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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOHN GILL SMITH, Plaintiff, v. THE CITY OF PHILADELPHIA, Defendant.	No. 03-6494 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION TO INTERVENE AS OF RIGHT OR, ALTERNATIVELY, TO INTERVENE BY PERMISSION

The United States files this Memorandum of Points and Authorities in Support of its Motion to Intervene in this action for injunctive relief and compensatory damages to remedy alleged violations of title II of the Americans with Disabilities Act ("title II" and "ADA"), 42 U.S.C. §§ 12131 et seq., and section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794. The action stems from the alleged failure of defendant City of Philadelphia ("City") to ensure that its emergency medical system does not discriminate against individuals with disabilities. The United States requests leave to intervene as of right, or, alternatively, to intervene by permission, pursuant to Rule 24 of the Federal Rules of Civil Procedure. Intervention as of right is warranted in this case because the United States has a significantly protectable interest in the enforcement of title II and section 504 which is not adequately represented by the existing parties and which may as a practical matter be impaired if intervention is denied. See Fed. R. Civ. P. 24(a)(2). Alternatively, the United States moves for permissive intervention because its claims against defendant have questions of law and fact in common with the main action, and the main action involves the interpretation of statutes which the Attorney General is entrusted by Congress to administer. See Fed. R. Civ. P. 24(b)(2).

A. Statutory and Regulatory Background

The proposed Complaint in Intervention, attached as Exhibit 1, generally alleges that defendant violated title II and section 504 when, on the basis of disability, it discriminated against plaintiff John Gill Smith and excluded him from participation in, and denied him the benefits of, the services, programs, and activities of the City's Emergency Medical Services Unit ("EMS"). Under title II, "no 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 such entity." 42 U.S.C. § 12132. Title II defines "public entity" to mean "any State or local government," as well as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A) and (B). Section 504 states that

"[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). A "program or activity" under section 504 includes all of the operations of a department, agency or other instrumentality of a State or local government. 29 U.S.C. § 794(b).

As required by statute, the United States Department of Justice ("Department") issued regulations implementing title II, which establish requirements for non-discrimination by public entities against individuals with disabilities. See 42 U.S.C. § 12134; 28 C.F.R. Part 35. The Department has also issued regulations implementing section 504's non-discrimination mandate as to recipients of federal funds. See Executive Order 12250, 45 Fed. Reg. 72995 (1980), reprinted in 42 U.S.C. § 2000d-1; 28 C.F.R. Part 41; 28 C.F.R. § 42.501 et seq. The title II regulations state, *inter alia*, that it is prohibited discrimination to deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service of a public entity, and to afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service of the public entity that is not equal to that afforded others. 28 C.F.R. §§ 35.130(b)(1)(i) and (ii). The regulations further prohibit a public entity from providing a qualified individual with a disability with an aid, benefit, or service of the public entity that is not as effective in affording equal opportunity to obtain the same result or gain the same benefit as that provided to others. 28 C.F.R. § 35.130(b)(1)(iii). Reasonable modifications in policies, practices, or procedures must be made when necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7).

B. Factual Background

On March 18, 1994, the Department entered into a settlement agreement with the City to resolve a complaint by an individual with HIV regarding discriminatory treatment by the City's EMS. In that case,

EMS workers responded to a 911 call regarding a young man who had collapsed on the floor of a school building. As soon as the EMS workers learned that the complainant had HIV disease, they stepped back from him and refused to place him on a stretcher. A nearby teacher had to lift the complainant onto the stretcher so that he could be transported to the hospital. Under the 1994 settlement between the City and the Department, the City's obligations included: (1) payment of damages; (2) agreement not to discriminate in the provision of emergency medical services on the basis of disability; and (3) agreement to provide training to its emergency medical personnel regarding current medical knowledge about HIV transmission and methods of preventing such transmission during emergency medical treatment. See Settlement Agreement attached hereto as Exhibit 2, ¶¶ 5, 8, 9, and 12.

Seven years later, plaintiff John Gill Smith lodged allegations of discrimination against the City under circumstances strikingly similar to those underlying the complaint that the Department settled short of suit in 1994. According to plaintiff's complaint in this action, a call was placed to the City's 911 system on February 20, 2001, because plaintiff was experiencing severe chest pain while at his residence within the City. Plaintiff had a history of high blood pressure and believed that he was having a heart attack. The City dispatched an emergency medical team comprised of two emergency medical technicians (EMTs). It is alleged that when the EMTs arrived at plaintiff's home and learned of his HIV status, one EMT abruptly exited plaintiff's home and remained outside, providing no assistance, throughout the emergency visit. The other EMT refused to touch plaintiff, speaking to him only from across the room. Although the EMTs transported plaintiff by ambulance to a hospital, plaintiff alleges that the EMTs failed to provide him with emergency medical assistance, and, additionally, utilized harassing and threatening language with him. See Plaintiff's Complaint, ¶¶ 17-34.

Prior to filing suit, plaintiff filed a complaint with the Department of Justice and with the Office of Civil Rights in the Department of Health and Human Services. Plaintiff filed suit in this court on December 1, 2003. Based on the same facts underlying plaintiff's Complaint, the United States' Complaint in Intervention alleges discrimination in the City's EMS in violation of title II and section 504,

focusing on specific regulations relevant to the City's conduct in this matter.

C. Argument

1. The United States Is Entitled to Intervention as of Right

Federal Rule of Civil Procedure 24(a) provides that upon timely application anyone shall be permitted to intervene in an action:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). An applicant for intervention as of right must prove four elements:

> first, a timely application for leave to intervene; second, a sufficient interest in the litigation; third, a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action; and fourth, inadequate representation of the prospective intervenor's interest by existing parties to the litigation.

Kleissler v. United States Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998); Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 365-66 (3d Cir. 1995); Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc., 54 F.3d 156, 161-62 (3d Cir. 1995). These requirements are "intertwined," and, thus, "a very strong showing that one of the requirements is met may result in requiring a lesser showing of another requirement." Harris v. Pernsley, 820 F.2d 592, 596 & n.6 (3d Cir. 1987). As discussed herein, the United States meets the prerequisites for intervention as of right.

(a) The United States' Application for Intervention is Timely.

"The timeliness of a motion to intervene is 'determined from all the circumstances' . . . ." Mountain Top Condo., 72 F.3d at 369 (quoting In re Fine Paper Antitrust Litig., 695 F.2d 494, 500 (3d Cir. 1982), in turn citing NAACP v. New York, 413 U.S. 345, 366 (1973)). When deciding whether an applicant's motion is timely, courts consider three factors: "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." Id. (citation omitted). See also Pansy v. Borough of Stroudsburg, 23 F.3d 772, 779-80 (3d Cir. 1994) (discussing prejudice factor in timeliness analysis); Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3d Cir. 1976) (adopting tripartite

balancing test as a "useful framework" for informing a district court's determination of whether an application for intervention is timely "under all the circumstances").

The Third Circuit has emphasized that the mere passage of time will not render an application untimely. Mountain Top Condo., 72 F.3d at 369 (finding application for intervention timely where four years had elapsed before applicant filed motion to intervene) (citing Bank of Am. Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assoc., 844 F.2d 1050, 1056 (3d Cir. 1988), and 7C Wright, Miller & Kane, Fed. Practice & Procedure § 1916, at 425-26 (1986)); United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1181-83 (3d Cir. 1994) (finding application timely where filed more than four years after litigation commenced). Rather, "the critical inquiry is: what proceedings of substance on the merits have occurred?" Mountain Top Condo., 72 F.3d at 369. As explained in Mountain Top Condo, "[t]his is because the stage of the proceeding is inherently tied to the question of the prejudice the delay in intervention may cause to the parties already involved." Id. (further noting that intervention is, at times, allowed even after the entry of a judgment). See also Alcan Aluminum, 25 F.3d at 1181 ("As used here, timeliness is not just a function of counting days; it is determined by the totality of the circumstances.") (citing NAACP, 413 U.S. at 366).

Applying these principles in this case, the United States' motion to intervene is timely as intervention would cause neither delay nor prejudice to the original parties. Plaintiff filed this suit in December, 2003, and the Department learned of the litigation in February, 2004. Consistent with the Department's administrative policies, the Department undertook a careful investigation and deliberative evaluation of whether intervention by the United States would be appropriate in this case. With regard to substantive proceedings, the litigation in this case stands in a relatively neutral posture: no dispositive motions have been filed and discovery between the parties remains ongoing, with, *inter alia*, additional depositions still to be conducted and experts still to be named. The United States' intervention, and the additional discovery which we would require, would be neither unduly burdensome nor time-consuming

and would not prejudice the defendant. In light of these facts, the United States' application for intervention as of right should be deemed timely.

(b) The United States Has a Significantly Protectable Interest in the Litigation

"To justify intervention as of right, the applicant must have an interest 'relating to the property or transaction which is the subject of the action' that is 'significantly protectable.'" Kleissler, 157 F.3d at 969 (quoting Donaldson v. United States, 400 U.S. 517, 531 (1971)). The interest asserted "must be a cognizable legal interest and not simply an interest 'of a general and indefinite character.'" Brody v. Spang, 957 F.2d 1108, 1116 (3d Cir. 1992) (quoting Harris, 820 F.2d at 601). While this requisite interest has not been assigned a "precise and authoritative definition," Mountain Top Condo., 72 F.3d at 366, the Third Circuit has observed that circuit precedent reflects "adherence to the elasticity that Rule 24 contemplates." Kleissler, 157 F.3d at 970. The Kleissler court noted that Rule 24, as currently promulgated, was intended to liberalize and expand the class of appropriate intervenors. See id. (quoting 7C Wright, Miller & Kane, Fed. Practice and Procedure: Civil 2d § 1908: "The central purpose of the 1966 amendment was to allow intervention by those who might practically be disadvantaged by the disposition of the action and to repudiate the view, [under the former rule], that intervention must be limited to those who would be legally bound as a matter of res judicata."). The court explicitly declined to endorse a narrow approach that would "minimize[ ] the flexibility and spirit" of the Rule. Id. at 971.

The United States' interest in the pending litigation supports intervention as of right. As the federal agency charged with enforcing the ADA, the Department has a substantial, and significantly protectable, interest in the subject matter of the pending litigation. Underlying enactment of the ADA was Congress' intent to "provide a clear and comprehensive national

mandate for the elimination of discrimination against individuals with disabilities . . . ." 42 U.S.C. § 12101(b)(1). Congress sought "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2), and explicitly stated that one of the purposes of the ADA was "to ensure that the Federal Government plays a central role in enforcing the standards established [in the Act] on behalf of individuals with disabilities . . . ." 42 U.S.C. § 12101(b)(3). The United States' prominent enforcement role is reflected in the statutory authorization given the Attorney General to commence a legal action when discrimination prohibited by the ADA takes place. 42 U.S.C. § 12133.

This case directly implicates the United States' interest in enforcing title II of the ADA to ensure the "clear, strong, consistent, enforceable standards" envisioned by Congress. And while the United States has an interest in the elimination of all forms of disability discrimination, that interest is heightened in this case given the important nature of the public service at issue and the existence of the 1994 Settlement Agreement evidencing the City's prior recognition of its obligations under title II not to discriminate against individuals with HIV seeking emergency medical services. The Department also has a substantial interest in ensuring that recipients of federal financing, such as defendant, do not violate section 504's similar prohibition of disability discrimination. Accordingly, the United States' significantly protectable interests in ensuring that this case results in clear, consistent, enforceable standards, both substantive and remedial, supports intervention as of right. Cf., e.g., Ceres Gulf v. Cooper, 957 F.2d 1199, 1204 (5th Cir. 1992) (collecting cases, and finding, in insurer's suit against employee for reimbursement of advance payments, that the interest of the federal director of the Office of Workers' Compensation Programs in "consistent application of . . . a statutory scheme he is charged with

administering" was sufficient to support intervention as of right); Nuesse v. Camp, 385 F.2d 694, 700-01 (D.C. Cir. 1967) (discussing liberalization of Rule 24(a) under 1966 amendment, and finding that state government official charged with administering a banking law had interest in advocating particular construction of the law that was sufficient to support intervention as of right).

Additionally, because the alternative to the Department's intervention in plaintiff's lawsuit is a separate action including the Department's title II and section 504 claims, the efficiency goals implicit in Rule 24(a) are furthered if intervention is permitted here. See Kleissler, 157 F.3d at 969-71 (discussing circuit precedent and noting that the court has "more often relied on pragmatic considerations such as the benefits derived from consolidation of disputes into one proceeding"); Brody, 957 F.2d at 1123 (noting circuit "policy preference, which, as a matter of judicial economy, favors intervention over subsequent collateral attacks"). As noted previously, the Department wrote the title II regulations at issue in this case, see 42 U.S.C. § 12134; 28 C.F.R. Part 35, and plays the primary role in coordinating the implementation and enforcement of section 504 among federal agencies, see Executive Order 12250. Through its regulatory and enforcement work, the Department has accumulated significant experience in guiding public entities in amending policies, practices, and procedures to conform to the mandates of title II and section 504. The Department's unique experience and familiarity with the statutes and regulations at issue will facilitate the efficient litigation of this dispute and promote a resolution which provides the clear, consistent, enforceable standards contemplated by Congress.

(c) The United States' Interest Would be Impaired if Intervention is Not Permitted.

Under the third intervention factor, the would-be-intervenor must demonstrate that its "interest *might* become affected or impaired, as a practical matter, by the disposition of the action in [its] absence." Mountain Top Condo., 72 F.3d at 368 (emphasis in original). "Incidental effects on legal interests are insufficient; 'rather, there must be a 'tangible threat' to the applicant's legal interest.'" Alpha Hous. & Health Care, 54 F.3d at 162 (quoting Brody, 957 F.2d at 1122-23, in turn quoting Harris, 820 F.32 at 601). Consistent with the language of the Rule, the Third Circuit has directed courts to assess "'the practical consequences of the litigation'" when analyzing the impairment factor. Brody, 957 F.2d at 1122 (quoting Harris, 820 F.2d at 601). Significantly, however, the Third Circuit has repeatedly held that "[a]n applicant need not . . . prove that he or she would be barred from bringing a later action or that intervention is the only possible avenue of relief." Id. at 1123; accord Alpha Hous. & Health Care, 54 F.3d at 162 (citing Brody for the proposition and reaffirming Brody's admonition that a contrary policy would undermine the circuit's policy preference for judicial economy).

Because the ADA is a relatively young statute, federal decisions interpreting and applying the provisions of the Act are an important enforcement tool. An unfavorable disposition of this case may, as a practical matter, impair the United States' interest in eliminating disability discrimination by public entities with regard to the provision of emergency medical services. Moreover, the effect of title II or section 504 on a city's provision of emergency medical services appears unresolved in the Third Circuit. Thus, the outcome of this case, including the potential for appeals by existing parties, implicates *stare decisis* concerns which support intervention as of right. See Brody, 957 F.2d at 1123 (stating that impairment factor is satisfied if disposition of the

action in the applicant's absence will have a "significant *stare decisis* effect" on its claims). Because a holding in favor of defendant may negatively affect the United States' title II and section 504 enforcement efforts, both in this case and others, the third factor for intervention as of right is met. See also United States v. City of Los Angeles, Cal., 288 F.3d 391, 400 (9th Cir. 2002) (holding that amicus status may be insufficient to protect the rights of an applicant for intervention "because such status does not allow [the applicant] to raise issues or arguments formally and gives it no right of appeal").

(d) The United States' Interest is Inadequately Represented by Existing Parties.

The fourth and final element to justify intervention of right is inadequate representation of the United States' interest by existing parties to the litigation. The burden to show inadequate representation is minimal. See Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972); Hoots v. Pennsylvania, 672 F.2d 1133, 1135 (3d Cir. 1982). "An intervenor need only show that representation may be inadequate, not that it is inadequate." Conservation Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992), cited in Kleissler, 157 F.3d at 974. Representation will be considered inadequate where, "although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests." Brody, 957 F.2d at 1123 (citing Hoots, 672 F.2d at 1135).

In this case, the United States' interest in enforcing the ADA and section 504 to advance the public interest in ending disability discrimination with regard to the provision of emergency medical services is inadequately represented by the existing parties. Plaintiff's case, while seeking both injunctive and monetary relief under title II and section 504, will be directed

primarily at individual remedy. Accordingly, the United States' interest in a clear and consistent interpretation and application of relevant title II and section 504 provisions cannot be adequately represented by the parties in this case. Cf. Kleissler, 157 F.3d at 972 (recognizing the likelihood of divergent interests between an agency, "necessarily colored by its view of the public welfare," and "the more parochial views of a [private entity] whose interest is personal to it").

Consistent with its "broader" interest in enforcing title II on behalf of the public, the Department brings to this action the Civil Rights Division's extensive experience in investigating and litigating discrimination complaints relating to the provision of emergency medical services and healthcare. Moreover, the Department has a history with this particular defendant with regard to emergency medical services and HIV discrimination, as evidenced by the 1994 Settlement Agreement between the City and the United States. And as the entity charged with formulating and issuing regulations under title II, and coordinating agency enforcement under section 504, the Department brings a unique expertise and familiarity with key issues in this case. Such expertise will be necessary in order to litigate this case to advance the Department's interests on behalf of the public. These facts demonstrate that plaintiff's interests may not sufficiently align with those of the United States, and support a finding that plaintiff's representation may be inadequate to protect the United States' interests. Cf. Kleissler, 157 F.3d at 974 ("It does not stretch the imagination to conjure up situations in which [existing parties] may face the irresistible temptation to work out settlements that benefit themselves and not the [would-be-intervenors].").

Because the United States can prove each of the requisite elements for Rule 24(a)(2) intervention, we respectfully request that this Court grant our application for leave to intervene as of right.

2. The United States' Application for Permissive Intervention Should Be Granted.

Rule 24(b) states, in part:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b).

As discussed above in conjunction with the Rule 24(a) analysis, herein incorporated, the United States' application for intervention is timely. The United States' claims against defendant share common questions of law and fact with those in the pending litigation. As does plaintiff, the United States would assert, as a common question of law, whether defendant's conduct with regard to the provision of emergency medical services violates title II and section 504, and the relevant implementing regulations. The basis for the factual allegations in the United States' Complaint in Intervention is, essentially, the same basis for plaintiff's allegations of discrimination by defendant. And, as discussed with regard to intervention as of right, the United States' participation as intervenor would neither unduly delay the proceedings nor prejudice the adjudication of the rights of the original parties.

Furthermore, the Department's involvement in this case would fall squarely within that contemplated by the language of Rule 24(b). See Fed. R. Civ. P. 24 advisory committee's note (explaining that subsection (b) was amended in 1946 to include explicit reference to governmental agencies and officers in order to avoid exclusionary construction of the rule, and

citing, with approval, cases in which governmental entities were permitted to intervene). The Department has the central role in administering and enforcing title II, and has developed experience and familiarity with section 504 requirements from reviewing, pursuant to Executive Order 12250, all such regulations relating to disability discrimination for all federal agencies. The Department's extensive regulatory work further evidences the United States' vital interest in enforcing the statutes and regulations at issue on behalf of the public interest in ending illegal disability discrimination. See, e.g., Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84, 92 (3d Cir. 1979) (en banc) (permitting United States to intervene based on its enforcement of federal statute and regulations protecting individuals with developmental and cognitive disabilities, and noting therein, "Large amounts of federal funds flow to Pennsylvania from the federal government, and the United States is vitally interested in the enforcement of the conditions on which those grants are made."). And, as discussed above, that interest is paramount where at issue are critically important public services such as the City's provision of emergency medical care.

For these reasons, and those addressed in our discussion of intervention as of right, we respectfully request that this Court grant our motion to intervene by permission.

Conclusion

For the reasons set forth above, this Court should grant the United States' motion to intervene.

Dated this 30th day of July, 2004,

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