UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE DISABILITY RIGHTS COUNCIL OF GREATER WASHINGTON, et al.	)	
Plaintiffs,	)	
v.	)	**CASE NO. 1:99CV0-2116**
AMES DEPARTMENT STORES, INC.,	)	**Judge Paul L. Friedman**
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES BY UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO DEFENDANT AMES' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

INTRODUCTION

The United States has moved separately for leave to address as amicus curiae the proper construction of title III of the Americans with Disabilities Act ("ADA") on the question of exhaustion of administrative remedies. 42 U.S.C. §§ 12181-12189. Plaintiffs allege discrimination in access to public accommodations in violation of title III of the ADA, 42 U.S.C. § 12182, and several state law causes of action. Plaintiffs allege that Defendant Ames has discriminated against persons with disabilities by, among other things, failing to remove architectural barriers from its businesses in violation of title III, 42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(iv). Defendant Ames has moved to dismiss the ADA claim arguing incorrectly that Plaintiffs failed to exhaust administrative remedies by notifying a state agency before commencing this action.

STATUTORY AND REGULATORY BACKGROUND

Section 308(a)(1) of the ADA provides a private right of action for persons who experience prohibited discrimination. That section reads in pertinent part:

> § 12188. Enforcement
> (a) In general
> (1) Availability of remedies and procedures
> The remedies and procedures set forth in section 2000a-3(a) of [Title 42] are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination [in violation of Title III] * * * Nothing in this section shall require a person with a disability to engage in a futile gesture if such person or organization covered by [Title III] does not intend to comply with its provisions.

42 U.S.C. § 12188(a)(1)(emphasis added). The highlighted reference to 42 U.S.C. § 2000a-3(a), above, refers to **Section 204(a)** of the Civil Rights Act of 1964, that provides as follows:

> 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 * * * 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
> * * * *

At issue is **Section 204(c)** of the 1964 Act, 42 U.S.C. § 2000a-3(c), that is not incorporated in the ADA. That section provides that, when a state has a law prohibiting the same conduct as that prohibited by the federal law, an aggrieved person must notify the state enforcement authorities of the grievance and wait 30 days before filing suit in federal court.

In its motion to dismiss, Defendant Ames argues that the ADA incorporates the administrative notice requirements of § 2000a-3(c). Def. Memo, pp. 12-14.[1] Title III does not adopt the administrative notice requirements of Section 2000a-3(c). By its express terms, the ADA adopts only Section 2000a-3(a), which does not include a notice requirement. Therefore, the plain language of the statute requires rejection of Defendant's argument, and the motion to dismiss on those grounds should be denied.

ARGUMENT

AGGRIEVED PERSONS MAY SUE UNDER TITLE III OF THE ADA WITHOUT PRIOR NOTICE TO STATE AGENCIES

A. The ADA Adopted Different Enforcement Mechanisms In Each Of Its Titles Each Patterned After Different Titles Of The Civil Rights Act Of 1964

The ADA is the newest major federal civil rights act. It is similar in many respects to the Civil Rights Act of 1964. Title III of the ADA addresses discrimination in public accommodations, as did Title II of the Civil Rights Act, but with a number of differences. The public accommodations provision of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, national origin, or religion. Rather than simply amending Title II of the 1964 Act to add disability as a prohibited basis for discrimination, Congress

[1] In this brief, we will not address other arguments raised by Defendant in its Memorandum of Points and Authorities in Support of Defendant Ames' Motion To Dismiss and For Summary Judgment.

enacted a new, 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's 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).

Congress enacted procedures for the enforcement of the different titles of the ADA that are modeled, in varying degrees, on the enforcement provisions in different titles of the 1964 Civil Rights Act. Thus, for example, one part of the ADA that deals with employment takes its enforcement scheme from Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination on the basis of race, color, national origin, religion, or sex in employment. See Title I of the ADA, Section 107, 42 U.S.C. § 12117(a) (incorporating Title VII remedies by reference). Title VII of the 1964 Act clearly has administrative prerequisites to suit in federal court.

Title II of the ADA, which prohibits discrimination in public services, borrows its enforcement scheme from Title VI of the 1964 Civil Rights Act, as those remedies were incorporated in Section 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(a)(2). See 42 U.S.C. § 12133.

Finally, title III of the ADA, governing discrimination against persons with disabilities in the use of public accommodations and

services operated by private entities, contains a partial incorporation of the remedies provided for in Title II of the Civil Rights Act of 1964.[2] Under 42 U.S.C. § 12188(a)(1), an aggrieved person may invoke the procedures set forth in Section 204(a) of the 1964 Civil Rights Act. Section 204(a) of the 1964 Act allows aggrieved persons to file suit to enforce Title II. Its incorporation in title III of the ADA allows an aggrieved person to bring a civil action to enforce title III. Just as Section 204(a) does not require administrative notification, a person filing suit to enforce title III is not required to notify any state agency before filing this suit. Indeed, the enforcement provision goes on to say that the person with the disability need not always wait until the "public accommodation" actually engages in discrimination. It provides that "[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." 42 U.S.C. § 12188(a)(1). Thus, for example, a

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[2] It should be emphasized that the enforcement provision in title III of the ADA is adopted from Title II, not Title VII, of the 1964 Act. Several courts, however, have erroneously stated that the remedies available to an aggrieved person under the ADA are similar to those provided in Title VII of the 1964 Act. See, e.g., Guzman v. Denny's, Inc., 40 F. Supp. 2d 930, 934 (S.D. Ohio 1999) (the ADA explicitly adopts the enforcement provisions of Title VII); Botosan v. Fitzhugh, 13 F. Supp. 2d 1047, 1049 (S.D. Cal. 1998) (Section 2000a-3(a) comes from Title VII); Daigle v. Friendly Ice Cream Corp., 957 F. Supp. 8 (D.N.H. 1997); Sharp v. Waterfront Resturants, 1999 WL 1095486, *2 (C.D. Cal. Aug. 2, 1999) (Section 2000a-3(a) is part of Title VII); Synder v. San Diego Flowers, 21 F. Supp. 2d 1207, 1209 (S.D. Cal. 1998) (the same).

person using a wheelchair need not try to enter an obviously inaccessible store before bringing suit.

By incorporating Section 204(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), Congress has authorized courts to grant plaintiffs "preventive relief" (injunctive relief) under Section 308(a)(1) of the ADA.[3] In addition, Section 204(a) of the Civil Rights Act (as incorporated) permits the Attorney General to intervene if she certifies that the case is "of general public importance." Finally, Section 204(a) (as incorporated) permits the district court, under certain circumstances, to appoint an attorney for the plaintiff and "authorize the commencement of the civil action without the payment of fees, costs, or security."

B. The Plain Language Of Title III Is Unambiguous In Its Authorization Of Suit Without Notice To State Agencies

Settled canons of statutory interpretation tell us that the starting point of any analysis must be the plain words of the statute. Staples v. United States, 511 U.S. 600, 605 (1994). When the plain words are unambiguous, the inquiry is at an end; there is no need to have recourse to the legislative history or other collateral sources. Presumptively, "the plain language of [a] statute expresses congressional intent." Ardestani v. INS, 502 U.S. 129, 135 (1991),

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[3] Section 308(a)(2) of the ADA, 42 U.S.C. § 12188(a)(2), expands the injunctive relief available to include orders requiring the alteration of facilities or the provision of auxiliary services, measures that would not be necessary when discrimination is on the basis of race.

quoted in American Public Power Association v. NRC, 990 F.2d 1309, 1312 n.3 (D.C. Cir. 1993). Accordingly, “courts must presume that a legislature says in a statute what it means and means * * * what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992); U.S. v. Bost, 87 F.3d 1333, 1335 (D.C. Cir. 1996). Thus, the Court of Appeals for the District of Columbia assumes that "the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." DAE Corp. v. Engeleiter, 958 F.2d 436, 439 (D.C. Cir. 1992)(citations and internal quotation marks omitted).

Had Congress intended to engraft other parts of Section 204 to the ADA, it knew how to do so. When a legislature adopts part but not all of another statute, there is a presumption that the omission was intentional. See, e.g., Kirchner v. Chattanooga Choo Coo, 10 F.3d 737, 739 (10th Cir. 1993); Bank of America v. Webster, 439 F.2d 691, 692 (9th Cir. 1971); Guzman v. Denny's, Inc., 40 F. Supp. 2d 930, 934 (S.D. Ohio 1999) (relying on the doctrine of "expressio unius est exclusio alterius").

The language of Section 308(a)(1) of the ADA, 42 U.S.C. § 12188(a)(1), is clear and unambiguous. By incorporating Section 204(a), it clearly and unambiguously allows suit without any administrative prerequisites.

Indeed, in construing the requirements of the enforcement provisions of title III, several federal courts have held that plaintiffs are not required to pursue state administrative remedies

prior to filing an action to enforce title III of the ADA. One of the most recent decisions is Wyatt v. Liljenquist, 2000 WL 553656 (C.D. Cal. May 3, 2000). There, as here, the defendant contended that the ADA requires exhaustion of administrative remedies and 30 day notice before a plaintiff may file a civil suit. Id. at *2. As the court noted, however,

> that the plain language of Section 12188(a)(1) is not ambiguous. The ADA does not purport to adopt Section 2000a-3(c). By its express terms, the ADA adopts only Section 2000a-3(a), which says nothing about notice or exhaustion of remedies. Furthermore, Section 2000a-3(a) makes no reference to subsection (c) and, under the doctrine of expressio unius est exclusio alterius, "when a statute enumerates particular subjects [subsection (a)], the court should assume that all those not mentioned [subsections (b) and (c)] are excluded." [(citation omitted).] The unambiguous statutory language of Section 12188(a)(1) defeats Defendants' argument.

Id. Other courts have come to the same conclusion. See, e.g., Parr v. L & L Drive-Inn Restaurant, 2000 WL 684800 *10 (D. Hawai'i, May 16, 2000); Guzman v. Denny, Inc., 40 F. Supp. 2d 930, 934 (S.D. Ohio 1999); Bercovith v. Baldwin School, 964 F. Supp. 597, 604 (D.P.R. 1997), rev' on other grounds, 133 F.3d 141 (1st Cir. 1998) ("Given that Congress specifically referred to § 2000a-3(a) when outlining the available remedies under Title III, we believe that, had it wanted to make written notice to state authorities a requirement under this title, it would have explicitly done so"); Mirando v. Villa Roma Resorts, Inc., 1999 WL 1051118 (S.D.N.Y. Nov. 19, 1999); Shotz v. Victorian Restaurant Corp., 1999 WL 790689 (S.D. Fla. Feb. 5, 1999); Moyer v. Showboat Casino Hotel, Atlantic City, 56 F. Supp. 2d 498, 501

(D.N.J. 1999); Botosan v. Fitzhugh, 13 F. Supp. 2d 1047, 1050 (S.D. Cal. 1998) ("By its clear, express terms, the ADA adopts only § 2000a-3(a), which says nothing about exhausting administrative remedies"); Lewis v. Aetna Life Insurance Co., 993 F. Supp. 382, 387 (E.D. Va. 1998) ("For claims brought under ADA Title I, there is an administrative exhaustion requirement which would toll the statute. However, for Title III claims, there is no exhaustion requirement"); Botosan v. McNally Realty, Inc., Civil Action No. 98-CV-0367-J-AJB (S.D. Cal. Nov. 24, 1998) (order holding that "the administrative exhaustion requirements of subsection (c) are not incorporated into the ADA") (Order Denying Defendants' Motion to Dismiss appended as Attachment 1), appeal docketed, No. 99-55580 (9th Cir. 1999); Doukas v. Metropolitan Life Ins. Co., No. CIV 4-478-S.D, 1997 WL 833134 (D. N.H. Oct. 21, 1997) ("the court assumes that Congress's reference to paragraph (a) excludes paragraph (c)"); Coalition of Montanans Concerned with Disabilities, Inc., v. Gallatin Airport Auth., 957 F. Supp. 1166, 1169 (D. Mont. 1997) (in case arising under title III, court noted that "plaintiffs need not exhaust their administrative remedies" before bringing suit); Soignier v. American Bd. of Plastic Surgery, 1996 WL 6553, *1 (N.D. Ill. 1996) ("[b]y the express terms of [42 U.S.C.] § 12188, the only provision adopted for subchapter III of the ADA is § 2000a-3(a)", aff'd on other grounds, 92 F.3d 547 (7th

Cir.1996), cert. denied, 519 U.S. 1093 (1997).[4]

Defendant cites six cases as holding that Section 12188 purports to adopt the administrative notice requirements of Section 2000a-3(c). See Def's Memo at p. 13. For the following reasons, Defendant's argument lacks merit.

In three of these six cited cases, Daigle v. Friendly Ice Cream Corp., 957 F. Supp. 8 (D.N.H. 1997), Howard v Cherry Hills Cutters, Inc., 979 F. Supp. 1307 (D. Colo. 1997), and Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148 (D. Colo. 1997), the district court, without analysis, stated that the title III enforcement provision is limited by the administrative requirements of Section 2000a-3(c). Daigle, 957 F. Supp. at 9-10; Howard, 979 F. Supp. at 1150; Howard, 935 F. Supp. at 1149-50. In the absence of any explanation of how the courts reached the conclusion that section 12188(a)(1) of the ADA incorporated not just section 204(a), but also section 204(c), the

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[4] In Soignier, 92 F.3d 547, the Seventh Circuit made clear that there are no prerequisites to filing suit under title III. In that case, a physician sought certain accommodations in taking the oral portion of the exam for board certification in plastic surgery; when he did not receive the accommodations he sought, he first appealed to the Board of Plastic Surgery, and after the appeal, failed, filed in federal court. Id. at 549. His action was dismissed on grounds that it was time-barred. Id. In upholding that decision, the Seventh Circuit observed that

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

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

opinions are simply not persuasive.

The other three cited cases provided some analysis for the holding that the ADA incorporated Section 2000a-3(c). The reasoning in these cases, however, is fatally flawed. In Mayes v. Allison, 983 F. Supp. 923 (D. Nev. 1997), the court found the language of Section 308(a)(1) to be "ambiguous." The court said that because Section 36.501(a) of the Attorney General's regulation, 28 C.F.R. Pt. 36, incorporates by reference the attorneys' fees provision of 42 U.S.C. § 2000a-3(b), the Department of Justice must believe Congress intended to incorporate more of Section 204 (of the 1964 Act) than 204(a), the part explicitly referenced in the statute. 983 F. Supp. at 925.

But the regulation cited, 28 C.F.R. § 36.501(a), does not adopt or restate the attorneys' fees provision of Section 204(b) of the 1964 Act, 42 U.S.C. § 2000a-3(b). In fact, as we show, infra, p. 13, the ADA has its own attorneys' fees provision, 42 U.S.C. § 12205. The regulation actually restates the provision in 204(a) of the 1964 Act that:

> [u]pon 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.

See 28 C.F.R. 36.501(a). Therefore, the Mayes reasoning is based upon an incorrect reading of the law.

The fifth case cited by Defendant in support of its argument is Snyder v. San Diego Flowers, 21 F. Supp. 2d 1207, 1210 (S.D. Cal.

1998). Like a number of other courts, (see supra, n.2), the district court in Snyder incorrectly believed that Title III of the ADA was based on Title VII of the 1964 Civil Rights Act ("Section 2000a-3(a) is part of Title VII," 21 F. Supp. 2d at 1209). Understandably, the court then wondered whether or not Congress intended the administrative procedures of Title VII to be incorporated in the procedural section of title III of the ADA. There is, however, no such ambiguity in the Act. As indicated above, title III of the ADA is generally modeled on Title II of the 1964 Act, not on Title VII.[5]

The sixth case cited by Defendant in support of its argument that the administrative notice requirement of Section 12188(c)(1) is applicable to this suit is Burkhart v. Asean Shopping Ctr., Inc., 55 F. Supp.2d 1013 (D. Ariz. 1999). In that case, the district court assumed that Section 12188(a)(1) requires the aggrieved party to notify the violator an opportunity to provide a response to the complaint concerning its intent to comply. 55 F. Supp.2d at 1016-1018. This assumption is incorrect. There is no statutory basis for assuming that the "futile gesture" language refers to an administrative notice requirement. Rather, that language codifies the "futile gesture" language established in International Bhd. of Teamsters v. United

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[5] The administrative procedures required by Section 204(c) of the 1964 Act are, in all events, totally different than those required by Title VII of the 1964 Act. There is no logic to the Snyder court's reasoning that Congress intended to incorporate Section 204(c) of the 1964 Act into Section 308 of the ADA in order to make the latter provision similar to Title VII of the 1964 Act.

States, 431 U.S. 324 (1977), which in this context would relieve a party of the need to try to enter an obviously inaccessible store before suit or to seek the accommodations accorded by title III where the party has notice that the entity does not intend to comply with title III's provisions.

Two pieces of the ADA legislative history establish that Congress intended the second sentence of Section 308(a)(1) to apply the Title VII "futile gesture" doctrine to private actions under the ADA. First, the House Report's discussion of Section 308(a)(1) states unequivocally:

> The Supreme Court has enumerated the "futile gesture" doctrine under title VII in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-67 [1977] ... The Committee intends for this doctrine to apply to this title.

H.R. Rep. No. 101-485(ii), 101st Cong., 2d Sess. at 82-83 (1990); accord S.Rep. No. 116, 101st Cong., 2d Sess. at 43 (1989). Second, in a speech delivered on the House floor before passage of the ADA, Representative Hoyer described the amendments which added the "futile gesture" language to Section 308(a)(1) and provided an example of the doctrine's application in the context of private actions under Title III:

> [A] person does not have to engage in a "futile gesture" if the person has notice that an entity covered under title III does not intend to comply with its provisions. For example, if a theatre has turned away six people with cerebral palsy and has indicated that it has a policy of turning away such individuals, a person with cerebral palsy can bring suit without first subjecting himself or herself to the humiliation of being turned away by the theatre.

136 Cong. Rec. E1913-01, E1920 (daily ed. May 22, 1990) (available on WESTLAW 1990 WL 80290).

The legislative history of the ADA therefore establishes that the second sentence to Section 308(a)(1) reflects Congress' desire to apply the "futile gesture" doctrine to private actions brought under Title III of the ADA. By contrast, nothing in the statute or its legislative history suggests that Congress intended Section 308(a)(1) to impose an administrative notification requirement.

C. Incorporating Other Parts Of Section 204 Of The Civil Rights Act Leads To Incongruous Results

Section 204 of the Civil Rights Act of 1964 has four subsections. One of them, Section 204(a), is expressly incorporated in Section 308(a)(1) of the ADA. Defendant argues that Section 204(c) is also incorporated by reference. Defendant does not, however, explain why a court should find Section 204(c) of the 1964 Act incorporated in Section 308(a)(1) of the ADA, but not Sections 204(b) and 204(d), 42 U.S.C. § 2000a-3(b) and 42 U.S.C. § 2000a-3(d). The only way that Defendant can argue for incorporation of Section 204(c) is to claim that Congress intended to incorporate all four subsections of Section 204 into the remedial provision of Title III of the ADA.

If all four subsections were deemed incorporated, however, the result would be duplication and incongruity. For example, Section 204(b) of the Civil Rights Act, 42 U.S.C. 2000a-3(b), provides:

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Congress could not have intended this provision to be incorporated in Section 308(a)(1) of the ADA. The ADA contains its own all-purpose attorneys' fees provision, 42 U.S.C. § 12205, applicable to all civil actions and administrative proceedings brought pursuant to all titles of the ADA.

Nor could Congress have intended to incorporate Section 204(d) of the 1964 Civil Rights Act into Section 308 of the ADA. That part of the 1964 Act permits federal courts, in states having no parallel state law prohibiting public accommodations discrimination, to refer pending public accommodation disputes to the Community Relations Service (CRS) for a maximum of 120 days if there is a possibility that the defendant will comply voluntarily with the Civil Rights Act. Congress never expanded the jurisdiction of the CRS to allow it to mediate issues under the ADA. Therefore, Congress could not have intended Section 308 of the ADA to incorporate Section 204(d) of the 1964 Act. Accordingly, there is no basis for an argument that Congress incorporated in Section 308(a)(1) of the ADA one subsection of Section 204 of the 1964 Civil Rights Act without expressly mentioning it, but failed to incorporate two other provisions that are also not mentioned. The rational answer is that Congress incorporated only that section it alluded to explicitly: Section 204(a).

D. **The Legislative History Is Consistent With The "Plain Language" Of Title III's Enforcement Provision**

Defendant does not argue that the statute on its face is ambiguous; thus, there is no reason to examine the legislative history. If relevant, however, the legislative history is entirely consistent with reading the statute to incorporate only Section 204(a) of the 1964 Civil Rights Act.

The district court in Mayes cited a fragment of legislative history consisting of one sentence from the Conference Report saying that the House amendment, ultimately adopted by Congress, "'specifies that the remedies and procedures of Title II of the 1964 Civil Rights Act' shall be the remedies and procedures for enforcement of 42 U.S.C. §12182." 983 F. Supp. at 925. The court in Mayes concluded from this sentence that Congress intended all of the procedures of Title II to be incorporated, not just Section 204(a). This is entirely incorrect. Apart from the fact that incorporation of "all the procedures of Title II" would have an irrational result, as we demonstrated above, the Mayes court missed the point being made in the Conference Report.

Both the House and the Senate passed versions of Title III that expressly incorporated only the procedures set forth in 42 U.S.C. 2000a-3(a) of the 1964 Civil Rights Act. See Section 308(a)(1) of the Senate Bill, S. 933, as passed September 18, 1989 (appearing also at 135 Cong. Rec. S10707 (daily ed. Sept. 7, 1989)); 136 Cong. Rec. H2460 (daily ed. May 19, 1990) (House-passed version). The two bills differed, however, as to who could invoke the remedies offered by Title

III. The Senate version provided:

> The remedies and procedures set forth in section 204 of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) shall be available to any individual who is being or is about to be subjected to discrimination on the basis of disability in violation of this title.

(Emphasis added.) The House bill, however, provided that the:

> remedies and procedures of title II of the 1964 Civil Rights Act shall be the powers, remedies and procedures title III provides to any person who is being subject to discrimination * * * or * * * has 'reasonable grounds' for believing that he or she is about to be subjected to discrimination with respect to the construction of new or the alteration of existing facilities in an inaccessible manner.

H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 80 (1990) (emphasis added).

The Conference Report explained, briefly, that the Senate receded and the House version prevailed. In so doing, it shortened its description of the two provisions, referring to the "remedies and procedures of the 1964 Civil Rights Act" and "the remedies and procedures of title II of the 1964 Civil Rights Act" instead of specifying what subsection was actually in each version of the bill. See H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 80 (1990). Clearly, by using these shorthand descriptions, the conferees did not purport to change the words of the bill that the House passed, especially considering that the purpose of the Report was to announce that the committee was adopting the House version.

The only other legislative history we have found relevant to this point consists of a colloquy between two sponsors of the Senate bill,

ending with a definitive statement that no administrative procedures attach to title III of the ADA.[6] There is not a scintilla of evidence in the legislative history that Congress intended anything but 42 U.S.C. § 2000a-3(a) to be incorporated in the enforcement section of title III of the ADA.

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[6] 135 Cong. Rec. S10759-S170760 (daily ed. Sept. 7, 1989):

MR. BUMPERS. Mr. President, to continue the colloguy before we were interrupted by the vote, let me ask and clarify something before we go on. Is it correct with this act must exhaust, as we lawyers say, his or her administrative remedies before they proceed to file suit.

MR. HARKIN. That is affirmative.

MR. BUMPERS. In that connection, Senator, 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 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 --

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.

CONCLUSION

For the foregoing reasons, the United States, as amicus curiae, urges this court to deny Defendant's motion to dismiss the case and to find that Plaintiffs did not have to notify any state agency before commencing this action under title III.

Respectfully submitted,

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Dated this 5th day of June, 2000.

Attachment