IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD GALLOWAY, Plaintiff, v. SUPERIOR COURT OF THE DISTRICT OF COLUMBIA and THE DISTRICT OF COLUMBIA, Defendants.	)	Civil Action No. 91-0644 (JHG)

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

I. Introduction

Plaintiff Donald Galloway is blind. When responding to a summons for jury duty, he was informed by personnel of the Superior Court of the District of Columbia that the Court's policy was to exclude all blind persons from jury service. Galloway was therefore barred from serving as a juror. On March 16, 1993, this Court granted plaintiff's motion for summary judgment for declaratory and injunctive relief, holding that the Superior Court's policy of categorically excluding blind persons

from jury service violates title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131 et seq., and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The March 16 order directed the parties to address several remaining issues regarding relief.[1]

In this brief, the United States as amicus curiae urges the Court to hold that the plaintiff is entitled to seek compensatory damages under both title II of the ADA and section 504 of the Rehabilitation Act and, further, that the eleventh amendment is not a bar to obtaining such relief. We take no position on other issues raised by the parties.

II. Interest of the United States

The United States has significant responsibilities for implementing and enforcing the ADA, including, pursuant to statutory directive, the promulgation of implementing regulations.[2] Accordingly, the United States has a strong

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[1] The Court delayed the briefing schedule to afford the parties an opportunity to settle. We have been advised that no settlement has been reached.

[2] As required by Section 204 of the ADA, 42 U.S.C. § 12134, the Attorney General promulgated a regulation implementing title II of the ADA. 28 C.F.R. pt. 35 (1992). This regulation became effective on January 26, 1992. Pursuant to the statute and the regulation, several federal agencies have responsibility for investigating title II complaints. The Department of Justice coordinates the title II implementation efforts of these agencies and may file suit in federal district court when a complaint cannot be resolved by voluntary means. See 42 U.S.C. § 12133; 28 C.F.R. pt. 35 at subpt. F; S. Rep. No. 116, 101st Cong., 1st Sess. 57 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2,
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interest in ensuring that the case law developed in this suit is consistent with the United States' interpretation of the statute and the Department of Justice's regulation implementing title II of the ADA, 28 C.F.R. pt. 35.

Similarly, the United States has substantial responsibility for enforcing section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, in connection with federally assisted programs and activities.[3] The United States has often participated as amicus curiae in cases involving section 504, both before the Supreme Court and other federal courts.[4]

The issues raised in this case implicate the ability of both the Department of Justice and private plaintiffs to obtain relief under title II and section 504. Furthermore, because the

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[2](...continued)
at 98 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 381.

[3] In 1976 the President directed the Secretary of Health, Education, and Welfare to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976). The Secretary issued detailed regulations. See 45 C.F.R. pt. 86 (1978). In 1980, the Secretary's responsibility was transferred to the Attorney General, Exec. Order No. 12250 (45 Fed. Reg. 72995 (1980)), and the regulations were "deemed to have been issued by the Attorney General" (id. at 72997; see 28 C.F.R. pt. 41). The regulations require each federal agency to issue its own regulations concerning discrimination on the basis of disability in the programs and activities financially assisted by that agency.

[4] See e.g., Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984); University of Texas v. Camenisch, 451 U.S. 390 (1981); Southeastern Community College v. Davis, 442 U.S. 397 (1979); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979).

Attorney General does not have unlimited resources to enforce civil rights laws, suits brought by private citizens as "private attorneys general" are critical to the successful implementation of those laws. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) (title VII of the 1964 Civil Rights Act (employment)); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (title VIII of the 1968 Civil Rights Act (fair housing)); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-402 (1968) (title II of the 1964 Civil Rights Act (public accommodations)).

III. Argument

The Americans with Disabilities Act is the nation's first comprehensive civil rights statute protecting the rights of persons with disabilities. The statute itself sets forth among its purposes:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
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> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
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> . . . and
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> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b). As we demonstrate below, this comprehensive statute includes the right to be compensated for

injuries resulting from the unlawful discriminatory conduct of state and local government officials.

Title II of the ADA was patterned after section 504 of the Rehabilitation Act of 1973, the first federal statute to provide broad prohibitions against discrimination on the basis of disability. Section 504 prohibits discrimination in programs and activities receiving federal financial assistance (including assisted programs of state and local governments).[5] As we discuss in detail below, a recent Supreme Court decision construing a similar statute confirms the conclusion reached by most lower courts that compensatory damages are available in private suits brought under section 504.

Even if the District of Columbia is considered a state for eleventh amendment purposes, it is not a bar to recovery of damages under either title II of the ADA or section 504. Congress explicitly abrogated eleventh amendment immunity when it enacted the ADA. In the Civil Rights Remedies Equalization Act of 1986, Congress did the same for suits brought under section 504.

A. Compensatory damages are available forms of relief under title II of the ADA and section 504 of the Rehabilitation Act

[5] In 1978, section 504 of the Rehabilitation Act was amended to apply also to programs conducted by federal executive agencies. 29 U.S.C. § 794 (as amended by Pub. L. 95-602, Title I, §§ 119, 112(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987).

Congress explicitly patterned title II's substantive and enforcement provisions after section 504. Section 203 of the ADA, 42 U.S.C. § 12132, provides that enforcement is to be achieved through the "remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act," 29 U.S.C. § 794a, which establishes the remedies by which section 504 is enforced.[6] As a result, the remedies afforded under title II and section 504 are the same.

Section 505 of the Rehabilitation Act does not itself specify what remedies are available for violations of section 504. Rather, it adopts the rights and remedies available under title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs. Most of the lower courts have held that compensatory damages are authorized under both section 504[7] and title VI.[8]

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[6] See S. Rep. No. 116, 101st Cong., 1st Sess. 57 (1989); Rep. of Comm. on Educ. and Labor at 98. Indeed, Congress intended that the enforcement of title II "should closely parallel the federal government's experience" in enforcing section 504. Id.

[7] See, e.g., Bonner v. Lewis, 857 F.2d 559, 566 (9th Cir. 1988); Moore v. Warwick Public School District N. 29, 794 F.2d 322, 325 (8th Cir. 1986); Ciampa v. Massachusetts Rehabilitation Comm'n, 718 F.2d 1, 5 (1st Cir. 1983); Miener v. Missouri, 673 F.2d 969, 977-79 (8th Cir. 1982), cert. denied, 459 U.S. 909, 916 (1982); Nelson v. Thornburgh, 567 F.Supp. 369 (E.D.Pa. 1983), aff'd without opinion, 732 F.2d 147 (3d Cir. 1984), cert. denied, 469 U.S. 1188 (1985). See also Smith v. Robinson, 468 U.S. 992, 1020 n.24 (1984) ("courts generally agree that damages are available under § 504"). But see Marshburn v. Postmaster Gen., 678 F.Supp. 1182 (D.Md. 1988), aff'd without opinion, 861 F.2d

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In a decision interpreting title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, yet another statute patterned after title VI, the Supreme Court last term ruled that a private plaintiff is entitled to recover compensatory damages. Title IX prohibits gender discrimination in federally assisted education programs. Like section 504, the enforcement scheme of title IX adopts the rights and remedies provided under title VI without specifying what particular remedies are available.[9] The Court's decision, Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028 (1992), disposes of any argument that compensatory damages are not available to private plaintiffs seeking to enforce their rights under title VI-like statutes.

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265 (4th Cir. 1988); Byers v. Rockford Mass Transit Dist., 635 F.Supp. 1387, 1391 (N.D.Ill. 1986); Shuttleworth v. Broward County, 649 F.Supp. 35, 38 (S.D.Fla. 1986).

[8] The Supreme Court has noted that compensatory damages may be available under title VI, but has not actually ruled on the issue. Guardians Assoc. v. Civil Service Comm'n of the City of New York, 463 U.S. 582, 597 (1983) ("[i]n cases where intentional discrimination has been shown ... it may be that the victim of the intentional discrimination should be entitled to a compensatory award"). See also Gilliam v. City of Omaha, 388 F.Supp. 842 (D.Neb. 1975), aff'd, 524 F.2d 1013 (8th Cir. 1975) (without mention of remedies); Flanagan v. President and Directors of Georgetown College, 417 F.Supp. 377 (D.D.C. 1976). But see Concerned Tenants Assoc. v. Indian Trails Apartments, 496 F.Supp. 522, 527 (N.D.Ill. 1980).

[9] Cannon v. University of Chicago, 441 U.S. 677, 694-96 (1979) (title IX patterned after title VI); N.A.A.C.P. v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979) (title IX was expressly intended by Congress to track the previously enacted title VI).

In Franklin, a female student alleged that a high school teacher had continually abused her and subjected her to sexual harassment. The student had since graduated and sought damages. The school district claimed that only injunctive relief could be awarded in a private suit under title IX. The Court disagreed, holding that compensatory damages are available. 112 S. Ct. at 1032-33. It based its decision on the longstanding and fundamental principle of law that, absent clear congressional direction to the contrary, federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. Id. at 1033. Indeed, the Court concluded that courts should presume the availability of all forms of relief unless Congress has expressly indicated otherwise. Id. (citing Davis v. Passman, 442 U.S. 228, 246-47 (1979)).

Having already held in Cannon v. University of Chicago, 441 U.S. 677 (1979), that title IX is enforceable through an implied private right of action, the Franklin Court found no indication, either in the statute itself or its legislative history, that Congress intended to limit the remedies available under title IX. In fact, the Franklin Court noted that after Cannon, Congress twice[10] had the opportunity to limit the remedies available under

[10] See the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, and the Civil Rights Restoration Act of 1987, Pub.L. 100-259, 102 Stat. 28 (1988), both of which also apply to title VI and to section 504.

title IX and made no effort to do so either time.[11] The Court thus concluded that the full range of remedies could be applied in a title IX suit.

Because section 504 and title IX share a common enforcement mechanism, the reasoning in Franklin is equally applicable to section 504. Another judge of this court has already adopted the Franklin analysis and concluded that compensatory damages are available under section 504.[12] Doe v. District of Columbia, 796 F. Supp 559, 572 (D.D.C. 1992). Every other court to address this issue since Franklin has reached the same conclusion. See, e.g., Wood v. Spring Hill College, 978 F.2d 1214, 1219-20 (11th Cir. 1992); J.L. and K.P. v. Social Sec. Admin., 971 F.2d 260, 264 (9th Cir. 1992); Kraft v. Memorial Medical Center, 807 F. Supp. 785, 790 (S.D. Ga. 1992); Ali v. City of Clearwater, 807 F. Supp. 701, 704-05 (M.D. Fla. 1992); Tanberg v. Weld County Sheriff, 787 F. Supp. 970, 972 (D. Colo. 1992) (Franklin

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[11] Franklin, 112 S. Ct. at 1036-37. See also id. at 1039 (Scalia, J., concurring) (concluding that the Civil Rights Remedies Equalization Amendment of 1986 was not only a validation of Cannon, but "an implicit acknowledgment that damages are available [under title IX]").

[12] Judge Thomas Hogan noted that two earlier cases decided in this court had held that compensatory damages are unavailable under section 504. See Doe v. Southeastern University, 732 F.Supp. 7 (D.D.C. 1990); Duvall v. Postmaster General, 585 F.Supp. 1374 (D.D.C. 1984), aff'd without opinion, 774 F.2d 510 (D.C.Cir. 1985). Judge Hogan noted, however, that these cases were decided prior to Franklin, and that the reasoning applied in these cases "was misplaced." Doe, 796 F. Supp. at 572, n. 13 & 14.

"provides dispositive analysis" that compensatory damages are available under section 504).

Like title IX, section 504 was designed to protect the civil rights of victims of discrimination. And as with title IX, Congress has had ample opportunity to amend section 504 to preclude the availability of compensatory damages.[13] By failing to amend the remedies provisions of section 504, even after many courts have held that damages are available under the statute,[14] Congress has implicitly confirmed that damages are, in fact, available.

Because title II of the ADA has adopted the rights and remedies available under section 504, the Franklin analysis also compels the conclusion that compensatory damages are available under title II.[15] As with section 504 and titles VI and IX, there is no indication whatsoever, in either the statutory language or the legislative history of title II, that Congress intended to limit the remedies available to a private plaintiff.[16] To the contrary, the legislative history of title

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[13] See note 10, supra.

[14] See note 7, supra.

[15] There have as yet been no decisions addressing whether compensatory damages are available under title II of the ADA.

[16] This can be contrasted with the enforcement procedures of title III of the ADA, which applies to private entities operating places of public accommodation and commercial facilities. Title III does limit private plaintiffs to equitable relief by reference to the procedures for enforcing title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a). See 42

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II suggests that Congress intended the full range of remedies, including compensatory damages, to be available under title II:

> As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies.[17]

B. Congress has expressly abrogated the states' eleventh amendment immunity from private suits brought under the ADA and Section 504

The eleventh amendment,[18] as interpreted by the Supreme Court, embodies a general constitutional principle of state sovereign immunity in federal court actions. The amendment, therefore, precludes a federal court from rendering judgment against an unconsenting state in favor of a citizen of the state.

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[16](...continued)
U.S.C. § 12188. See also the Department of Justice's regulation implementing title III, 28 C.F.R § 36.501(a) (1992), providing in pertinent part, "Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part . . . may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order."

[17] House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Americans with Disabilities Act of 1990, at 98, reprinted in 1990 U.S.C.C.A.N. at 381; see also H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. 3, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 475 (Report of the Judiciary Committee) (citing Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909 (1982) (compensatory damages available under section 504); S. Rep. No. 116, 101st Cong., 1st Sess., at 57-58 (1989).

[18] The eleventh amendment provides, "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 or Subjects of any Foreign State."

Hans v. Louisiana, 134 U.S. 1, 15 (1890). But the District of Columbia is not considered a state for eleventh amendment purposes. See Best v. District of Columbia, 743 F. Supp. 44, 46 (D.D.C. 1990) ("[t]he eleventh amendment ... does not apply to the District of Columbia"); Committee of Blind Vendors v. District of Columbia, 695 F. Supp. 1234, 1241 n.6 (D.D.C. 1988) (same).

Moreover, even if it applied to the District of Columbia, the eleventh amendment would not bar a suit for damages under either title II of the ADA or section 504. The Supreme Court has held that Congress may abrogate the eleventh amendment without the states' consent when acting pursuant to its plenary powers, so long as it does so explicitly. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Congress has the authority to override states' immunity when legislating pursuant to section 5 of the fourteenth amendment); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (Congress must make "its intention unmistakably clear in the language of the statute").

In the ADA, Congress expressly abrogated the States' eleventh amendment immunity. Title V, which contains provisions generally applicable to all other titles of the ADA, provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are

> available for such a violation in an action against any public or private entity other than a State.

Section 502 of the ADA, 42 U.S.C. § 12202 (parenthetical remark in the original). See also 28 C.F.R. § 35.178; S. Rep. No. 116, 101st Cong., 1st Sess., at 184 (1989); and House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Americans with Disabilities Act of 1990, at 138 (1990), reprinted in 1990 U.S.C.C.A.N. at 421.

Similarly, in the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, Congress specifically abrogated the states' immunity under the eleventh amendment for cases arising under section 504.[19]

IV. Conclusion

The Court should conclude that Mr. Galloway is entitled to seek compensatory damages under both title II of the ADA and section 504 of the Rehabilitation Act and, further, that the eleventh amendment is not a bar to obtaining such relief.

Dated: Washington, D.C.

April __ , 1993

Respectfully submitted,

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[19] Congress also abrogated the states' immunity under title IX, title VI, and the Age Discrimination Act of 1975.

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