IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

DAN L. GILBERT	)	
	)	
Plaintiff,	)	**97-CV-3118-K-(5)**
	)	
v.	)	
	)	
ECKERD DRUGS, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF AMICUS CURIAE BY THE UNITED STATES IN OPPOSITION TO DEFENDANT ECKERD DRUGS CORPORATION'S MOTION TO DISMISS UNDER RULE 12(b)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE

INTRODUCTION

Plaintiff Dan Gilbert is a person with a disability who uses a wheelchair for mobility. Plaintiff filed a complaint in this Court alleging that defendant Eckerd Drugs, a corporation doing business in the State of Louisiana, and other defendants, Zacks Famous Frozen Yogurt, and Katz & Besthoff, Inc., violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., by failing to make their businesses accessible to the plaintiff. Plaintiff alleges that the entrance to defendant Eckerd Drugs store, located at 3251 Manhattan Boulevard in Harvey, Louisiana, is hazardous to individuals who use wheelchairs for mobility, because the ramp is not in compliance with the ADA Standards for Accessible Design, ("the Standards'), 28 C.F.R. Part 36.

On April 30, 1998, Defendant Eckerd Drugs filed a Motion to Dismiss, arguing, in part, that the plaintiff must pursue state administrative remedies before filing suit in federal court under Title III of the ADA. (Mem. Supp. Eckerd Corp.'s Mot. Dismiss Under Rules 4(m), 12(b)(5), and Rule 12(b)(1) of the Fed. R. Civ. P. at 4.) Eckerd contends that the ADA's Title III enforcement scheme incorporates not only "the remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a))," 42 U.S.C. § 12188(a)(1), as specifically stated in Section 308 of the ADA, but also incorporates the procedures set forth in section 204(c) of the 1964 Act, 42 U.S.C. § 2000a-3(c), which requires pre-suit notice to state administrative entities. (Id. at 4, 6-8.)

Pursuant to 42 U.S.C. §§ 12206(c)(3), 12186(b), and 12188(b), the U.S. Department of Justice (the "Department") is the federal agency entrusted by Congress with the administration and enforcement of Title III of the ADA ("Title III"), 42 U.S.C. §§ 12181 - 12189. Since the ADA was enacted in 1990, the Department has consistently taken the position that Title III (specifically, 42 U.S.C. § 12188(a)) does not require private plaintiffs to pursue federal, state, or local administrative remedies before filing suit in federal court. Thus, the Department's regulations and Technical Assistance Manual implementing Title III of the ADA make no reference to any pre-suit notice or administrative exhaustion requirement.

The United States has previously participated as amicus curiae in a similar case construing the enforcement provisions of Title III of the ADA, Colorado Cross Disability Coalition v. Hermanson Family Limited Partnership I, Civil Action Nos. 96-WY-2492-AJB, 96-WY-2493-AJB, 96-WY-2494-AJB (Mar. 3, 1997), where the court properly held that there is no obligation to pursue administrative remedies under Title III of the ADA before filing a lawsuit in federal court. A copy of that opinion is attached as Exhibit A to this Memorandum. The United States submits this Memorandum to advise the Court of the Department's interpretation of 42 U.S.C. § 12188(a), and to respectfully request that this Court deny defendant's Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) on the grounds that Title III of the ADA does not impose a notice or exhaustion requirement before filing suit in federal court.

ARGUMENT

It has long been the Department's position that pre-suit notice and administrative exhaustion is not required by Title III of the ADA. The United States contends that the plain language of the enforcement provision of Title III of the ADA, 42 U.S.C. § 12188, imposes no such requirements. In providing individuals who suffer discrimination based on disability by a place of public accommodation the remedies and procedures provided in Subsection 204(a) of the Civil Rights Act of 1964[1], 42 U.S.C.

[1]Hereinafter referred to as "The 1964 Act."

§ 2000a-3(a), Congress simply did not intend to engraft upon Title III other provisions of Section 204 that have no applicability to the unique statutory scheme created by the ADA.

To impose a requirement that individuals alleging discrimination based upon disability must first invoke state administrative remedies prior to bringing a federal action under Title III is to introduce an unwarranted barrier to the prompt vindication of rights protected by the ADA. Because Subsection 204(c) of the 1964 Act gives the district court in which an action is filed pursuant to 204(a) the authority to "stay proceedings in such civil action pending the termination of State or local enforcement proceedings," 42 U.S.C. § 2000a-3(c), such a requirement could cause a substantial delay in obtaining appropriate relief under Title III. Where it is apparent from the plain language of the statute that Congress did not intend to impose such a delay, this Court should not invoke such a procedural requirement.

The Plain Language of the ADA Does Not Require Plaintiff To Pursue State Administrative Remedies Before Filing Suit In Federal Court.

In any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." Robinson v. Shell Oil Co., 519 U.S. 337, ___, 117 S. Ct. 843, 849 (1997). The Supreme Court has instructed "time and again that courts must presume that a legislature says in a statute what it means and

means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992).

Title III of the ADA, 42 U.S.C. § 12181 et seq., provides that

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

42 U.S.C. § 12182(a). Included within the definition of "public accommodation" is "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;" 42 U.S.C. § 12181(7)(E). Eckerds Drug Stores are clearly covered by this provision.

Congress intended the nondiscrimination provisions of Title III to be enforced both by persons who are themselves subjected to discrimination on the basis of disability, 42 U.S.C. § 12188(a), and by the Attorney General, 42 U.S.C. § 12188(b). Thus, section 308(a)(1), 42 U.S.C. § 12188(a)(1), provides, in relevant part (emphasis added):

> The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183.

Id. The "remedy" provided by 42 U.S.C. § 2000a-3(a), is a civil action for injunctive relief. The "procedures" it provides are intervention by the Attorney General in a case certified by the

Attorney General to be of "general public importance," and, "[u]pon application by the complainant and in such circumstances as the court may deem just," appointment of an attorney for the complainant and the commencement of suit without the payment of fees, costs, or security.[2]

As it often does in enacting a new statute, Congress selectively incorporated portions of existing statutes into the ADA. The ADA Title III enforcement provision under which the plaintiff has brought the instant suit makes reference only to Subsection 204(a) of the 1964 Act. It does not refer to any of the other three subsections of Section 204, including Subsection 204(c), codified as 42 U.S.C. § 2000a-(3)(c), upon which the defendant relies. Given the clear and unambiguous language in Title III of the ADA incorporating only Subsection 204(a), there is no legal basis for incorporating additional subsections of Section 204 to which Congress did not refer.

---

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

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court, may in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

The Third Circuit faced an analogous situation in Sperling v. Hoffmann-La Roche, Inc., 24 F.3d 463 (3rd Cir. 1994). There the issue was whether the filing of a representative complaint under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), tolled the statute of limitations for unnamed employees to become members of the opt-in class. At the time the action was filed, the ADEA expressly incorporated the statute of limitations contained in Section 6 of the Portal-to-Portal Act, 29 U.S.C. § 255. 29 U.S.C. § 626(e)(1) (1991). The employer argued that the tolling question should be governed by Section 7 of the Portal-to-Portal Act, 29 U.S.C. § 256, which was not incorporated specifically into the ADEA. Section 7 would have required employees who wished to opt in to do so within the Section 6 statute of limitations.

The Court of Appeals noted that "incorporation of selected provisions into section 7(b) of [the] ADEA indicates that Congress deliberately left out those provisions not incorporated." Sperling, 24 F.3d at 470. The Court stated that its decision was "a fairly routine application of the traditional rule of statutory construction pithily captured in the Latin maxim expressio unius est exclusio alterius." Id. That principle applies equally here.

Title III of the ADA is not simply a carbon-copy of Title II of the Civil Rights Act of 1964, although both prohibit discrimination in places of public accommodation. Congress recognized that discrimination based upon disability is

manifested in ways that are distinct from discrimination on the basis of race, color, religion or national origin, and must be addressed in a different way. Thus, rather than simply amending Title II of the 1964 Act to add disability as a prohibited basis for discrimination, Congress enacted a comprehensive statute addressing issues such as architectural and communication barriers to access, 42 U.S.C. § 12182(b)(2)(A)(iv), and provision of auxiliary aids and services, 42 U.S.C. § 12182(b)(2)(A)(iii), that were not relevant to the kinds of discrimination prohibited by the 1964 Act. The ADA concept of public accommodations is also much broader than that of Title II of the 1964 Act. Additionally, the ADA covers other entities. Compare 42 U.S.C. § 2000a(b), with 42 U.S.C. 12181(7), 42 U.S.C. § 12183 (commercial facilities), 42 U.S.C. § 12184 (public transportation services provided by private entities).

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

In construing the requirements of the enforcement provisions of Title III, most 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. Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 553 (7th Cir. 1996), cert. denied, 117 S. Ct. 771 (1997) (holding that "because there is no first obligation to pursue administrative remedies," the plaintiff in the Title III action was obligated to file suit within the period dictated by the state statute of limitations); Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, Civil Action Nos. 96-WY-2492-AJB, 96-WY-2493-AJB, 96-WY-2494-AJB (Mar. 3, 1997)(same); Bercovitch v. Baldwin Sch., 964 F. Supp. 597, 605 (D.P.R. 1997); Coalition of Montanans Concerned with Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1168 (D. Mont. 1997) (holding that "plaintiffs need not exhaust their administrative remedies" before bringing suit under Title III of the ADA); Devlin v. Arizona Youth Soccer Ass'n, No. CIV 95-745 TUC ACM, 1996 WL 118445, *2 (D. Az. Feb. 8, 1996)(same); Grubbs v. Medical Facilities of America, Inc., No. 94-0009-D, 1994 WL 791708, *2-3(W.D. Va. Sept. 23, 1994) (in denying a motion to dismiss, the court found that Congress did not intend to require exhaustion of administrative remedies for persons with disabilities under either § 504 of the Rehabilitation Act or Title III of the ADA).

Two cases cited by Defendant, Daigle v. Friendly Ice Cream Corp., 957 F. Supp. 8, 9 (D.N.H. 1997) and Howard v. Cherry

Hills Cutters, Inc., 935 F. Supp. 1148 (D. Colo. 1996) are cases that have held that an individual must pursue administrative remedies. Yet, these decisions do not provide any legal analysis for the conclusion that a plaintiff in a Title III enforcement action must follow the procedures of Subsection 204(c) of the 1964 Act. See Daigle, 957 F. Supp. at 9; Howard, 935 F. Supp. at 1148. In Daigle, the district court ruled on a motion to dismiss, summarily concluding without any statutory analysis that administrative exhaustion was required but refusing to dismiss the complaint on the grounds that the plaintiff had substantially complied with administrative exhaustion requirements. In Howard, the district court dismissed an action brought under Title III of the ADA on the grounds that the ADA does not authorize private individuals to sue for damages, but it granted the plaintiff's request for leave to amend the complaint with the simple "caveat that any claim for injunctive relief under Subchapter III of the ADA must comply with the applicable state law exhaustion requirement set forth in 42 U.S.C. § 2000a-3(c)." Howard, 935 F. Supp. at 1150.[3] Although never articulated, the underlying rationale of the Daigle, Howard, and Bechtel courts would seem to

[3] Similarly, in an action to enforce title II of the ADA, the district court in Bechtel v. East Penn Sch. Dist. of Lehigh Cty., Civ. A. No. 93-4898, 1994 WL 3396, *3 (E.D. Pa. Jan. 4, 1994) simply observed in dicta, without further analysis, that "[d]efendants are correct that Section 12188 makes the enforcement procedures of the Civil Rights Act of 1964, which provide for exhaustion of administrative remedies, applicable to actions under Title III of the ADA." Id. On the other hand, the court properly held that claims under Title II of the ADA do not require exhaustion of administrative remedies. Id.

be that by incorporating Subsection 204(a), Congress must necessarily have intended to incorporate the rest of Section 204 as well. However, an examination of the other subsections of Section 204 that are also not specifically incorporated demonstrates the fallacy of any such reasoning.

Title III of the ADA does not refer specifically to Subsection 204(d) of the 1964 Act, which applies under Title II of the 1964 Act where the alleged discrimination takes place in a state where there is no state law prohibiting such discrimination. Under those circumstances, Subsection 204(d) allows a court in which a civil action is commenced pursuant to Section 204(a) to refer the matter to the Community Relations Service ("CRS") for a limited time, if it believes there is a "reasonable possibility of obtaining voluntary compliance." Although the district court's apparent rationale in Howard would suggest that Subsection 204(d) may be followed by a court in which an ADA Title III action is filed, Congress could not have intended such a result. Since the ADA did not expand the jurisdiction of the CRS to allow it to mediate issues of discrimination based on disability, Congress could not have intended Subsection 204(d) to be incorporated by implication into Title III.

Neither does the ADA refer to Subsection (b) of Section 204 of the 1964 Act, which allows a court to award attorney's fees to a prevailing party other than the United States in an action brought pursuant to Subsection 204(a). Congress certainly did

not intend to incorporate Subsection 204(b) because the ADA contains a separate attorney's fees provision, 42 U.S.C. § 12205, that is applicable to all civil actions and administrative proceedings brought pursuant to the ADA.

When one statute is modeled on another one but does not include a specific provision contained in the original, "a strong presumption exists that the legislature intended to omit that provision." Kirchner v. Chattanooga Choo Choo, 10 F.3d 737, 738-739 (10th Cir. 1993) citing Bank of America v. Webster, 439, 691, 692 (9th Cir. 1971); Crane Co. v. Richardson Constr. Co., 312 F.2d 269, 270 (5th Cir. 1973).[4] See also Frankfurter, Some

---

[4]The only discussion in the legislative history of the ADA of prerequisites to filing a federal action under Title III is contained in a colloquy between Senator Harkin, one of the primary sponsors of the ADA and the floor manager of the bill, and Senator Bumpers, a co-sponsor. Although the colloquy is apparently addressed to the question whether Title III creates any federal administrative remedy, it indicates that it was not accidental that Congress incorporated only subsection (a) of section 204.

> MR. BUMPERS. * * * if somebody who is disabled goes into a place of business, and we will just use this hypothetical example, and they say, "You do not have a ramp out here and I am in a wheelchair and I just went to the restroom here and it is not suitable for wheelchair occupants," are they permitted at that point to bring an action administratively against the owner of that business, or do they have to give the owner some notice prior to pursuing a legal remedy?
>
> MR. HARKIN. First of all, Senator, there would be no administrative remedy in that kind of a situation. The administrative remedies only apply in the employment situation. In the situation you are talking about --
>
> 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

Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947) (in construing a statute, "[o]ne must also listen attentively to what it does not say.") The inherent differences between Title II of the 1964 Act and Title III of the ADA demonstrate the error in defendant's attempt to pick and choose, on its own, portions of the 1964 Act to incorporate into the ADA. The plain language of § 308 of the ADA indicates that a plaintiff in a Title III action need not pursue or exhaust state administrative remedies and that this court has jurisdiction to proceed with the ADA claim.

---

accommodations.

135 Cong. Rec. 19859 (1989). If Congress had intended to incorporate Subsection 204(c) of the 1964 Civil Rights Act into Title III of the ADA, it is likely that either Senators Harkin or Bumpers would have made reference to it during this colloquy. The fact that they did not is persuasive evidence that pre-suit notice and exhaustion of administrative remedies was not contemplated by Congress.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny defendant Eckerd Drugs Corporation's Motion to Dismiss Under Rule 12(b)(1) of the Federal Rules of Civil Procedure and defer to the Department of Justice's interpretation of Title III of the ADA, holding that plaintiff is not required to pursue state administrative remedies before filing suit under Title III of the ADA.

Respectfully submitted,

EDDIE J. JORDAN, JR.
United States Attorney
Eastern District of
Louisiana

BILL LANN LEE
Acting Assistant Attorney General
Civil Rights Division

GLENN K. SCHREIBER,
Assistant U.S. Attorney
501 Magazine Street, Rm 210
New Orleans, LA 70130
(504) 680-3000

JOHN WODATCH, Chief
ALLISON J. NICHOL, Deputy Chief
ROBERTA S. KIRKENDALL, T.A.
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
1425 New York Ave., N,W., Rm. 4009
Washington, D.C. 20035-6738
(202) 307-0986

Dated: June 1, 1998

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES

LEGISLATIVE HISTORY

MISCELLANEOUS