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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

	)	
LARRY BEAUCHAMP, *et al.*,	)	**Case No. 98-0402 CBM(BQRx)**
	)	
Plaintiffs	)	**MEMORANDUM OF AMICUS CURIAE UNITED STATES IN OPPOSITION TO DEFENDANT MTA's MOTION TO DISMISS**
	)	
LOS ANGELES COUNTY METROPOLITAN TRANSIT AUTHORITY, *et al.*,	)	**DATE: August 24, 1998**
	)	**TIME: 10:00 a.m.**
Defendants.	)	**COURTROOM: 11**
	)	

INTRODUCTION

Plaintiffs, a class of persons with disabilities who use wheelchairs or other mobility aids and routinely rely on Los Angeles County's fixed route system for transportation, have sued the Los Angeles County Metropolitan Transit Authority ("MTA"), the public entity responsible for providing fixed route bus services in Los Angeles County, to end alleged discrimination that denies them access to the public transit system. MTA seeks to dismiss the complaint on alternative grounds. In particular, MTA argues that this Court should

exercise its discretion to dismiss this case pursuant to the doctrine of primary jurisdiction[1], in a manner that would be inappropriate under the law as shown below. The United States, as *amicus curiae*, urges the Court to deny MTA's motion because the doctrine of primary jurisdiction does not apply in this case.[2]

There is no statutory basis to dismiss this case and refer this matter to the United States Department of Transportation ("DOT") as MTA suggests. Both the Rehabilitation Act and title II of the Americans with Disabilities Act ("ADA") provide plaintiffs a private right of action that does not require exhaustion of any administrative remedy before filing suit. In addition, it is clear that Congress did not intend for claims such as plaintiffs' to be referred to DOT in lieu of judicial review. Instead, the Court should recognize plaintiffs' private right of action and deny MTA's motion to dismiss.

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[1] Notice of Motion and Motion of Defendant Los Angeles County Metro. Transp. Auth.'s Motion to Dismiss; Points and Authorities (hereafter "MTA Motion") at 4.

[2] The United States has limited its argument to this aspect of defendant MTA's motion to dismiss and has not submitted argument on other pending matters. Should the Court request memoranda on any other issues currently pending, the United States would respond with additional memoranda.

ARGUMENT

PRIVATE RIGHTS OF ACTION ARE GUARANTEED UNDER TITLE II OF THE ADA AND THE REHABILITATION ACT, AND THIS MATTER SHOULD NOT BE REFERRED TO THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION

Title II of the ADA prohibits any state or local government from discriminating on the basis of disability, and provides that no person with a disability shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In later sections, title II requires that states and localities shall not discriminate against persons with disabilities in the provision of fixed route transportation services. 42 U.S.C. § 12141 – 12150. To enforce these broad guarantees, title II provides: "[t]he remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202." 42 U.S.C. § 12133.

A. Courts Recognize A Private Right Of Action.

In Cannon v. University of Chicago, 441 U.S. 677, 709, 99 S.Ct. 1946, 1964, 60 L.Ed. 560 (1979), the Supreme Court held that Congress's use of language in Title IX, which is indistinguishable from that used in the Rehabilitation Act of 1973, was intended to create a private right of action. "Title IX was patterned after Title VI of the Civil Rights Act of

1964." Cannon v. Univ. of Chicago, 441 U.S. at 694 99 S.Ct. at 1956 (citations omitted). Title VI is also the basis for the remedy provisions in both the ADA and Rehabilitation Act.

Since Cannon, Courts have consistently found a private right of action under the Rehabilitation Act. Meiner v. State of Missouri, 673 F.2d 969, 973 (8th Cir.), Pushkin v. Regents of Univ. of Colorado, 658 F.2d 1372, 1376-80 (10th Cir. 1981); Kling v. County of Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980); Camenisch v. Univ. of Texas, 616 F.2d 127, 131 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); NAACP v. Medical Center, 599 F.2d 1247, 1258(3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2nd Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284 (7th Cir. 1977).

Similarly, courts reviewing title II ADA claims have routinely found a private right of action. Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976 (9th Cir. 1997); Schonfeld v. City of Carlsbad, 978 F. Supp. 1329, 1333 (S.D. Cal. 1997); Dominguez v. City of Council Bluffs, 974 F. Supp. 732 (S.D. Iowa W.D. 1997); Davoll v. City of Denver, 943 F. Supp. 1289, 1297 (D. Colo. 1996); Benedrum v. Franklin Recycling, 1996 WL 679402 (W.D. Pa., Sept. 12, 1996); Wagner v. Texas A&M Univ., 939 F. Supp. 1297 (S.D. Tex. 1996); Roe v. County of Monongohela, 926 F.Supp. 74 (N.D. W.Va. 1996); Dertz v. City of Chicago, 912 F. Supp. 319 (N.D. Ill. 1995); Etheridge

v. State of Alabama, 847 F. Supp. 903 (M.D. Ala. 1993); Finlay v. Giacobbe, 827 F. Supp. 215 (S.D.N.Y. 1993); Peterson v. Univ. Of Wisconsin, 818 F. Supp. 1276 (W.D. Wisc. 1993).

B. The Legislative History of the ADA Confirms A Private Right of Action

The legislative history of title II of the ADA makes clear that both the ADA and the Rehabilitation Act authorize a private right of action to enforce the law. The report of the House Committee on Education and Labor affirms that:

> "[A]s with section 504, there is also a private right of action for persons with disabilities which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising the private right of action."

H.R. REP. NO. 485(II), at 98 (1990), reprinted in 1990 U.S.C.C.A.N. 303,381.[3]

When it wrote the ADA, Congress knew that the Rehabilitation Act provided a private right of action. H.R. REP. NO. 101-485(III), at 52 (1990) citing Miener v. State of

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[3] "Section 205 of the legislation specifies that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be available with respect to any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of any provisions of this Act, or regulations promulgated under section 204, concerning public services." H.R. REP. NO. 485(III), at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 445,475. See also, S. REP. NO. 116, at 57,58 (1989); H.R. REP. NO. 485(IV), at 39 (1990), reprinted in 1990 U.S.C.C.A.N. 267,278; H.R. REP. NO. 485(I), at 34 (1990), reprinted in U.S.C.C.A.N. 565, 577; H.R. REP. NO. 596, at 68 (1990).

Missouri, 673 F.2d 969 (8th Cir. 1982). See also Kling v. County of Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980).

Section 505 of the Rehabilitation Act of 1973 originally borrowed enforcement language authorizing the "remedies, procedures and rights" from title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000(a) et seq.). 29 U.S.C. § 794a(a)(2). Title VI prohibits discrimination on the basis of race, color or national origin in federally assisted programs. 42 U.S.C. §§ 2000d - 2000d-4a. Title II of the ADA, in turn, adopted the "remedies, procedures, and rights" language from Section 504 of the Rehabilitation Act. 42 U.S.C. § 12133.

C. The Doctrine Of Primary Jurisdiction Is Not Applicable.

Finally, the Court should reject defendant MTA's suggestion that the case may be dismissed pursuant to the doctrine of primary jurisdiction. See MTA's Motion at 4. The doctrine of primary jurisdiction provides that in a limited class of cases, a court may stay, but not dismiss, litigation in order to permit time to refer a complex matter to an administrative agency for preliminary findings when the "protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." Cost Management Servs v. Washington Natural Gas Co., 99 F.3d 937, 949 (9th Cir. 1996), quoting United States v. General Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987). No such purpose is served in this case where the regulations interpreting title II and the Rehabilitation Act are easily understood and applied, and both DOT and the Department of Justice share enforcement

responsibilities, along with private parties who may seek enforcement through a private right of action. Finally, "a court must not employ the doctrine unless the ... division of power [between the courts and the administrative agency] was intended by Congress." United States v. General Dynamics, 828 F.2d at 1363, N.13. That is not the case here.

The Attorney General and the Secretary of Transportation are each authorized to promulgate regulations governing public and private entities that provide transportation services. 28 C.F.R. §35.120-35.135; 49 C.F.R. Parts 27, 37, 38.[4] Nowhere in either the Department's or DOT's title II or Rehabilitation Act transportation regulations is there any procedural requirement that persons alleging discrimination must file a complaint with either agency before filing suit.[5] There are administrative enforcement procedures available to persons who prefer administrative enforcement instead of the more costly alternative of filing a private lawsuit, but those procedures are not mandatory. 28 C.F.R. § 35.170(a); 49 C.F.R. § 47.10.

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[4] Nor can it be argued that only the Department of Transportation regulations should apply in cases such as these. The DOT regulations explicitly state that "[e]ntities to which this part applies also may be subject to ADA regulations of the Department of Justice," and that "[t]he provisions of this part shall be interpreted in a manner that will make them consistent with applicable Department of Justice regulations." 49 C.F.R. § 37.21(c). The Department of Transportation regulations further state that they prevail over the Department of Justice regulations only in "case[s] of apparent inconsistency." Id.

[5] The preamble to the Department's title II regulation also explains that a private right of action is guaranteed under title II. 56 F.R. 35713-14 (July 26, 1991)

Moreover, the alternative remedy of administrative action offered in the regulations does not offer the same type of relief to the individual who has experienced discrimination because the agency controls the administrative action and the complainant cannot exercise any control over the timing or operation of the process, the outcome, or the remedy.

Four factors are uniformly present in cases where the primary jurisdiction doctrine properly is invoked: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration. Id. at 1362 (citations omitted).

Defendant's invocation of the doctrine fails all four elements of the Ninth Circuit's test. First, there is no issue here that the Court is unable to resolve without the assistance of an administrative agency. Courts routinely apply the law to the facts presented, and this case merely requires a determination about whether MTA's failures to provide transportation services to disabled persons traveling on public transportation in the City of Los Angeles violate the ADA or the Rehabilitation Act. Both statutes outlaw the same discriminatory activities, and in both laws Congress authorized private enforcement actions through the same statutory remedy provision. Applying civil rights laws to the facts here does not require a special expertise typical of most schemes in which

courts have found it appropriate to stay federal litigation to permit agency analysis under the doctrine of primary jurisdiction. See Cal-Almond, Inc. v. United Statess Dep't of Agriculture, 67 F.3d 874,882 (9th Cir. 1995), vacated on other grounds, 117 S.Ct. 2501. Furthermore, there is no regulatory scheme that the Court is being asked to protect. Rather, the City is seeking protection from being brought into court by plaintiffs — something the doctrine of primary jurisdiction is not meant to prevent. United States v. Almany, 872 F.2d 924, 925 (9th Cir. 1989).

Even when a case is properly deferred to an agency, courts should never apply the doctrine in the context of a motion to dismiss. The Ninth Circuit has held that the primary jurisdiction doctrine does not permit dismissing a lawsuit pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because the Court must accept as true plaintiffs' factual allegations and the "'threshold decision' which [defendants] would have [the Court] refer ... must necessarily be resolved in favor of [plaintiffs]." Cost Management ervs. v. Washington Natural Gas Co., 99 F.3d at 948-49.[6]

[6] When properly invoked, courts have the discretion to stay litigation while the administrative agency acts, and the court retains jurisdiction over the matter to resolve the litigation disputes at a later date. Cal-Almond Inc. v. United States Dep't of Agriculture, 67 F.3d at 882.

CONCLUSION

The United States, as *amicus curiae*, respectfully requests that the Court deny MTA's Motion To Dismiss.

Respectully submitted,

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