UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
vs.	)	Civil Action No. 03:2061 B
	)	
CENTURY MANAGEMENT, LLC,	)	
FRED TILLMAN, and	)	
McDONALD'S CORPORATION,	)	
	)	
Defendants	)	

UNITED STATES' RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The defendants' Motion for Summary Judgment is pre-mature and should not be granted given the current status of the case. Furthermore, the defendants erroneously assert that the United States is under an affirmative obligation to demonstrate that the Attorney General has discharged his duty to investigate alleged violations of Title III of the Americans with Disabilities Act (ADA) as a condition precedent to commencing an enforcement action by filing a complaint in District Court. The defendants also erroneously assert the United States must plead and be prepared to prove facts supporting the Attorney General's determination that reasonable cause exists to believe that any person or group of persons is engaged in a pattern or practice of discrimination or that any person or group of persons has been discriminated against in violation of the ADA and that such discrimination raises an issue of general public importance as a condition precedent to filing and maintaining an enforcement action in District Court.

II. ALTERNATIVE STATEMENT OF UNDISPUTED FACTS

The Statement of Undisputed Facts in the Defendants' Motion for Summary Judgment primarily relate to matters occurring between counsel for the plaintiff and counsel for the defendants prior to the filing of the United States complaint on January 28, 2003. However, the United States does not believe that the facts recited by the defendants are material to the issues raised by the defendant. In addition the facts recited by the defendants do not include any references to matters occurring during the two years of investigation and negotiation between the United States and representatives of Century Management prior to Mr. Henderson undertaking representation of the defendants.

Nevertheless, there are certain facts which are relevant to the issue of whether the Motion for Summary Judgment is premature. In addition, though the United States argues that the defendant may not challenge the adequacy of the Attorney General's pre-complaint investigation and reasonable cause determination, there are also certain facts relevant to same**.** These facts are summarized as follows:

1. On July 3, 2003, the plaintiff served the defendants with plaintiff's First Set of Interrogatories and First Requests for Production of Documents. (Exhibit 1–Declaration of Gary Vanasek)

2. On August 4, 2003, counsel for the defendants requested an additional 30 days to file responses to the plaintiff's interrogatories and requests for production of documents. The United States consented to this extension. (Exhibit 1 and Exhibit 2–Letter memorializing agreement)

3. On September 5, 2003, counsel for the defendants made a further request to extend the date for responding to plaintiff's interrogatories and requests for production of documents until

September 12, 2003. The United States consented to this extension. (Exhibit 1 and Exhibit 3–Letter memorializing agreement.)

4. On September 12, the defendants' counsel mailed "answers" to plaintiff's interrogatories and requests for production of documents. (Collective Exhibit 4–Century Management's Answers to Plaintiff's First Set of Interrogatories, Century Management's Answers to Plaintiff's First Requests for Production of Documents, Fred Tillman's Answers to Plaintiff's First Set of Interrogatories, and Fred Tillman's Answers to Plaintiff's First Requests for Production of Documents.)

5. On September 19, 2003, counsel for the defendants called the attorney's for the United States and apologized for filing the documents described as Collective Exhibit 4 and promised to follow up with substantive responses not later than September 24, 2003. (Exhibit 1)

6. On September 24, 2003, the defendants' attorney faxed a letter to the attorneys for the United States requesting the entry of a protective order relative to financial information requested in the plaintiff's requests for production of documents. (Exhibit 5–Letter dated September 24, 2003, from Thomas Henderson)

7. The Protective Order referenced above was entered by the Court on October 6, 2003. (Exhibit 6–filed copy of protective order)

8. Counsel for the United States expected the defendants to file substantive responses to the interrogatories and requests for production of documents shortly after entry of the protective order. (Exhibit 1)

9. On October 27, 2003, the United States filed a Motion to Compel the defendants to respond the the Plaintiff's First Set of Interrogatories and First Requests for Production of Documents. (Exhibit 1)

10. In a letter dated June 15, 2000, the United States advised defendant Fred Tillman of its investigation of alleged violations of Title III of the Americans with Disabilities Act by McDonald's restaurants owned and/or operated by him. Exhibit 7–Letter to Fred Tillman)

11. On July 21, 2000, counsel for the United States met with attorney Stephen Wakefield and management representatives of Century Management to discuss options for resolving the ADA allegations. (Exhibit 1)

12. At this meeting the parties agreed that the United States should conduct a preliminary survey of a representative group of restaurants managed by Century Management. (Exhibit 1 and Exhibit 8–Letter to Stephen Wakefield)

13. On August 31, 2000, and thereafter the United States conducted ADA compliance surveys of ten McDonald's restaurants managed by Century Management. (Exhibit 1)

14. On December 11, 2000, counsel for the United States sent a letter to attorney Stephen Wakefield advising him of the survey results and indicating that the United States believed that the items listed in an attachment to the letter constituted barriers to access for persons with disabilities and could be removed in a readily achievable manner. (Exhibit 9)

III. ARGUMENT

A. The Defendants' Motion for Summary Judgment is pre-mature because the plaintiff has not had an opportunity to make full discovery.

The Supreme Court cases defining the contours of summary judgment practice under Fed. R. Civ. Pro. 56 contemplate that such a motion will be regarded as premature if the nonmoving party has not had an opportunity to make full discovery. *Celotex Corporation v. Catrett,* 106 S. Ct. 2548, 2554, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2508, 477 U.S. 242 (1986), *See Street v. J.C. Bradford & Company*, 886 F.2d 1472, 1478 (6th Cir. 1989). The defendants assert that "[D]espite ample discovery opportunity, Plaintiff has made no suggested accommodations nor has Plaintiff shown them to be 'readily achievable.'" While it might be said that a significant amount of time has elapsed since the plaintiff was allowed to commence discovery following entry of the first Scheduling Order on May 27, 2003, it would not be accurate to conclude that the plaintiff has had ample time for discovery. On July 3, 2003, the plaintiff served the defendants with plaintiff's First Set of Interrogatories and First Request for Production of Documents. On August 4, 2003, counsel for the defendants contacted the United States requesting a 30 day extension, until September 5, 2003, to file responses to interrogatories and requests for production of documents. The United States' consent is memorialized in a letter dated August 5, 2003. On September 5, 2003, counsel for the defendants again contacted the United States requesting a further extension until September 12, 2003, to respond to plaintiff's discovery requests. The United States consent to this request is memorialized in a letter dated September 5, 2003. On September 12, 2003, the defendants mailed their "answers" to plaintiff's First Set of Interrogatories and First Requests for Production of Documents, which amounted to an

objection to each and every interrogatory and request for production of documents. On September 19, 2003, counsel for the United States spoke with counsel for defendants, Mr. Henderson. Mr. Henderson apologized to the United States and told counsel for plaintiff that defendants objected to the discovery requests because he had been busy with another matter and did not have time to prepare responses. Mr. Henderson assured counsel for plaintiff that he would serve amended responses to Plaintiff's discovery requests no later than September 24.

On September 24, 2003, defendants' counsel faxed to plaintiff a letter[1] requesting a Consent Protective Order. Though plaintiff had no objection to entering a protective order, September 24th was the first time defendants had mentioned a protective order since they received service of plaintiff's discovery requests on July 3, 2003. Nevertheless, the United States did not oppose the entry of a protective order and same was filed with the Court on October 6, 2003. It was the understanding of the plaintiff that following the entry of the protective order, substantive responses to its discovery requests would be immediately forthcoming from the defendants. To date the plaintiff has not received the promised amended responses to its discovery requests.

On October 27, 2003, the plaintiff filed a Motion to Compel Century Management, LLC and Fred Tillman to Respond to Plaintiff's First Set of Interrogatories and First Request for Production of Documents. On October 31, 2003, the Court entered an Order of Reference referring the plaintiff's motion to the Magistrate for determination. The Motion to Compel remains pending with the Magistrate as of the date of the filing of this pleading.

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[1]Though the date on Defendants' letter is September 5, 2003, the fax tag line indicates that the letter was sent on September 24.

Under the circumstances recited above it is disingenuous for the defendants to assert that the plaintiff has had ample time for discovery. The United States cannot assert that the defendants' objections to the interrogatories and requests for production of documents were not made in good faith. However, the facts remain that the defendants filed no response to these discovery requests for more than 60 days after issuance, then created further delay by promising to amend their objections to provide substantive responses, ultimately failing to do so, and finally forced the plaintiff to seek the assistance of the Court by filing a Motion to Compel which has remained pending for nearly two and a half months as a result of the Court's busy schedule.

B. The statutorily mandated investigation of alleged violations of the ADA and the requirement that the Attorney General have reasonable cause to believe that a person or persons have engaged in a pattern or practice of discrimination or that an allegation of discrimination raises an issue of general public importance are not conditions precedent which must be pled and proven by the United States in filing a complaint to enforce the ADA.

The defendants allege that the Attorney General did not investigate the alleged violations of Title III of the ADA prior to filing suit as required by 42 U.S.C. §12188(b)(1)(A) and thus could not have formed a reasonable cause to believe that the defendants have engaged in a pattern or practice of discrimination or that any such discrimination raises an issue of general public importance required by 42 U.S.C. §12188(b)(1)(B). However, in United States v. International Association of Bridge, Structural and Ornamental Ironworkers the 7th Circuit Court of Appeals rejected the defendant's Motion to Dismiss the government's enforcement action pursuant to §707(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-6, premised on the failure

of the government to show that the Attorney General had reasonable cause to believe that a pattern or practice of discrimination existed. United States v. International Association of Bridge, Structural and Ornamental Ironworkers, 438 F.2d 679 (7th Cir. 1971). In rejecting the defendant's argument the Court noted,

> Federal Courts have consistently held that the Attorney General need not plead his "reasonable cause to believe" that discrimination exists. United States v. Building and Const. Tr. Comm. Of St. Louis, Mo. 271 F.Supp. 447, 452 (E.D.Mo. 1966); United States by Clark v. IBEW Local 683, 270 F.Supp. 233, 235 (S.D.Ohio 1967). Other district courts have denied motions for interrogatories aimed at discovery of the factual basis for determination of the Attorney General's reasonable cause to believe. United States v. IBEW Local 309, Civil No. 6910 (E.D.Ill filed July 2, 1969); United States v. Building and Const. Tr. Comm. Of St. Louis, Mo. supra. Id. at 681.

The Court concluded that the only issue for the trial court is "whether there has been a violation of the statute and not whether the Attorney General has reasonable cause to believe there was a violation." Id. In a footnote following this holding the Court cites from the legislative history of §707 as follows: "Congressman Cellar, the floor manager in the House , stated: 'Finally, the statute contains the usual directive to the Attorney General that he should have reasonable cause before he sues, but of course, he–not the court–decides whether reasonable cause exists, and the issue of reasonable does not present a separate litigable issue.' 110 Cong. Rec. 15895 (1964)." Id. See United States v. City of Yonkers, 592 F.Supp 570 (S.D.N.Y. 1984); United States v. Philadelphia Electric Co., 351 F.Supp. 1394, 1398-99 (E.D.Pa. 1972). But see United States v. State of North Carolina, 914 F.Supp. 1257 (E.D.N.C. 1996).

Based on the widely accepted principle that the Attorney General's reasonableness cause determination may not be challenged by defendants seeking dismissal of a case, the Court should find that the defendants' Motion for Summary Judgment is not well founded.

C. If inquiry into the validity of the Attorney General's reasonable cause determination was permissible, the Attorney General conducted an appropriate investigation and made an appropriate determination that reasonable cause existed to believe that the defendants engaged in a pattern or practice of discrimination and that the allegation of discrimination raised issues of general public importance.

Without conceding the necessity for making such a showing, the United States is compelled to correct the defendants' assertion that the Attorney General did not investigate the alleged violations of Title III. The United States advised defendant Fred Tillman of its investigation of violations of Title III of the ADA in a letter dated June 15, 2000. On Friday July 21, 2000, representatives of the United States Attorney's Office met with attorney Stephen Wakefield and management representatives of Century Management, to discuss options for resolving the complaint. At this meeting the parties agreed that the United States should conduct a preliminary survey of a representative group of restaurants managed by Century Management. On August 31, 2000, and thereafter the United States conducted surveys of ten McDonald's restaurants. On December 11, 2000, the United States Attorney wrote a letter to Stephen Wakefield advising him of the survey results and indicating that the United States believed that the items constituting barriers as listed in the attachment to the letter could be removed in a readily achievable manner.

The United States is confident that the surveys conducted by the United States Attorney as outlined above provided more than a sufficient basis for the Attorney General's reasonable cause certification.

III. CONCLUSION

For the foregoing reasons the Defendants' Motion for Summary Judgment should be denied.

Respectfully submitted,

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