42 U.S.C. § 12188(b). Thus, section 308(a)(1), 42 U.S.C. § 12188(a)(1), provides, in relevant part (emphasis added):

> The 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 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.

The "remedy" provided by 42 U.S.C. § 2000a-3(a), 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.[2]

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[2] Section 204(a), 42 U.S.C. 2000a-3(a), states:

> Whenever 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.

As it often does in enacting a new statute, Congress selectively incorporated portions of existing statutes into the ADA. The ADA Title III enforcement provision under which the plaintiffs have brought the instant suit makes reference only to Subsection 204(a) of the 1964 Act. It does not refer to any of the other three subsections of Section 204, including Subsection 204(c) upon which the defendant relies. Given the clear and unambiguous language in Title III of the ADA incorporating only Subsection 204(a), there is no legal basis for incorporating additional subsections of Section 204 to which Congress did not refer.

The Third Circuit faced an analogous situation in Sperling v. Hoffman-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." 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 expression unius est exclusio alterius." Ibid. That principle applies equally here.

Title III of the ADA is not simply a carbon-copy of Title II of the 1964 Act, although both prohibit discrimination in places of public accommodation. 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 must be addressed in a different way. Thus, rather than simply amending Title II of the 1964 Act to add disability as a prohibited basis for discrimination, Congress enacted a comprehensive statute addressing issues such as architectural and communication barriers, 42 U.S.C. § 12182(b)(2)(A)(iv), and provision of auxiliary aids and services, 42 U.S.C. § 12182(b)(2)(A)(iii), that were not relevant to the kinds of discrimination prohibited by the 1964 Act. The ADA concept of public accommodations is also much broader than that of Title II of the 1964 Act. Compare 42 U.S.C. § 2000a(b) with 42 U.S.C. 12181(7), 42 U.S.C. § 12183 (commercial facilities), 42 U.S.C. § 12184 (public transportation services provided by private entities).

Congress borrowed from the 1964 Act the remedial structure contained in Section 204(a), but it did not thereby incorporate any of the other provisions of Section 204. Congress could simply have repeated the language of section 204(a) in Title III of the ADA to indicate the remedies and procedures it intended to provide to aggrieved persons. If it had done so, it would be manifestly clear that Congress had no intention of requiring such persons to exhaust state or local administrative remedies. The fact that Congress used Subsection 204(a) of the 1964 Act as a shorthand method to refer to the remedies and procedures it intended to provide should not change that result.[3]

In construing the requirements of the enforcement provision of Title III, courts have held that plaintiffs are not required to exhaust state administrative remedies prior to filing an

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[3] Even if the defendant is correct that Subsection 204(c) of the 1964 Act is implicitly incorporated into the ADA along with the specifically-referenced Subsection 204(a), there is no basis for the contention that Subsection 204(c) requires individuals to "exhaust" state administrative remedies.

Subsection 207(a) of the 1964 Act, 42 U.S.C. 2000a-6(a), specifically provides that

> [t]he district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

In reconciling the seeming contradiction between Subsection 204(c) and Subsection 207(a), courts have concluded that Subsection 204(c) requires only that the aggrieved person give notice of the alleged violation to the state or local agency and wait 30 days thereafter before filing suit; exhausting the state or local remedy is not a jurisdictional prerequisite to suit. Harris v. Ericson, 457 F.2d 765, 766-767 (10th Cir. 1972).

action to enforce Title III of the ADA. Soignier v. American Board of Plastic Surgery, 92 F.3d 547, 553 (7th Cir. 1996) (holding that "because there is no first obligation to pursue administrative remedies," the plaintiff in the Title III action was obligated to file suit within the period dictated by the state statute of limitations.); Grubbs v. Medical Facilities of America, Inc., No. 94-0029-D, 1994 WL 791798 at *2-3 (W.D. Va. Sept. 23, 1994)(in denying a motion to dismiss, the court found that Congress did not intend to require exhaustion of administrative remedies for persons with disabilities under either § 504 of the Rehabilitation Act or Title III of the ADA).

Neither of the district court decisions principally relied upon by defendant Hermanson provide any legal analysis for the conclusion that plaintiffs in Title III enforcement actions must follow the procedures of Subsection 204(c). Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148 (D. Colo. 1996); Bechtel v. East Penn School Dist. of Lehigh County, Civ. A. No. 93-4898, 1994 WL 791708 at *3 (E.D. Pa. Jan. 4, 1994). In Howard, the district court dismissed an action brought under Title III of the ADA on the grounds that the ADA does not authorize private individuals to sue for damages, but it granted the plaintiff's request for leave to amend the complaint with the simple "caveat that any claim for injunctive relief under Subchapter III of the ADA must comply with the applicable state law exhaustion requirement set forth in 42 U.S.C. § 2000a-3(c)." 935 F. Supp.

at 1150.[4] Although never articulated, the underlying rationale of both the Howard and Bechtel courts would seem to be that by incorporating Subsection 204(a), Congress must necessarily have intended to incorporate the rest of Section 204 as well. However, an examination of the other subsections of Section 204 that are also not specifically incorporated demonstrates the fallacy of any such reasoning.

Title III of the ADA does not refer specifically to Subsection 204(d) of the 1964 Act, which applies under Title II of the 1964 Act where the alleged discrimination takes place in a state where there is no state law prohibiting such discrimination. Under those circumstances, Subsection 204(d) 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." Although the district court's apparent rationale in Howard would suggest that Subsection 204(d) may be followed by a court in which an ADA Title III action is filed, Congress could not have intended such a result. Since the ADA did not expand the

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[4] Similarly, in an action to enforce title II of the ADA, the district court in Bechtel v. East Penn School Dist. of Lehigh County, Civ. A. No. 93-4898, WL 791708 At *3 (E.D. Pa., Jan. 4 1994) simply observed in dicta, without further analysis, that "[d]efendants are correct that Section 12188 makes the enforcement procedures of the Civil Rights Act of 1964, which provide for exhaustion of administrative remedies, applicable to actions under Title III of the ADA." 1994 U.S. Dist. Lexis 1327 at 6. On the other hand, the court properly held that claims under Title II of the ADA do not require exhaustion of administrative remedies. 1994 U.S. Dist. Lexis 1327 at 6-8.

jurisdiction of the CRS to allow it to mediate issues of discrimination based on disability, Congress could not have intended Subsection 204(d) to be incorporated by implication into Title III.

Neither does the ADA refer to Subsection (b) of Section 204 of the 1964 Act, which allows a court to award attorney's fees to a prevailing party other than the United States in an action brought pursuant to Subsection 204(a). Congress certainly did not intend to incorporate Subsection 204(b) because the ADA contains a separate attorney's fees provision, 42 U.S.C. § 12205, that is applicable to all civil actions and administrative proceedings brought pursuant to the ADA.

As Tenth Circuit has recognized, when one statute is modeled on another one but does not include 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) (citations omitted). 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.") The inherent differences between Title II of the 1964 Act and Title III of the ADA demonstrates the error in the defendant's attempt to pick and choose, on its own, portions of the 1964 Act to incorporate into the ADA. The plain language of Section 308 of the ADA indicates that plaintiffs in a Title

III action need not exhaust state administrative remedies and that this court has jurisdiction to proceed with the ADA claim.[5]

B. Neither the Regulations Implementing Title III of the ADA nor the Technical Assistance Manual Interpreting Title III Mention the Need to Exhaust State Administrative Remedies

Pursuant to 42 U.S.C. § 12186(b) and 42 U.S.C. § 12206(c)(3), the Department of Justice has issued regulations

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[5] The only discussion in the legislative history of the ADA of prerequisites to filing a federal action under Title III is contained in 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. Although the colloquy is apparently addressed to the question whether Title III creates any federal administrative remedy, it indicates that it was not accidental that Congress incorporated only subsection (a) of section 204.

> 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?
>
> MR. HARKIN. First of all, Senator, there would be no 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). If Congress had intended to incorporate Subsection 204(c) of the 1964 Civil Rights Act into Title III of the ADA, it is likely that either Congressmen Harkin or Bumpers would have made reference to it during this colloquy. The fact that they did not is persuasive evidence that exhaustion of administrative remedies was not contemplated by Congress.

and a Technical Assistance Manual interpreting Title III. Neither the regulations nor the Technical Assistance Manual make any mention of a need to exhaust administrative remedies or a pre-suit state administrative notice requirement. See 28 C.F.R. 36.501(a) (1993); Department of Justice, The Americans with Disabilities Title III Technical Assistance Manual, §§ III-8.1000, 8.2000.[6] The absence of any mention of such requirements in the contemporaneous administrative interpretation of the statute is cogent evidence of the Attorney General's belief that resort to such procedures was not intended by Congress.

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[6] There also is no federal administrative remedy under Title III of the ADA. Thus, the Attorney General has taken the position that "it is not necessary to file a complaint with the Department [of Justice] prior to exercising [a] private right of action." Department of Justice, Response to Inquiry, 4 Nat'l Disability L. Rep. ¶ 360.

III. **CONCLUSION**

For the reasons set forth above, it is apparent from the plain language of the ADA that Congress did not intend impose a requirement that plaintiffs first exhaust state administrative remedies prior to bringing a suit to enforce Title III of the ADA and that the defendant's motion to dismiss the federal ADA claim should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the United States of America, do hereby certify that I have this date served upon the persons listed below, by overnight delivery, true and correct copies of the foregoing Memorandum for the United States as Amicus Curiae:

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