UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FRED DuVALL	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 4:00CV00315**
	)	
COUNTY OF VAN BUREN, ARKANSAS, ET AL.	)	
	)	
Defendants.	)	
_____	)	

RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Comes now the United States of America, on behalf of the Defendants, by and through its attorneys, Paula J. Casey, United States Attorney for the Eastern District of Arkansas, and Gwendolyn D. Hodge, Assistant United States Attorney for said District, and for its Response to Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, states:

The Plaintiff has brought a civil suit against the United States and certain officials of the United States, as well as against the County Judge of Van Buren County wherein he alleges that certain County offices, buildings and streets are not in compliance with the ADA or the Rehabilitation Act. He also alleges that his 14th Amendment Rights have been violated. As relief, the Plaintiff seeks to have this Court compel the United States to enforce the ADA and have the United States include the compliance issues raised in Plaintiff's civil Complaint in a proposed Agreement (Agreement) by and between the United States and Van Buren County,

Arkansas.[1] It having been determined that the Van Buren County Courthouse is inaccessible to individuals with mobility impairments, said Agreement facilitates the voluntary compliance with the ADA. The Plaintiff also filed a Motion for Preliminary Injunction to stop the execution of the proposed Agreement arguing that the Agreement fails to address several areas of noncompliance. The Plaintiff's Complaint should be dismissed in that he has failed to state a claim, either under the ADA, Rehabilitation Act, or the 14th Amendment, upon which relief can be granted. Plaintiff's motion for preliminary injunction should also be denied.

I.

The factors to be considered in determining whether a preliminary injunction should be granted are: 1) The probability that the movant will succeed on the merits; 2) the threat of irreparable harm to the movant should the motion be denied; 3) the balance between this harm and the harm that granting the injunction will cause to the other parties; and 4) the public interest. West Publishing Co. v. Mead Data Center, Inc., 799 F.2d 1219, 1222 (8th Cir. 1986).

A. Probability that the Movant will Succeed on the Merits

The Plaintiff's Motion should be denied in that the Plaintiff cannot satisfy the first

[1]On November 10, 1998, the Plaintiff and Angelica DuVall filed a very similar case wherein they alleged that Van Buren County had violated the ADA and named the United States as a Defendant alleging that they had failed to enforce a 1994 Agreement. See LR-C-98-745, *Fred and Angelika DuVall v. Kip Stringer, et al.* , Judge George Howard, Jr., presiding. Said Agreement was by and between the United States and Van Buren County, Arkansas and set forth actions to be taken to remedy certain instances of noncompliance with the ADA in Van Buren County, Arkansas. In Plaintiff's Complaint, the Plaintiff alleged that Van Buren County had not taken the actions as contemplated in the 1994 Agreement and sought to have the Department of Justice enforce the Agreement. The United States filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, defendants arguments including, but not limited to, discretionary function. Defendants' Motion was granted and the United States was dismissed. See Exhibit A, Order dated May 4, 1999, *DuVall v. Stringer, et al*, LR-C-98-745. Said matter is still pending with the remaining defendants.

element considered in determining whether a preliminary injunction should be granted. The Plaintiff is not likely to succeed on the merits. Plaintiff alleges that certain County facilities are not in compliance with the Rehabilitation Act and the Americans with Disabilities Act, resulting in his being discriminated against and that his 14th Amendment rights have been violated. The Plaintiff also seeks to have the Court order the United States, Department of Justice to enforce the ADA against the County. The Plaintiff will not succeed on the merits in that he has failed to state a claim under the ADA, the Rehabilitation Act, or the 14th Amendment upon which relief can be granted. First, the Plaintiff does not state a claim under the Rehabilitation Act or ADA because a) in the matter herein, the Department is the "funding agency" and not a provider of services to the Plaintiff and the Rehabilitation Act does not provide a private right of action to a complainant against the federal funding agency, and b) the ADA is not applicable to the federal government, nor does it provide a private right of action against a federal funding agency. Second, an agency's decision whether to enforce compliance with a statute is not subject to judicial review. Third, the 14th Amendment does not apply to the federal government. For these reasons, Plaintiff's motion should be denied and Plaintiff's Complaint should be dismissed.

1. Rehabilitation Act

The pertinent provisions of the Rehabilitation Act provide:

> No otherwise qualified individual with a disability in the United States . . . shall be 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Section 504 of the Rehabilitation Act, 29 U.S.C. §794. The Plaintiff does not allege that the United States is either a provider of services or a funding agency. However, it is clear that the

services of which the Plaintiff complains are provided by an entity other than the federal government and, at most, the United States would be a "funding agency".

Section 504 does not provide a private cause of action against a funding agency where the Plaintiff seeks review of a particular agency decision regarding an alleged act of discrimination by a recipient of federal funds. Marlow v. United States Department of Education, 820 F.2d 581 (2d Cir. 1987). See Exhibit B, Order of Judge Henry Woods, Kandice Raychenne Ball v. State of Arkansas, et al, J-C-97-251, dated April 28, 1998, pg. 3-4. See also, Washington Legal Foundation v. Alexander, 984 F.2d 483 (D.C. 1993) (Plaintiffs do not have cause of action to sue a funding agency under Title VI in order to require the Secretary of Education to exercise his enforcement authority.) In interpreting Section 504 and Title IX, Courts have relied upon Title VI of the Civil Rights Act of 1964 precedent. Section 504 and Title IX are modeled after Title VI. In Cannon v. University of Chicago, 441 U.S. 677 (1979), a Title IX case, the Supreme Court held that there was no private right of action against the federal funding agency. In the matter herein, the Department is not a provider of services, but, if anything at all, a *funding agency*.

The United States, Department of Justice, in this matter being neither an entity receiving federal funds providing a program, service or activity to the Plaintiffs, nor is it an executive agency providing programs or activities to the Plaintiffs and there being no private cause of action against a federal funding agency, the Plaintiffs have not stated a claim against Defendant United States under the Rehabilitation Act.

2. American With Disabilities Act

The pertinent provisions of the ADA provide:

> [N]o qualified individual with a disability shall, by reason of such disability, 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. Public entity is defined, in pertinent part, as:

(1)(A) any State or local government;
(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government;

42 U.S.C. §12131. By definition, the federal government is excluded and, therefore, does not provide a basis for relief against Defendant United States. See, Gupta v. United States, 1997 WL 792330 *2 (C.D. CA). Further, the ADA specifically incorporates the rights, remedies, and procedures of Section 504 of the Rehabilitation Act. 42 U.S.C. 12133. As a result, federal courts have held that past interpretations of Section 504 are persuasive authority in interpreting the ADA. See e.g., Easley v, Snider, 841 F. Supp. 668, 672 (E.D. Pa. 1993), rev'd on other grounds, 36 F.3d 297 (3d Cir. 1994). Therefore, the ADA must be viewed under the same standard as that which governs Section 504 and that standard precludes complainants from pursuing a private cause of action against funding agencies. See Marlow at 583. See Exhibit B, Order of Judge Henry Woods, Kandice Raychenne Ball v. State of Arkansas, et al., J-C-97-251, filed April 28, 1998, pg. 4.

3. Administrative Procedures Act

Even if the Court finds that the Plaintiff has a private right of action against the funding agency, the Plaintiff still has not stated a claim upon which relief can be granted. The Department of Justice's decision whether to enforce compliance with the ADA or the

Rehabilitation Act is not subject to judicial review.

The Administrative Procedures Act (APA), 5 U.S.C. §701 et seq. generally provides for the judicial review of agency actions. However, the Department of Justice's decision of whether to enforce compliance is not subject to judicial review under the APA and the Plaintiffs' Complaint still must be dismissed for failure to state a claim upon which relief can be granted. Agency action committed to an agency's discretion by law is not subject to judicial review under the APA. 5 U.S.C. §701(a)(2). Further, judicial review of final agency decisions is not available where there is an adequate remedy at law for the complainant. 5 U.S.C. §704. The Department's decision(s) whether to enforce the ADA and the Rehabilitation Act are discretionary by law and, therefore, not subject to judicial review. And, a person who believes that he has been discriminated against has an adequate remedy at law directly against the provider of services under either the ADA or the Rehabilitation Act.

a. Heckler v. Chaney

A leading case on judicial review of agency decisions of whether to enforce statutes is Heckler v. Chaney, 470 U.S. 821,105 S.Ct. 1649 (1985). Therein, the Court held that an agency's decision whether to enforce a statute is a decision generally committed to an agency's absolute discretion. Heckler at 830, 1655 (1985) citing United States v. Batchelder, 442 U.S. 114, 123-124, 99 S.Ct. 2198, 2203-2204 (1979), United States v. Nixon, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100 (1974) and Vaca v. Siopes, 386 U.S. 171, 182, 87 S.Ct. 903, 912 (1967). That decision is presumed immune from judicial review. Heckler at 1656 ("[An agency's decision not to take enforcement action] has traditionally been committed to agency discretion and we believe that the Congress enacting the APA did not intend to alter that tradition.") See also, Marlow v.

United States Department of Education, 820 F.2d 581, 582 (2d Cir. 1987).

i. Rebuttal of the Presumption of Immunity from Judicial Review

The Heckler presumption that an agency's decision whether to take enforcement action is committed to the agency's sole discretion and not subject to judicial review can be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Heckler at 1656.

Heckler defines a statute which commits the decision making to an agency's discretion as one which is drawn so that a court would have "no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, at 1655. Under the ADA, how to enforce the statute is left to the discretion of the agency. Title 42, United States Code, Section 12134 directs the Attorney General to promulgate regulations to implement §12132. Under said regulations, 28 C.F.R. Part 35, the Department of Justice is designated as the agency to enforce §12132 as it regards, in pertinent part, all programs related to the administration of justice, including court and correctional institutions. 28 C.F.R. 35.190(6). The Regulations set forth "compliance procedures" that provide for the filing of complaints by individuals alleging noncompliance with the Department. Upon the filing of the complaint, the Department "shall investigate each . . . complaint, attempt informal resolution, and, if resolution is not achieved, issue . . . a Letter of Findings of Fact . . . . ." If it is determined that the agency is not in compliance, the Department of Justice "shall . . . initiate negotiations with the public entity to secure compliance by voluntary means." If the public entity chooses not to negotiate or if negotiations are unsuccessful, the Department of Justice "shall refer the matter to the Attorney General with a recommendation for appropriate action." 28 C.F.R. 35.174.

Neither the statute nor the regulations provide any standards or guidelines as to how to enforce the statute. Marlow at 582, 583 ("Section 504 provides no express guidelines [to follow in exercising its enforcement powers] . . . nor impose significant substantive limitations on the . . . investigation and resolution of individual complaints of discrimination.") The regulations leave to the discretion of the Attorney General how to enforce the statute. Part 35.174 provides that after attempts at resolution have failed, recommendations for the appropriate action to be taken are to be made to the Attorney General. See 28 C.F.R. 35.174. Impliedly, therein, the Attorney General then has discretion as to how to proceed.

The Rehabilitation Act, §794 directs that the head of each funding or provider agency promulgate regulations to carry out the directives of §794. The regulations are set forth at 28 C.F.R. 42.501, et seq. §42.505 gives the Department authority to "take the remedial action the Department considers necessary" if it is determined that discrimination by an entity has occurred. The regulations for the Department are at 28 C.F.R. Part 41 and incorporate Part 42.101. As do the regulations for enforcement of the ADA, the regulations for enforcement of the Rehabilitation Act by the Department provide that upon the filing of a complaint with the Department, the Department is to investigate. 28 C.F.R. 42.107. The regulations further provide that, if attempts at correcting the noncompliance fail, the Department may suspend or terminate, or refuse to grant or continue Federal financial assistance or induce compliance by any other means authorized by law including initiating appropriate proceedings to enforce the rights of the United States. 28 C.F.R. §42.108.

Though each statute's regulations use the word shall, the use of the word shall does not itself limit the enforcement discretion or overcome the presumption of immunity from judicial

review. See Harmon Cove Condominium Ass'n, Inc. v. John O. Marsh, 815 F.2d 949, 952-953 (3d Cir. 1987). In Harmon Cove, the Federal Water Pollution Act's language declared that "whenever on the basis of any information available to him the Secretary finds that any person is in violation of a condition . . . of a permit, the Secretary shall issue an order requiring such person to comply . . . Ibid. The Court in Harmon Cove held that there was no mandatory duty limiting the Secretary of the Army's enforcement discretion because the statute "contains no guidelines for the Secretary to follow in choosing to initiate enforcement activity." Harmon Cove at 953. Nor does the use of the word "shall" in the regulations of the Rehabilitation Act and the ADA regulations limit the discretion of the agency in enforcing the statutes. Nor do they provide guidelines or measurable standards as to how or when to enforce.

The Rehabilitation Act, the ADA, nor the pertinent regulations relating thereto, set forth measurable standards or guidelines for enforcement. Discretion lies within the agency by law and, therefore, pursuant to 5 U.S.C. §701(a)(2), the Department's decision whether to enforce is not subject to judicial review.

ii. Other exceptions to Heckler

The Court in Heckler identified two other situations that may give rise to judicial review of an agency's decision of whether to enforce: An agency's refusal to enforce for lack of jurisdiction and abdication by an agency of its statutory responsibilities. Heckler at 1656. Heckler did not render an opinion as to whether the decisions would be reviewable under 5 U.S.C. §701(a)(2). However, whether such decisions would be reviewable is not an issue in the matter herein. Defendant United States has not refused to enforce the statute believing that they lacked jurisdiction, nor has Defendant United States abdicated its statutory responsibilities. The

very fact that the County and the United States are negotiating a Settlement Agreement demonstrates that Defendant United States has engaged in enforcement activities.

Further, an agency decision whether to enforce compliance with a statute(s) is not subject to judicial review in that there is an adequate remedy at law. 5 U.S.C. §704; United Handicapped Federation v. Andre, 558 F.2d 413, 415 (8th Cir. 1977). See also, Marlow at 853. As discussed below, the ADA and the Rehabilitation Act provide the Plaintiff with an adequate remedy at law. The Plaintiff has a private cause of action against the provider of services under both the ADA and the Rehabilitation Act. 42 U.S.C. §12132; 29 U.S.C. §794. A plaintiff's ability to bring a suit directly against the entity claimed to be discriminating is a sufficient remedy to defeat APA jurisdiction. See, Council of and for the Blind v. Regan, 709 F.2d 1521, 1531 (D.C. Cir. 1983); Washington Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990); Washington Legal Foundation v. Alexander, 984 F.2d 483 (D. C. Cir. 1993). See also Exhibit B, Order of Judge Henry Woods, Kandice Raychenne Ball v. State of Arkansas, et al., J-C-97-251, filed April 28, 1998, pg. 5

4. 14th Amendment

The Plaintiff will not succeed on the merits of his 14th Amendment claim in that the 14th Amendment does not apply to the federal government. San Francisco Arts and Athletics, Inc. v. United States Olympic Committee, 483 .S. 522, 543, 107 S.Ct. 2971, 2984 fn 21. The Plaintiff therefore, has failed to state a claim against the federal Defendants and Plaintiff's Complaint should be dismissed.

B. Irreparable Harm

Further, the Plaintiff's motion for preliminary injunction should be denied in that he cannot demonstrate that he will suffer irreparable harm if the preliminary injunction is not granted. The essence of Plaintiff's Complaint is that he wants certain County facilities and public areas brought into compliance with the ADA. By the County facilities not being in compliance, Plaintiff alleges that he is therefore being discriminated against.

Title 42, United States Code, Section 12132 provides a private cause of action against the provider of services, in this instance, the Government of Van Buren County, Arkansas, for discrimination. Section 504 of the Rehabilitation Act provides a private cause of action against the provider of services if the entity providing the service is a recipient of federal funds or where the provider of services and programs is an executive agency. 29 U.S. C. §794 . The Plaintiff has exercised this remedy before. He currently has a suit pending before the Honorable George Howard, Jr., LR-C-98-745, *DuVall v. Stringer, et al* (Van Buren County) alleging discrimination by Van Buren County, Arkansas in violation of the ADA and the Rehabilitation Act.

Defendant United States' decision whether to enforce compliance with the ADA and the Rehabilitation Act is not subject to judicial review in that whether to enforce is a discretionary act by law of the Department of Justice and the complainant has an adequate remedy at law. The agency's decision not being subject to judicial review, the Plaintiffs have failed to state a claim upon which relief can be granted and their Complaint should be dismissed. Further, the agency's decision not being subject to judicial review, the Court lacks jurisdiction to compel enforcement by the United States. The Plaintiff's motion for preliminary injunction should be denied and Plaintiff's Complaint dismissed.

C. Balance of Harm and Public Interest

In considering the balance of harm in granting or not granting the preliminary injunction and the public's interest, the Court should deny the motion for preliminary injunction. First, the public has an interest in the County entering into a voluntary agreement to bring the County entities at issue into compliance without a protracted civil suit regarding same. Second, as discussed above, the Plaintiff would not be harmed in that he has an adequate remedy at law and, again, the resolution of the non-compliance issues without suit is to his benefit as well in that the facilities will be brought into compliance sooner than if the matter is litigated. Plaintiff may argue that the current Agreement is not enough - that there are other instances of non-compliance. Not to sound trite, but, even a little is better than nothing. And, if he feels that there are other instances of noncompliance, he can sue the County, as he has in the past.

In weighing the factors to be considered in deciding whether to grant a motion for preliminary junction, clearly the balance is in favor of denying Plaintiff's motion.

CONCLUSION

For the foregoing reasons, the Plaintiff's motion should be denied and Plaintiff's Complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the Plaintiff, Fred DuVall, Pro Se, RR HC-63, Box 165-1, Clinton, AR 72031 on this 10th day of May, 2000.

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GWENDOLYN D. HODGE