IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

JEFFREY GORMAN,	)	
	)	
Plaintiff,	)	No. 95-0475-CV-W-8
vs.	)	
	)	
	)	
STEVEN BISHOP, et al,	)	
	)	
Defendants.	)	
	)	

RESPONSE OF THE UNITED STATES AS AMICUS CURIAE TO DEFENDANTS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

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I. BACKGROUND

The defendants, members of the Board of Commissioners ("the Board") of the Kansas City, Missouri Police Department ("KCMOPD"), have moved for summary judgment on plaintiff's claims against them in their official capacities under both title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12115-12164, and section 504 of the Rehabilitation Act of 1973 ("section 504" or "the Rehabilitation Act"), 29 U.S.C. § 794. The plaintiff has a spinal cord injury and uses a wheelchair. He alleges that defendants' failures to implement the requirements of the ADA and section 504 within the KCMOPD resulted in injuries to him during transportation to police headquarters following his arrest on May 31, 1992.

This Court has granted summary judgment, on the basis of "qualified immunity," in favor of Officer Neil Becker, who arrested and transported the plaintiff, Steven Bishop, former Chief of Police of the KCMOPD, and persons who were members of

the Board at the time plaintiffs injuries occurred, on plaintiff's ADA and Rehabilitation Act claims against them in their individual capacities. At the March 29, 1996 pretrial conference, counsel for the defendants requested leave to file the present motion for summary judgment. By order dated April 1, 1996, the Court granted that request and also granted the United States leave to file a brief as amicus curiae in response to defendants' arguments concerning the Rehabilitation Act only.[1]

For the reasons set forth below, the United States urges that defendants' motion for summary judgment be denied with respect to the Rehabilitation Act claims.[2]

II. ARGUMENT

A. Section 504 Covers Arrests and All Related Activities.

1. On its Face, Section 504's Language Prohibits Discrimination with Respect to All Activities of Recipients of Federal Financial Assistance.

Section 504's prohibition of discrimination by recipients of federal financial assistance is broad enough to cover arrests and

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[1] The United States previously intervened in this case to defend the constitutionality of title II of the ADA, and has also filed two briefs as amicus curiae concerning the applicability of title II to arrests and all related activities. On February 9, 1996, following a decision by this Court that title II is not unconstitutionally vague, defendants filed a motion requesting the Court to reconsider and set aside its November 14, 1995 order allowing the United States to participate as amicus curiae. The Court granted this motion on March 5, 1996, and, on March 15, denied the United States' motion for reconsideration.

[2] We assume for the purpose of addressing this issue that the plaintiff has properly sued the defendants in their official capacities.

all related activities, including the transportation of arrestees. In pertinent part, section 504 reads as follows:

> [n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a) (emphasis added). One of defendants' theories is that this language applies only to programs and services voluntarily sought out by persons with disabilities from which they obtain some benefit, not to arrests. See Suggestions in Support of Supplemental Motion for Summary Judgment (hereafter "Def. Br.") at 12-14, 15.[3]

Section 504's plain language does not support this theory. Excluding a qualified individual with a disability from participation in a program or activity and denying to such an individual the benefit of a program or activity are certainly two ways in which a recipient of federal funds may violate section 504. However, Congress clearly expressed its intention to

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[3] Defendants mistakenly assert that this Court has already ruled in their favor on this issue, pointing to the Orders of March 26 and March 29, 1996, granting summary judgment in favor of Officer Becker and former Chief of Police Bishop with respect to plaintiff's claims against them in their individual capacities. See Def. Br. at 12, 13-14. We do not read the Court's decisions holding that defendants Becker and Bishop could assert the defense of "qualified immunity" as tantamount to a ruling in favor of the KCMOPD and the members of the Board in their official capacities. The Court has merely concluded that, for the purposes of the defense of "qualified immunity," the plaintiff's rights under the ADA and section 504 were not "clearly established." It has not concluded that these rights do not exist at all.

prohibit a third type of conduct as well -- that which subjects individuals with disabilities to discrimination under federally-funded programs and activities. See 29 U.S.C. § 794(a). The statute does not limit the "programs" or "activities" under which individuals may "subjected to discrimination" to those voluntarily sought out for the purpose of obtaining a benefit.

The definition of the term "program and activity" in the Civil Rights Restoration Act of 1988, which applies to section 504, underscores this point. The term was amended to clarify its meaning in light of an unduly narrow interpretation by the Supreme Court in Grove City College v. Bell, 465 U.S. 555 (1984). See 20 U.S.C. § 1687; S. Rep. No. 64, 100th Cong., 2d Sess. 1-2 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 3-4.[4] Congress' clarified definition provides:

> [T]he term 'program or activity' means all of the operations of--
>
> > (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> >
> > (B) the entity of such State or local government that distributes such assistance

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[4] See also Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414, 1416 (E.D.N.Y. 1988), aff'd 869 F.2d 130 (2d Cir. 1989) (stating that the expressed purpose of the clarified definition of "program or activity" in the 1988 Civil Rights Restoration Act was to "restore the broad scope of the coverage and to clarify the application of . . . Section 504 of the Rehabilitation Act of 1973") Bonner v. Arizona Department of Correction, 714 F. Supp. 420, 422-23 (D. Ariz. 1989) (adopting the rationale in Leake); Cohen v. Brown University, 809 F. Supp. 978, 982 (1992), aff'd 991 F.2d 888 (1st Cir. 1993) (discussing effect of Civil Rights Restoration Act upon the definition of "program or activity" in title IX of the Civil Rights Act).

> and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

20 U.S.C. § 1687; 29 U.S.C. § 794(b)(1)(A) (emphasis added). By using the phrase "all of the operations of," the definition demonstrates that section 504 applies to every action taken by an entity receiving federal financial assistance.

2. An Official Interpretation of Section 504 by the Department of Justice Specifically Mentions Arrests.

We have previously directed the Court's attention to commentary by the Department of Justice that specifically identifies arrests as programs or activities covered by section 504. See Memorandum of the United States as Amicus Curiae (filed Nov. 14, 1995) at 9; Reply Brief of the United States as Amicus Curiae (filed Dec. 27, 1995) at 8. This commentary, which we have not previously quoted in full, appears in the Preamble to the Department's 1980 regulation implementing section 504 with respect to its federally-assisted programs. It addresses a police department's obligation toward arrestees who have hearing impairments:

> If a hearing-impaired person is arrested, the arresting officer's Miranda warning should be communicated to the arrestee on a printed form approved for such use by the law enforcement agency where thee [sic] is no qualified interpreter immediately available and communication is otherwise inadequate. The form should also advise the arrestee that the law enforcement agency has an obligation under Federal law to offer an interpreter to the arrestee without cost and that the agency

> will defer interrogation pending the appearance of an interpreter.

45 Fed. Reg. 37,620 (1980) (emphasis added; citations omitted). This is a reasonable interpretation of a statute by an agency empowered to enforce it; thus it must be given controlling weight. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); United States v. Board of Trustees for the University of Alabama, 908 F.2d 740, 746 (11th Cir. 1990) (applying Chevron to section 504 regulations issued by the Department of Education); Americans Disabled for Accessible Public Transportation v. Skinner, 881 F.2d 1184, 1991 (3d Cir. 1989) (principles of Chevron apply to section 504 regulations issued by Department of Transportation).[5]

B. Plaintiff is an "Otherwise Qualified" Individual With a Disability.

Defendants also appear to be arguing that the plaintiff is not an "otherwise qualified individual with a disability" within the meaning of section 504. This argument is first raised with respect to the definition of the term "qualified individual with

[5] The commentary set out above not only demonstrates that the statute covers arrests, but refutes defendants' apparent contention that, if section 504 applies to arrests at all, it only applies in situations where a person is arrested because of a disability. See Def. Br. at 13,14. The obligation to provide an interpreter obviously exists without regard to the reason for which a person with a hearing impairment was arrested. Likewise, the plaintiff was entitled to be free of discrimination in connection with all actions related to his arrest and transportation, even if he was not arrested because of his disability.

a disability" in title II of the ADA, see 42 U.S.C. § 12131(2), which the plaintiffs contend demonstrates that that statute was intended to apply only to services, programs and activities voluntarily sought out for the purpose of obtaining a benefit. See Def. Br. at 11-12. It is apparent, however, that the defendants intend to make the same argument with respect to section 504. See id. at 13-14.

That meaning of the term "otherwise qualified individual with a disability" is not limited in the manner that defendants suggest. The term "qualified handicapped person" in the Department of Justice regulation implementing section 504 with respect to its federally-assisted programs is synonymous with the terms "qualified individual with a disability" and "otherwise qualified individual with a disability." The regulation says that a "qualified handicapped person" means "a handicapped person who meets the essential eligibility requirements for the receipt of . . . services." 28 C.F.R. § 42.540(l) (1995). The definition does not distinguish between services that are voluntarily sought and those that, like the transportation of an arrestee, are connected with an action to which a person with a disability may be subjected involuntarily. The plaintiff certainly was "qualified" for arrest within the meaning of this definition, since he exhibited conduct that, according to the police, warranted placing him under arrest.

C. Defendants Are Not Entitled to Summary Judgment on the Question of Whether They Provided Plaintiff With a "Reasonable Accommodation."

Once the plaintiff was arrested, he was entitled, under the Rehabilitation Act, to be free from discrimination with respect to his transportation to the police station. Since the decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), it has been clear that the obligation under section 504 to refrain from discrimination requires a recipient of federal funding to make "reasonable accommodations" for persons with disabilities that do not fundamentally alter the nature of their programs and activities (i.e., that do not eliminate eligibility criteria for participation that are essential). See id., at 410, 412. Alexander v. Choate, 469 U.S. 287 (1985), subsequently clarified and re-affirmed the holding in Davis. See Id. at 300 & n.20, 308.

The defendants have failed to demonstrate that they satisfied their legal obligation to make "reasonable accommodations" for the plaintiff in connection with his arrest and subsequent transportation. They claim that section 504 does not prohibit the use of a standard patrol wagon to transport arrestees who use wheelchairs. See Def. Br. at 17, 19. However, this point is irrelevant to their obligation to make "reasonable accommodations" for particular individuals with disabilities. It does not follow from the fact that one type of vehicle may be appropriate for transporting some individuals in wheelchairs,

that the defendants had no obligation to make a "reasonable accommodation" for the plaintiff.

Defendants also claim that they had no choice but to transport the plaintiff in the manner they did, because he appeared intoxicated, was uncooperative, and did not provide them with specific information about the nature of his disability and the manner in which he should be transported. See Def. Br. at 20. There are, however, factual disputes concerning the plaintiff's cooperativeness and the information he provided to police officers. The plaintiff claims that he informed the officers who arrested him and Officer Becker that the patrol wagon was unsuitable to transport him. See Affidavit of Jeffrey Gorman, Exhibit "B" to Plaintiff's Suggestions in Opposition to Separate Motion for Summary Judgment of Defendant Becker, at ¶ 7. He further states that once the decision was made to transport him in the patrol wagon, he requested that he be permitted to sit on the cushion of his wheelchair for additional support. Id. at ¶ 8. This request appears to have been denied. Officer William Warren, an off-duty officer who assisted Officer Becker in placing the plaintiff into the patrol wagon, stated in his deposition that the plaintiff provided no information about transporting him other than the manner in which he should be lifted from his wheelchair. Deposition of William J. Warren, Exhibit "A" to Def. Br. (hereafter "Warren Dep."), at 50, 54. Officer Becker does not recall whether the plaintiff gave specific instructions about how to transport him. Deposition of

Neil S. Becker, Exhibit "A" to Plaintiff's Suggestions in Opposition to Separate Motion for Summary Judgment of Defendant Becker, at 14, 15-16.

Additionally, significant factual issues exist as to whether the plaintiff could have been safely transported in some other vehicle, such as in a patrol car. Defendants maintain that transporting the plaintiff in a patrol car, unhandcuffed and with access to an armed police officer, "would not have been safe for the officer, the individual or other traffic on the public streets." Def. Br. at 20.[6] It does not appear likely, however, that the plaintiff, with his particular type of disability, would have been able to disarm or otherwise injure an officer transporting him in a patrol car, even if he were not handcuffed.

D. Defendants Are Not Entitled to Summary Judgment on the Issue of Whether Plaintiff's Injuries Resulted From Inadequate Officer Training.

We believe that the Rehabilitation Act requires police departments to train officers in the proper manner of detaining and transporting persons with disabilities, including individuals who use wheelchairs. Defendants do not argue that such training would have resulted in a fundamental alteration of the KCMOPD's existing policies. Instead, they make two arguments in response

[6] See also Def. Br. at 15 ("Compromising an established procedure such as the method of transporting arrestees could result in grave danger to police officers effecting the arrest, bystanders who may have already been victimized and indeed to the disabled individual who may be a threat to himself as well as others").

to the plaintiff's allegation that no training or inadequate training had been provided.

First, by referring to the deposition testimony of Officer Warren, they suggest that officers in the KCMOPD are in fact trained in the manner of arresting individuals in wheelchairs. Def. Br. at 20. Officer Warren's deposition is, at best, ambiguous on the point. At one point in his deposition, he says that he cannot recall having received training about handling people with disabilities in connection with arrests. See Warren Dep. at 25. The most that his deposition and the affidavit of Officer Neil Becker (which also accompanies the summary judgment motion) can establish is that KCMOPD police officers are trained to deal with all arrestees -- with and without disabilities -- differently, depending upon the circumstances surrounding the arrest. See id. at 22-29; Affidavit of Neil S. Becker, Exhibit "C" to Def. Br., at ¶¶ 9, 10. See also Def. Br. at 20.

Second, defendants insist that additional training would not have affected the outcome of this case, because the plaintiff had not provided specific information about the nature of his disability and the manner in which he should have been transported. We have previously highlighted the factual disputes precluding summary judgment that exist on this point. See Part II.C, supra.

The government takes no position on the question of whether, as of May 31, 1992, the KCMOPD provided police officers with adequate training on the manner in which to detain and transport

arrestees with disabilities. Nor do we express an opinion on whether such training would have averted what occurred in this case. We do believe, however, that training law enforcement officials in the proper techniques for detaining and transporting persons with disabilities is a reasonable accommodation which section 504 requires, and that factual disputes precluding summary judgment exist as to whether such training was provided, and whether appropriate policies were followed.

III. CONCLUSION

For all of the foregoing reasons, the United States respectfully requests this Court to deny defendants' motion for summary judgment as to plaintiff's Rehabilitation Act claims.

Respectfully submitted,

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