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

BARRIER BUSTERS, et al.,	)	
Plaintiffs,	)	
	)	CASE No.: 02-203 E
v.	)	
CITY OF ERIE, PENNSYLVANIA	)	
Defendants.	)	

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO RESTRICT PLAINTIFFS' ACTION TO A TWO-YEAR PRE-FILING PERIOD

Introduction

Municipalities violate title II of the Americans with Disabilities Act when they fail to install curb ramps during street and sidewalk construction and alteration. In this case, plaintiffs allege, and defendant admits, that numerous violations have occurred over several years, both before and after the expiration of the statute of limitations. Although curbs without ramps present a permanent barrier and safety hazard to people with disabilities, the City of Erie maintains that it should be relieved of any obligation to correct curbs that were installed outside the two year statute of limitations. Plaintiffs maintain that defendant should not be relieved of its obligation to correct these curbs because these violations are related and constitute a continuing violation of the Americans with Disabilities Act.

The United States submits this memorandum in support of its Motion for Leave to Participate as amicus curiae and in support of plaintiffs' opposition to defendant's Motion to Restrict Plaintiffs' Action to a Two-Year Filing Period. For the reasons set forth below, the United States requests the Court to grant its motion to participate as amicus curiae and to deny the defendant's motion.

Background

The ADA requires all public entities to install curb ramps at intersections where road construction and alterations are done and to ensure that all curbs installed after January 26, 1992, are accessible to and usable by persons with disabilities. 28 C.F.R. § 35.151(b) and (e).[1] On June 26, 2002, plaintiffs brought this suit to challenge the City of Erie's practice of constructing, or altering city streets and sidewalks without installing accessible curb ramps at affected intersections. In its Answer, the city admits that, since 1992, it has not completed "thousands of curb ramps" and has constructed others that do not comply with regulatory standards. Answer at para. 4. Notwithstanding this admission, the city has now filed a motion in which it argues that

[1] 28 C.F.R. 35. 151(b) states that "each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." Facility is defined to include walks and passageways. 28 C.F.R. 35.104. 35.151(e) states: "Newly constructed or altered streets, roads and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway."

The Court of Appeals for the Third Circuit, in *Kinney v. Yerusalim*, 9 F.3d 1067, 1075 (3d Cir.1993), *cert. denied sub nom., Hoskins v. Kinney*, 511 U.S. 1033, 114 S.Ct. 1545, 128 L.Ed.2d 196 (1994) held that the resurfacing of the city streets can be an alteration within the meaning of 28 C.F.R. 35.151(b) and thus must be accompanied by the installation of curb ramps under 28 C.F.R. 35.151(e).

plaintiffs' claims for acts occurring before June 26, 2000 are time barred because they fall outside the two year statute of limitations period.[2] The city thus seeks to have the Court relieve it of its obligation to install or correct those curbs where violations occurred between January 26, 1992, when the ADA went into effect, and June 26, 2000. Defendant's Motion at 2.

Argument

I. The United States Should be Permitted to Participate as Amicus Curiae in this Action

Title II of the ADA, 42 U.S.C. 12132, prohibits discrimination on the basis of disability by public entities. One of the purposes of the Act is "to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities." 42 U.S.C. 12101(b)(3). As part of this responsibility, the Department of Justice has, pursuant to statutory directive, 42 U.S.C. § 12134(a), promulgated the regulation implementing title II, found at 28 C.F.R. Pt. 35. The United States has a strong interest in ensuring that the case law developed in private litigation is consistent with its interpretation of the statute and the Department of Justice's regulation.

The United States believes that this case raises an important issue: the ability of private litigants to enforce state or local governments' obligation to construct curb ramps. The ADA

[2] Title II does not include a statute of limitations for private actions. Therefore, the court must look to state law and apply the statute of limitations for the most analogous state law claim unless doing so would be inconsistent with federal law. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64 (1987). The parties in the lawsuit agree that in Pennsylvania the applicable statute of limitations is the two year limitations period for personal injury. *See, e.g.*, *Estrada v. Trager*, 2002 WL 31053819 (E.D. Pa. 2002)(two year statute of limitations for personal injury claims applies to ADA and Section 504). *See also Cowell v. Palmer Township*, 263 F.3d 286 (3d Cir. 2001) (same for actions brought under Section 1983). The United States takes no position with respect to the correct statute of limitations that is applicable to this case.

requires all public entities to install curb ramps at intersections where road construction and alterations are done and to ensure that all curbs installed after January 26, 1992, are accessible to and usable by persons with disabilities. 28 C.F.R. § 35.151(b) and (e). The attention to curb ramps in the regulations reflects their importance in ensuring that individuals with mobility impairments will be able to travel through cities safely and independently. The Court of Appeals in *Kinney* has emphasized how critical curb ramps are to the citizens of Pennsylvania:

> The lack of curb cuts is a primary obstacle to the smooth integration of those with disabilities into the commerce of daily life. Without curb cuts, people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors. At present, people using wheelchairs must often make the Hobson's choice between traveling in the streets--with cars and buses and trucks and bicycles--and traveling over uncut curbs which, even when possible, may result in the wheelchair becoming stuck or overturning, with injury to both passenger and chair.

Kinney, 9 F.3d at 1069.

The city asserts that it should be relieved of its obligation to install or correct curbs where the construction or alteration occurred prior to the statute of limitations, even though the lack of curb ramps creates an ongoing barrier to access to persons with disabilities. This case will be the first case in this Circuit addressing this important issue and may affect many future cases alleging violations of title II of the ADA. We have previously participated as amicus curiae in *Deck v. City of Toledo*, 56 F. Supp. 2d 886 (N.D. Ohio W.D. 1999), in which the city of Toledo raised the defense Erie seeks to raise here. The Court in *City of Toledo* rejected the city's argument that acts occurring outside the limitations period were time barred. 56 F. Supp. 2d at 893-94.

This case has considerable importance for private enforcement of the ADA. The Department of Justice has limited resources and cannot address every violation of title II of the

ADA; private litigation is an integral component of effective enforcement of the ADA. *See, e.g.*, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972) (where Attorney General's ability to enforce civil rights law is limited, "main generating force must be private suits in which complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."). It is important that private litigants not be unduly limited in the relief they can achieve.

Given the strong interest of the United States in effective enforcement of the ADA and the importance of this case to other private litigation under the ADA, the United States requests that its motion for leave to participate as amicus curiae on all issues relating to the ADA be granted.

II. **The Defendant's Action Represents a Continuing Violation of the ADA**

Plaintiffs allege that curb cuts were not installed, or were not installed correctly, at intersections constructed or altered by the City of Erie between 1992 and 2002. Complaint at paras. 11- 17. The city admits that it has failed to complete "thousands of curb ramps" and that others are in need of repair or do not meet regulatory standards. Answer at para. 4. This pattern of repeated and related violations constitutes a continuing violation; plaintiffs' cause of action would not be time-barred so long as at least one of the violations occurred within the statute of limitations.

In *Havens Realty Corporation v. Coleman*, plaintiffs alleged "racial steering" in a suit under the Fair Housing Act. Although only one of the five alleged incidents was timely, the Supreme Court held that all of the incidents were actionable. The Court explained,

> We agree with the Court of Appeals that for purposes of § 812(a), a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. Where the challenged violation is a continuing one, the staleness concern disappears.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982). Thus, " where a plaintiff challenges not just one incident of conduct violative of the Act, but *an unlawful practice* that continues into the limitations period," the complaint is timely." *Id.* at 381. (emphasis added).

The Court of Appeals for the Third Circuit recognizes the continuing violation doctrine. The court held in *Cowell v. Palmer Township*, 263 F.3d 286 (3d Cir. 2001):

> when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; *in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred*. (Emphasis added)

Cowell, 263 F.3d at 292, *citing Brenner v. Local 514, United Bhd of Carpenters and Joiners of Am*, 927 F. 2d 1283, 1295 (3d Cir. 1991). In *Cowell*, the Court set forth three factors that must be considered in determining whether there has been a continuing violation: "(1) subject matter - whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation; (2) frequency - whether the acts are recurring or more in the nature of isolated incidences; and (3) degree of permanence - whether the act had a degree of permanence which should trigger the plaintiff's awareness of and duty to assert his/her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate." *Id.*

All three factors are present here. The first two factors are met because road and sidewalk repairs have been on-going for ten years; the attendant failure to install curb cuts, or to

install them correctly, is the same violation repeated year after year. *See, e.g., Brenner*, 927 F.2d 1283 (NLRA)(3d Cir. 1991)(claim that union retaliated against certain members for 13 years, including during the limitations period, by refusing to refer them for jobs, is "continuing course of conduct" that is not time barred); *Wright v. O'Hara*, 2002 WL 1870479 (E.D. Pa. 2002) (harassment of prisoner over period of years not time barred where some harassment occurred in limitations period). *See also Deck v. City of Toledo*, 56 F. Supp. 2d 886, 893-94 (N.D. Ohio W.D. 1999) (numerous failures to properly construct curb ramps, including violations in the limitations period, constitute continuing violation). With regard to the third factor, the process of altering roads is not a discrete act that will trigger an awareness in a citizen that he must take legal action. In a city such as Erie, there are hundreds, if not thousands, of roads, and unless a citizen happens to observe the road crew, it is impossible to know whether – or when – a city street was altered. Indeed, to hold that each construction or alteration is an isolated incident that triggered the statute of limitations, would create an absurd result, effectively placing the burden on plaintiffs to follow road crews around to make sure they were properly installing curb ramps. Such a reading would allow the city to benefit from years of knowing, discriminatory policies and practices.

To hold that the city's on-going practice of failing to install curb ramps is a continuing violation is fully consistent with *Brenner*, where the Court of Appeals for the Third Circuit held that there was a continuing violation when a labor union refused to refer certain union members for jobs. The practice continued from 1979-86, with many of the incidents occurring outside the limitations period. The court did not view each failure to refer as an isolated incident. Instead, the court held "the allegation of a continuing course of conduct constituting a violation of the

union's duty of fair representation is sufficient to warrant the application of the continuing violation theory to plaintiffs' claims." 927 F.2d at 1296.

Applying *Brenner* to the City of Erie's repeated failure to construct curb ramps, demonstrates that the continuing violation doctrine is warranted here. As in *Brenner*, the plaintiffs' claims allege a "continuing course of conduct" that recurred over a long period of time: the City of Erie has continually violated the alterations and new construction requirements of title II by failing to install curb cuts (or installing them incorrectly) when the city did construction or alteration on roads and sidewalks. These same violations allegedly occurred both before and after the date on which the individual claims may have ordinarily been time-barred. As such, they represent a continuing violation and none of these claims are barred by the applicable statute of limitations.

The continuing violation theory also supports the broad remedial purpose of the ADA. In *Havens Realty Corporation*, the Court noted that:

> Petitioners' wooden application of [the statute of limitations], which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the [Fair Housing] Act.

455 U.S. at 380.

Similarly, when a municipality regularly constructs inaccessible curbs, it would frustrate the purpose of title II of the ADA to require persons with disabilities to constantly monitor local street resurfacing projects and then bring suit for each violation independently in order to satisfy the statute of limitations. This difficulty this would impose on persons with disabilities would be compounded by the fact that information about street improvement projects may not be readily

available to the public, and, as in this instance, available only from the entity which seeks to evade its legal obligation.

Recognizing the continuing violation theory is important here because title II is broad remedial legislation designed to correct a long history of discrimination by public entities. In enacting the predecessor of title II, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Congress recognized that society has historically discriminated against people with disabilities. The sponsors of that legislation condemned the "invisibility of the handicapped in America," and introduced bills responding to the country's "shameful oversights" that caused individuals with disabilities to live among society "shunted aside, hidden, and ignored." Alexander v. Choate, 469 U.S. 287, 296 (1985). Almost twenty years later, Congress recognized that the Rehabilitation Act had not met the "compelling need ... for the integration of persons with disabilities into the economic and social mainstream of American life," S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989), and enacted the ADA "to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life." H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 49-50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 472-473.

The need for remedial legislation is particularly important when basic physical access is at issue. Without a curb cut, a person with a mobility impairment may be simply unable to access the adjoining sidewalk and may be denied any goods and services provided in that space. Lack of curb cuts may also present a serious safety hazard to a person with a mobility impairment who cannot seek refuge from vehicular traffic by accessing a sidewalk. The legislative history of the ADA supports the proposition that the elimination of architectural barriers such as curbs is among the most basic and fundamental purposes of the statute. The House Education and Labor

Committee report recognized that "[t]he employment, transportation, and public accommodation sections of [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H. R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 84 (1990).[3] Accordingly, "local and state governments are required to provide curb cuts on public streets." Id. Accord *Kinney*, 9 F.3d at 1069 and supra at 4 ("lack of curb cuts is a primary obstacle to the smooth integration of those with disabilities into the commerce of daily life"). This laudable legislative purpose is undermined where, as here, state and local governments could disregard their obligation to build accessible curbs – and get away with it – unless their efforts were continually monitored by persons with disabilities who were prepared to run into court after each violation.

The United States believes that these important public policy concerns strongly counsel for recognizing a continuing violation exception to a statute of limitations defense where, as here, the city has failed, year after year, to install curb ramps.

[3] The installation of curb ramps is important not only for persons in wheelchairs but also for ambulatory persons with mobility impairments, such as those who use walkers and crutches.

Conclusion

For the foregoing reasons, the United States respectfully urges the Court to grant its Motion for Leave to Participate as Amicus Curiae and to deny defendant's motion to limit relief only for those acts that occurred since June 26, 2000.

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