IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

C.A. NO. 96-K-370

UNITED STATES OF AMERICA, Plaintiff, v. THE CITY AND COUNTY OF DENVER; THE DENVER POLICE DEPARTMENT; and THE CIVIL SERVICE COMMISSION FOR THE CITY AND COUNTY OF DENVER, Defendants.	Hon. John L. Kane Jr.

PLAINTIFF UNITED STATES' RESPONSE
TO DEFENDANTS' MOTION TO DISMISS

I. BACKGROUND

On February 15, 1996, the United States filed this action alleging, inter alia, that defendants'[1] policy and practice of denying employment opportunities to qualified individuals with disabilities in the Denver Police Department, including Jack Davoll, violated title I, 42 U.S.C. § 12112, and title II, 42 U.S.C. § 12132, of the Americans with Disabilities Act of 1990 ("ADA").

[1] Defendants are the City and County of Denver, the Denver Police Department and the Civil Service Commission for the City and County of Denver. They are referred to throughout as "defendants."

Defendants have moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 42(a) arguing that: (1) the United States has not met the procedural requisites for filing a complaint under title I of the ADA; (2) the private plaintiffs' lawsuit, Davoll v. Webb, C.A. No. 93-K-2263 ("Davoll"), extinguishes the right of the United States to file its own suit under the ADA; and (3) the United States' complaint is duplicative and prejudices the defendants.

These arguments are without merit and this Court should deny defendants' motion. As we demonstrate below, the United States has properly exercised its enforcement authority under both titles I and II of the ADA. Defendants' papers reflect a misunderstanding of the statute's separate remedial structures for titles I and II as well as a confusion about the nature and scope of the Attorney General's enforcement role vis-a-vis private plaintiffs under these titles.

II. ARGUMENT

Title I of the ADA prohibits employment discrimination on the basis of disability. 42 U.S.C. § 12112; 28 C.F.R. pt. 1630, at 384. Title II of the ADA prohibits discrimination on the basis of disability in all of the services, programs, and activities, including employment, of public entities (state and local governments). 42 U.S.C. § 12132; 28 C.F.R. pt. 35, at 436.[2] The United States has properly brought suit against the

[2] Defendants do not seem to dispute that they are "employers" within the meaning of title I, 42 U.S.C. §§ 12111(5),

defendants under both titles. One of the stated purposes of the ADA is "to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3). Consistent with this purpose, both titles I and II give the U.S. Department of Justice authority to file suit to enforce the rights guaranteed to individuals under the ADA.

A. The United States Has Properly Exercised Its Enforcement Authority In Filing This Complaint Under Titles I and II of The ADA

1. The Attorney General Has Authority To Initiate Suits Against Public Employers Under Title I

For enforcement of title I, Congress adopted the powers, remedies and procedures from title VII of the Civil Rights Act of 1964 ("title VII"), 42 U.S.C. § 2000e et seq., which prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin.[3] Two provisions of Title VII (sections 706 and 707) authorize the Attorney General to bring

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12111(7) and 2000e(a), or "covered entities" within the meaning of title II, 42 U.S.C. § 12131. Their argument is rather that the government has failed to meet the procedural requirements for filing suit against them under the ADA.

[3] Title I of the ADA states:

> The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title 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 Act, or regulations promulgated under section 106, concerning employment.

42 U.S.C. § 12117(1).

suits against public employers such as the defendants. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6. It is the latter provision, section 707, 42 U.S.C. § 2000e-6, which is invoked in this suit. See U.S. Complaint ¶ 2 (Plaintiff's Exhibit A). Section 707 provides, in part:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this section, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States....

42 U.S.C. §2000e-6(a) (emphasis added).

While section 706 is designed to vindicate individual instances of discrimination,[4] the thrust of section 707 is "to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." United States v. Alegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Section 707 authorizes the Attorney General to bring a civil action against any person or group of persons whom she has reasonable cause to believe were engaged in a pattern or practice

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[4] Under section 706, the Attorney General can sue public employers only after an individual has filed a charge with EEOC, and that agency has investigated, made a finding of reasonable cause and been unable to conciliate the charge. 42 U.S.C. § 2000e-5. The EEOC has authority to sue private employers but must refer charges against public employers to the Attorney General who may then sue to obtain relief on behalf of individual victims of discrimination.

of discrimination. 42 U.S.C. § 2000e-6. Nowhere does section 707 require a specific complainant or a referral from the Equal Employment Opportunity Commission ("EEOC") as condition precedent to a lawsuit nor is the Attorney General obliged to follow procedures established by the EEOC. United States v. New Jersey, 473 F. Supp. 1199, 1205 (D.N.J. 1979).

Courts have routinely acknowledged the Attorney General's self-starting section 707 authority to bring pattern or practice actions against state and local governments. See United States v. City of Miami, Fla., 664 F.2d 435, 436-37 (5th Cir. 1981) (en banc) ("Congress has now explicitly authorized only the Attorney General" to file pattern or practice suits); United States v. North Carolina, 587 F.2d 625, 626 (4th Cir. 1978) (the "Attorney General [has] full and complete authority in the initiation of litigation with respect to State or local government or political subdivisions' under Section 707 of the [Civil Rights] Act"), cert. denied, 442 U.S. 909 (1979); United States v. City of Yonkers, 592 F. Supp. 570, 584 (S.D.N.Y. 1984) (the only prerequisite to the Attorney General's authority to bring a pattern or practice suit is the unreviewable determination that reasonable cause exists); accord United States v. Masonry Contractors Ass'n of Memphis, Inc., 497 F.2d 871, 876 (6th Cir. 1974); United States v. New Jersey, 473 F. Supp. 1199, 1205 (D.N.J. 1979); United States v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local No. 1, 438

F.2d 679, 681 (7th Cir. 1971); EEOC v. Chicago Miniature Lamp Works, 526 F. Supp. 974, 976 (N.D. Ill. 1981).

Nonetheless, defendants contend that the United States has not met the procedural requisites for filing a complaint under title I of the ADA because the Attorney General "has never issued [a Letter of Findings] regarding the Title I claim...." Defendants' Motion to Dismiss ("Defendants' Motion") at 2. This argument reflects a fundamental misunderstanding of the ADA's remedial structure. Such a letter is not a prerequisite to a pattern or practice suit brought under the Attorney General's independent pattern or practice authority to initiate title I lawsuits against a public employer.

2. The Attorney General Has Authority To Initiate Suits Against Public Employers Under Title II

The United States' complaint is also predicated on title II of the ADA, 42 U.S.C. § 12131 et seq., see U.S. Complaint ¶¶ 1, 2 (Plaintiff's Exhibit A), which prohibits disability discrimination in all of the programs, services and activities (including employment) of public entities, such as defendants. See 42 U.S.C. § 12132. Like title I, title II is modeled after earlier civil rights statutes. Although title II coverage is not dependent on the receipt of federal funds, the remedies are borrowed from previous statutes which prohibited discrimination in federally assisted programs and activities. Title II of the ADA states:

> The remedies, procedures, and rights set forth in section 794a of title 29 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. § 12133.

Section 505 of the Rehabilitation Act, in turn, provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.] shall be available by any person aggrieved...." 29 U.S.C. § 794a(a)(2). Title VI provides:

> Compliance ... may be effected (1) by the termination of or refusal to grant or to continue [federal financial] assistance..., or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

42 U.S.C. § 2000d-1.

Under title VI, the phrase "by any other means authorized by law" has been understood to mean that a funding agency, after finding a violation and determining that voluntary compliance is not forthcoming, could refer a matter to the Department of Justice to enforce the statute's nondiscrimination requirements in court.[5]

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[5] See National Black Police Ass'n, Inc. v. Velde, 712 F.2d 569, 575 & n.33 (D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984); United States v. Marion County Sch. Dist., 625 F.2d 607, 612 & n.12 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981); see also Cannon v. University of Chicago, 441 U.S. 677, 712 n.49 (1979) (relevant legislative history of title VI).

Under title VI and the Rehabilitation Act, the funding agencies adopted procedures to investigate complaints of violations filed by individuals. The Department of Justice adopted similar procedures when enacting the title II regulations. 28 C.F.R. pt. 35, subpart F. The title II regulation also provides that where voluntary compliance cannot be obtained, the matter must be referred to the Attorney General for appropriate action. 28 C.F.R. § 35.174. Because fund termination procedures are inapplicable to state and local government entities that receive no federal funds, Congress anticipated that Attorney General lawsuits under title II would be "the major enforcement sanction for the Federal government." S. Rep. No. 116, 101st Cong., 1st Sess. 57 (1989).

There is no question that Attorney General has met all of the procedural requisites for filing a suit under title II. 28 C.F.R. §§ 35.173 and 35.174. The Department of Justice investigated the administrative complaint filed by Jack Davoll, issued a letter of findings and attempted, unsuccessfully, to resolve the matter before the complaint was filed.[6]

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[6] On August 22, 1994, and following its investigation of Mr. Jack Davoll's title II complaint, the United States provided to the defendants detailed reasons why their failure to provide a reasonable reassignment or transfer as a reasonable accommodation for Mr. Davoll violated title II. Defendants were also invited to negotiate an agreement. See Plaintiff's Exhibit B. But on October 20, 1994, defendants replied that they were unwilling to enter into any such negotiations. See Plaintiff's Exhibit C. These steps were the only ones required prior to suit under title II. However, on March 9, 1995, the United States advised defendants that based on the information it had gathered in the

B. Suits Brought By The United States Are Not Subject To Fed. R. Civ. P. 23 Class Certification Requirements

Claiming that plaintiff has made no allegations to support class certification, defendants urge the Court to dismiss this action based on the Court's earlier reasoning denying the private plaintiffs class certification. Defendants' Motion at 5; see Davoll v. Webb, 160 F.R.D. 142 (D. Colo. 1995). But, in numerous Title VII actions, the Supreme Court has held unequivocally that actions brought by the United States are not subject to Rule 23. In ruling that the EEOC may seek class-wide relief without being certified under Rule 23, the Court noted:

> Prior to 1972, the Department of Justice filed numerous § 707 pattern-or-practice suits.... In none was it ever suggested that the Attorney General sued in a representative capacity or that his enforcement suit must comply with the requirements of Rule 23. Nor has it been so suggested in § 707 suits brought since 1972.

General Tel. Co. of the N.W. v. EEOC, 446 U.S. 318, 327 & n.9 (1980) (citations omitted); see also Donovan v. University of Texas at El Paso, 643 F.2d 1201, 1203 (5th Cir. 1981) ("it is now clear from General Telephone that Government Title VII actions

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investigation of Mr. Davoll's case the United States was expanding its inquiry to determine whether defendants were engaged in a pattern or practice of discrimination in violation of title I of the ADA. See Plaintiff's Exhibit D. On July 18, 1995, the United States notified defendants that defendants' policy of not reassigning or transferring persons with disabilities to appropriate vacant positions constituted a pattern or practice of discrimination under title I of the ADA and invited the defendants to enter into a consent decree. See Plaintiff's Exhibit E. Once again the defendants declined. See Plaintiff's Exhibit F. Subsequent efforts to resolve this matter in November 1995 and as recently as February 8, 1996, were also unsuccessful. On February 15, 1996, the United States filed its complaint.

are not governed by Rule 23"). Thus, Rule 23 does not apply to suits brought by the United States under either section 706 or section 707 and by reference under title I of the ADA.

In Southwest v. Falcon, 457 U.S. 147 (1982), the Court addressed the difference between action brought by a private litigant and the government. In acknowledging this distinction, the Falcon Court noted that:

> In exercising [its] enforcement power, the [government] may seek relief for groups of employees or applicants for employment without complying with the strictures of Rule 23. Title VII, however, contains no special authorization for class suits maintained by private parties. An individual litigant seeking to maintain a class action under Title VII must meet "the prerequisites of numerosity, commonality, typicality, and adequacy of representation specified in Rule 23(a).

Id. (citations omitted).

In short, the relevant case law has repeatedly and consistently recognized that Rule 23 is inapplicable to cases where the Attorney General is endeavoring to "vindicate the public interest in preventing employment discrimination." General Telephone, 446 U.S. at 326; see also EEOC v. Occidental Life Ins. of Cal., 535 F.2d 533, 542 (9th Cir. 1976) (the government is "charged with the vindication of public policy, not merely the enforcement of private rights"), aff'd, 432 U.S. 355 (1977). Defendants' attempt to subject the United States to the requirements of Federal Rules of Civil Procedure 23 is unfounded and once again reflects a basic misunderstanding of the ADA's requirements and procedures.

C. Private Plaintiffs' Lawsuit Does Not Bar The United States From Filing A Complaint Under The ADA

Defendants do not explain their statement that "[Jack] Davoll's initiation of a private lawsuit terminates the [United States'] authority to bring an action on his behalf [because] there is no statutory grant of authority to do so." Defendants' Motion at 2. As discussed previously, the ADA unambiguously authorizes the Attorney General to initiate this action under title I and under title II. This authority is not extinguished when private plaintiffs file suit under title I or II. United States v. City of Philadelphia, 499 F. Supp. 1196, 1200 (E.D. Pa. 1980) ("Congress in enacting Title VII of the Civil Rights Act of 1964 ... gave the Attorney General the authority to bring independent 'pattern or practice' cause of action against public employers under Section 707 of Title VII ..., and authorized private litigants to bring their own separate causes of action under Section 706 of Title VII.... Where a statute provides for both Government and private suits, they may proceed simultaneously or in disregard of each other, since different policy considerations govern each of these.") (citing Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961)). United States v. Terminal Transport Co., 653 F.2d 1016, 1021 (Attorney General section 707 action filed after, and consolidated with, the private plaintiff's action). Thus, defendants' insistence that "[p]ermitting the filing of a suit by the United States while Davoll is pending, would be to allow two lawsuits to proceed through this Court simultaneously, dealing

with identical issues," Defendants' Motion at 3, is unsupported by statutory and case authority.[7]

Aside from authorizing the Attorney General to initiate lawsuits, the ADA also allows individuals to sue to vindicate their individual rights. The Davoll plaintiffs have invoked both titles I and II in their action.[8] Under title I, private suits are subject to the procedural prerequisites of Title VII. 42 U.S.C. § 12117(a); see Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993) (title I of the ADA "adopts the procedures set forth in Title VII of the Civil Rights Act requiring exhaustion of administrative remedies"); Dertz v. Lynn, 912 F. Supp. 319 (N.D. Ill. 1995); Hardy v. Fleming Food Cos., 1996 WL 145463, at *21 (S.D. Tex. Feb. 9, 1996) ("aggrieved party must first exhaust administrative remedies by filing a charge with the EEOC"); see also Million v. Frank, 47 F.3d 385 (10th Cir. 1995) (dictum).

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[7] To the extent that defendants are attempting to argue that the United States is collaterally estopped, such an argument is baseless. Collateral estoppel bars a party from re-litigating, in a second proceeding, an issue of fact or law that was litigated and actually decided in a prior proceeding. Allen v. McCurry, 449 U.S. 90, 95 (1980); Montana v. United States, 440 U.S. 147 (1979); Brown v. DeLayo, 498 F.2d 1173 (10th Cir. 1974). Here, the Davoll suit is pending. No valid and final judgment on the merits has been issued. Moreover, the United States has not been a party to the Davoll suit, and has not had a full and fair opportunity to litigate the issues. In any event, the Supreme Court has recognized that "[a] rule allowing nonmutual collateral estoppel against the government ... would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." United States v. Mendoza, 464 U.S. 154, 160, 162 (1984).

[8] See Davoll Plaintiffs' Response to Defendants' Motion for Summary Judgment at 19 n.24, filed March 5, 1996.

No similar prerequisites apply for bringing private employment claims under title II. 42 U.S.C. § 12133; Tyler v. City of Manhattan, 849 F. Supp. 1429, 1431 (D. Kan. 1994) (stating that "court has jurisdiction notwithstanding the fact plaintiff has not exhausted his administrative remedies"); Petersen, 818 F. Supp. at 1278 (title II of the ADA "adopts the remedies, rights and procedures of Section 505 of the Rehabilitation Act of 1973, which does not require exhaustion of administrative remedies and allows a plaintiff to go directly to federal court") (citing Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990), cert. denied, 501 U.S. 1217 (1991)); see also Finley v. Giacobbe, 827 F. Supp. 215, 219 n.3 (S.D.N.Y. 1993) ("[b]ecause plaintiff's claim has been brought under Title II, rather than Title I, of the ADA there is no requirement that she exhaust administrative remedies prior to filing suit in federal court"); Ethridge v. State of Alabama 847 F. Supp. 903, 906-07 (M.D. Ala. 1993) (title II of the ADA does not require exhaustion of administrative remedies); Doe v. County of Milwaukee, 871 F. Supp. 1072 (E.D. Wis. 1995) (same).

Defendants also argue that the United States has somehow acted unfairly because, as they contend in their summary judgment papers in the Davoll action, private plaintiffs failed to obtain a timely right to sue notice and therefore, their claims cannot proceed. This argument, if valid at all, is relevant only to the Davoll plaintiffs' title I claim and not their title II claim. In any event, however, any procedural defects which affect

private suits under the ADA are not applicable to this separate action brought by the United States.[9]

III. CONCLUSION

For the foregoing reasons, defendants' Motion to Dismiss should be denied.

Respectfully submitted,
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[9] Defendants are equally unsuccessful if they intend to invoke the doctrine of unreasonable delay or laches when they claim that the United States has had jurisdiction over Mr. Davoll's complaint since May 1992. Defendants have not shown "unreasonable and unexcused delay" by the United States. Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 286 (8th Cir. 1993). Moreover, this affirmative defense, which must be raised in the pleadings or is deemed waived is unavailable here. See United States v. One (1) 1963, Hatteras Yacht Ann Marie, 584 F.2d 72, 76 (5th Cir. 1978). Laches is inapplicable to section 707 lawsuits: "'laches or neglect of duty on the part of officers of the Government is no defense to a suit by it'" because the United States seeks "'to enforce a public right or protect a public interest.'" United States v. City of Warren, 759 F. Supp. 355 (E.D. Mich. 1991)United States v. City of Warren, 759 F. Supp. 355, 364 (E.D. Mich. 1991) (citation omitted); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 935 (10th Cir. 1979) (dicta).