UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:97CV747BO-1

FRANCES A. JAMES, Plaintiff, v. PETER PAN TRANSIT MANAGEMENT, INC., and THE CITY OF RALEIGH, NORTH CAROLINA, Defendants.	***AMICUS CURIAE* UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIESIN OPPOSITION TO DEFENDANT CITY OF RALEIGH'S OBJECTIONS TO THE ORDER AND RECOMMENDATION OF THE MAGISTRATE JUDGE REGARDING SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff Frances James is a woman with a disability who is paraplegic and uses a wheelchair for mobility. Ms. James lives in Raleigh, North Carolina and relies on public transportation for her transportation needs. Ms. James has sued the City of Raleigh and Peter Pan Transit Management, Inc., alleging that she has been denied equal access to CAT Connector service in violation of Titles II and III of the Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act" or "§ 504").

CAT Connector service is a combination fixed route/demand responsive public transportation service that supplements fixed route mass transit bus service in the Raleigh Metropolitan area. CAT Connector service is operated by Peter Pan Transit Management, Inc. ("Peter Pan") a private entity primarily engaged

in the business of transporting people, through a contract with the City of Raleigh ("City"). Peter Pan operates the CAT Connector buses, providing drivers, dispatchers, and maintenance personnel. The City of Raleigh provides the vehicles for a minimal leasing fee.

Ms. James filed suit seeking injunctive relief and damages, alleging that the City and Peter Pan were operating the CAT Connector service in violation of Titles II and III respectively. On August 31, 1998, defendants filed motions for summary judgment. Pursuant to Federal Rule of Civil Procedure 72(b), these motions were brought before Magistrate Judge Denson. On January 20, 1999, the Magistrate Judge filed a Recommendation and Order denying defendants' motions as they pertained to the ADA and Rehabilitation Act claims. Memorandum and Recommendation and Order, January 20, 1999 (hereinafter "Recommendation and Order"). On February 1, 1999, the City filed its objections to the Recommendation and Order.[1] Among other things, the City objects to the Magistrate Judge's finding that the City would be liable for violations that took place in the provision of CAT Connector service. The City argued that because it has a contract with a private entity (Peter Pan) to provide this service it has in

[1]Peter Pan filed its objections on January 31, 1999. In its objections the City attempts to incorporate Peter Pan's objections by reference. We address only the legal arguments raised by the City. To the extent the City incorporates Peter Pan's arguments with regard to these issues, we oppose their objections as well.

effect contracted away its responsibility to comply with Title II and the Rehabilitation Act. Second, the City argues that the Magistrate Judge was incorrect in finding that Ms. James might be entitled to damages, claiming that Title II and § 504 provide for damages only in cases where intentional discrimination has taken place and that no evidence of intent is present.

Defendants' arguments lack merit. First, the ADA, the Rehabilitation Act, and their implementing regulations make clear that public entities like the City cannot shirk their statutory responsibility by contracting with a private entity. Second, the magistrate judge's findings establish that damages may be available to Ms. James in this case, a matter which is properly left to the trier of fact.

II. THE CITY OF RALEIGH IS LIABLE FOR VIOLATIONS OF TITLE II COMMITTED BY PETER PAN

Congress expressly authorized the Justice Department and the Department of Transportation to issue regulations implementing both § 504 of the Rehabilitation Act and title II of the ADA, and to provide technical assistance to entities covered by the ADA. 29 U.S.C. § 794; 42 U.S.C. §§ 12134, 12149, 12164. See also 42 U.S.C. §§ 12186, 12206. In view of Congress' expressed delegation, each of these agencies' regulations should be accorded "controlling weight unless arbitrary, capricious, or manifestly contrary to the statute.'" ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324, 114 S. Ct. 835, 839 (1994), quoting

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984); see also Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 2208-09 (1998); Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 525 U.S. 687, 708, 115 S. Ct. 2407, 2418 (1995); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994). The same is true of the preamble or commentary accompanying the regulations since both are part of a department's official interpretation of legislation. Stinson v. United States, 508 U.S. 36, 45, 113 S. Ct. 1913, 1918 (1993), quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 65 S. Ct. 1215, 1217, (1945); see also United States v. Larionoff, 431 U.S. 864, 872-873, 97 S. Ct. 2150, 2155-56 (1977).

The regulations promulgated by both the Department of Transportation and the Department of Justice under the Rehabilitation Act and the ADA make clear that public entities such as the City cannot contract away their Title II and Rehabilitation Act liability. The Department of Transportation regulation implementing the transportation provisions of Titles II and III of the ADA and the Rehabilitation Act addresses this exact issue.

§ 37.23 Service under contract.

> (a) When a public entity enters into a contractual or other arrangement or relationship with a private entity to operate fixed route or demand responsive service, the public entity shall ensure that

> the private entity meets the requirements of this part that would apply to the public entity if the public entity itself provided the service.

49 C.F.R. § 37.23. Nor can the defendants look to the interpretive guidance of the Department of Transportation for relief. In its accompanying interpretation of the regulation the Department of Transportation makes the meaning of § 37.23 abundantly clear. "It ensures that, while a public entity may contract out its service, it may not contract away its ADA responsibilities." 49 C.F.R. Pt. 37, 56 Fed. Reg. at 45736 (1991). To the extent Peter Pan failed to comply with the requirements placed on the City under Title II and the Rehabilitation Act, the City has violated those laws. The legislative history makes clear that this is exactly what Congress intended.

> With regard to the operation of a system providing public transportation, if a public entity has entered into a contractual or other arrangement or relationship with a private entity to operate the system, or a portion of the system, the public entity must assure that the same accessibility requirements are met by the private entity for service provided under a contractual, or other arrangement or relationship as would apply if the public entity were operating the system, or portion of the system, itself.

H.R. Rep. No. 101-485, pt. 1 at 26 (1990) (as quoted in 49 C.F.R. Pt. 37, 56 Fed. Reg. at 45588 (1991)).

The Title II regulation promulgated by the Department of Justice contains similar requirements applicable to public entities that contract with private entities for the provision of

services. The Department of Justice regulation "applies to all services, programs, and activities provided by or made available by public entities." 28 C.F.R. § 35.102(a). That regulation goes on to prohibit discrimination in the provision of any aid, benefit, or service by public entities "directly or through *contractual, licensing, or other arrangements*, on the basis of disability." 28 C.F.R. § 35.150(b)(1)(emphasis added).[2] The Department's preamble commentary further illustrates what this language means.

> All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements.

28 C.F.R. Part 35, 56 Fed. Reg. at 35696 (1991).

The ADA also directs the Attorney General to develop Technical Assistance manuals interpreting the ADA's requirements and giving further guidance to entities covered by titles II and III of the ADA. 42 U.S.C. § 12206(c)(3). As an agency directed by Congress to render technical assistance, the interpretations set forth by the Department in its Technical Assistance Manuals

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[2]This language was identical to that used by both agencies when they promulgated their regulations implementing the Rehabilitation Act. Discriminatory actions on the basis of disability were prohibited whether done "directly *or through contractual, licensing, or other arrangements*," 28 C.F.R. § 42.503 (b)(1), (3); 49 C.F.R. § 27.7(b)(1)(emphasis added). See also, 49 C.F.R. § 27.7(b)(4)(using similar "directly or through other arrangements," language).

are entitled to deference. See Bragdon, 118 S. Ct. at 2209; Paralyzed Veterans of America v. D.C. Arena, L.P., 117 F.3d 579, 584-86 (D.C. Cir. 1997); Innovative Health Sys. v. City of White Plains, 931 F. Supp. 222, 233 n.4 (S.D.N.Y. 1996); Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 36-37 n.4 (D.D.C. 1994).

Indeed, as the Magistrate Judge found, the Technical Assistance Manuals deal with this issue directly. Recommendation and Order at 19. One example, found in the Technical Assistance Manuals for both titles II and III best illustrates what the ADA requires from title II entities like the City.

> ILLUSTRATION 4: A private, nonprofit corporation operates a number of group homes under contract with a State agency for the benefit of individuals with mental disabilities. These particular homes provide a significant enough level of social services to be considered places of public accommodation under title III. The State agency must ensure that its contracts are carried out in accordance with title II, and the private entity must ensure that the homes comply with title III.

The Americans with Disabilities Act Title II Technical Assistance Manual, II-1.3000, Illustration 4. See also The Americans with Disabilities Act Title III Technical Assistance Manual, III-1.7000, Illustration 3.

Ignoring the clear statutory and regulatory scheme of both the Rehabilitation Act and the ADA, as well as the guidance afforded by the Department of Justice, the defendants ask this Court to put aside the Magistrate Judge's ruling and find that

common law agency principles require that the City cannot be held liable for the actions of its contractor, Peter Pan. In support of this argument they put forth only one relevant case, Palmer v. City of Yonkers, 22 F. Supp.2d 283 (S.D.N.Y. 1998).[3] In Palmer, the District Court for the Southern District of New York applied New York common law regarding independent contractors to

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[3]The other two cases relied upon by the City do not stand for the proposition that public entities can evade their Title II and Rehabilitation Act responsibilities simply by contracting with private entities to provide the services at issue. Neff v. American Dairy Queen Corp., 58 F.3d 1063, (5th Cir. 1995), cited by the City, deals only with the issue of whether private franchisors can be held liable for actions or failures of private franchisees to make architectural changes to an existing building under a provision of Title III of the ADA (governing public accommodations and commercial facilities) that covers any entity that "owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The decision, which addresses the applicability of this specific Title III provision, and the attendant obligations to make a private business accessible, turns on the provisions contained in a particular franchise agreement and the degree of control over the space that is necessary before the obligation to do barrier removal exists. It has nothing to do with Title II or the issue raised by the City in its objections.

The City's reference to Sharrow v. Bailey, 910 F. Supp. 187 (M.D.Pa. 1995), is similarly baseless. Here, the District Court for the Middle District of Pennsylvania ruled on the summary judgment motion of defendants (a Title III hospital) charged with discriminating against a patient with HIV. Defendants claimed that they were not liable because the doctor alleged to have committed this violation of the law was not an employee simply because he had admitting privileges. The Court declined to rule on this issue leaving it open to discovery but did say that the hospital was liable under Title III and the Rehabilitation Act to the extent that it could be held vicariously liable for the doctor's actions. The Court did not go on to say under what circumstances such a finding could be made and the case fails, therefore, to address the issue presently before the Court. Id. at 195.

determine that where a city had contracted with a private company to provide ambulance service the City was not liable for ADA violations committed by that provider. In doing so, the New York court failed to examine the relevant statutory and regulatory provisions of Title II and the Rehabilitation Act. The New York Court explicitly stated that both parties agreed that only general vicarious liability principles applied under the ADA, something the statutory and regulatory schemes clearly contradict. Palmer, 22 F. Supp.2d at 286. Because the New York Court based its decision on an apparent misunderstanding of the clear mandates of the statutes and regulations, the ruling in Palmer must be discounted and should be rejected by this Court.

Consistent with the regulations and interpretation set forth by the federal agencies charged with enforcing the relevant provisions of Title II, Magistrate Judge Denson determined, "A public entity must not only ensure by contract that the private entity with whom it contracts complies with Title II, but further, must ensure that the private entity complies with the contract." Recommendation and Order, at 20 (citations omitted). In doing so, he correctly rejected the City's attempt to escape liability for the discriminatory treatment handed down to its citizens with disabilities who attempt to utilize public transportation. His ruling on this issue should be upheld.

III. THE TRIER OF FACT MUST DETERMINE WHETHER THE CITY IS LIABLE FOR DAMAGES UNDER TITLE II AND THE REHABILITATION ACT

The Magistrate Judge ruled that based on the evidence presented, "a reasonable jury could find that Plaintiff was discriminated against in violation of the Rehabilitation Act [and that] Plaintiff may be entitled to compensatory damages." Recommendation and Order at 17.[4] In their objection, defendants make a vague reference to the level of intent required for public entities and Federal funding recipients to be liable for damages, stating, "Because the City has not committed intentional discrimination, money damages are not available against it." City's Memorandum in Support of Motion for Summary Judgment, at 3.

As the Magistrate Judge recognized in his Recommendation and Order, the full panoply of remedies, including compensatory damages, are available to victims of discrimination under § 504.[5] Pandazides v. Virginia Board of Ed., 13 F.3d 823, 829-832 (4th Cir. 1994); W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995);

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[4] Having failed to raise the issue of damages in its motion for summary judgment, the City attempts once again to attach itself to Peter Pan, stating that it can only be held liable for damages to the same extent that Peter Pan, a Title III entity, can be held liable. City's Memorandum in Support of Motion for Summary Judgment, at 13; City of Raleigh's Objections to Recommendation and Order, at 5-6. As stated above, Title II entities like the City cannot evade their ADA and Rehabilitation Act responsibilities by contracting with private entities.

[5] The Magistrate Judge discussed only the Rehabilitation Act in his opinion.

Rodgers v. Magnet Cove Public Schools, 34 F.3d 642, 644 (8th Cir. 1994); Waldrop v. Southern Co. Services, 24 F.3d 152, 157 (11th Cir. 1994); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1106-1111 (9th Cir. 1987); Saylor v. Ridge, 989 F. Supp. 680, 690-91 (E.D. Pa. 1998).

The remedies available for violations of title II of the ADA are coextensive with those available under § 504. Title II affords plaintiffs the "remedies, procedures, and rights" set forth in 29 U.S.C. § 794a (which governs the relief available under § 504). 42 U.S.C. § 12133. In turn, 29 U.S.C. § 794(a)(2) gives § 504 plaintiffs the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964," 42 U.S.C. § 2000d et seq. (title VI). Damages are available under title VI. See 42 U.S.C. § 2000d-7(a)(2). Compensatory damages are, therefore, available under title II of the ADA as well. Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998); Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 330-331 (2d Cir. 1998); Johnson v. City of Saline, 151 F.3d 564, 573 (6th Cir. 1998); Thrope v. State of Ohio, 19 F. Supp. 2d 816, 826, n. 12 (S.D. Ohio 1998); Niece v. Fitzner, 922 F. Supp. 1208, 1219 (E.D. Mich. 1996); McKay v. Winthrop Board of Ed., 1997 WL 816505, 2-3 (D.Me. 1997).

Defendants do not claim that compensatory damages are not available to plaintiffs in Title II and Rehabilitation Act cases,

but only that the Magistrate Judge is mistaken in finding that a trier of fact could reasonably find that the City's actions or failures to act had the requisite intent to make damages available in this case. The City fails, however, to address this matter in detail. An examination of the applicable standard for awarding damages in Title II and Rehabilitation Act cases, and the factual findings of the Magistrate Judge clearly show that, at a minimum, it should be left to the trier of fact to determine the availability of compensatory damages in this case.

In his Recommendation and Order, Magistrate Judge Denson recommended that defendants' motions for summary judgment regarding plaintiffs' claim for monetary damages be denied. He based his decision on Pandazides v. Virginia Board of Ed., 13 F.3d at 823 (4th Cir. 1994). In Pandazides, the Fourth Circuit considered the case of a woman with a learning disability who claimed discrimination under the Rehabilitation Act when she was refused certain accommodations she claimed she needed to take a standardized test required for teaching certification. While finding that intentional discrimination is required the Court rejected the need for a showing of discriminatory animus and acknowledged that a failure to accommodate could support a damages claim. Id. at 830, n. 9.

Other cases addressing the issue of the availability of damages under title II and the Rehabilitation Act follow the same

logic. In Proctor v. Prince George's Hospital Center, 1998 WL 931111 (D.Md. 1998), the District Court for the District of Maryland looked at this same issue and arrived at a similar conclusion. In Proctor, a county hospital failed to provide a patient who was deaf a sign language interpreter to explain the effects of and answer questions regarding his medical treatment. The hospital argued that damages should not be available because the discrimination was "'the result of thoughtlessness and indifference' rather than because of any intent to deny Plaintiff's rights." Id. at 9. The Court disagreed. "[I]ntentional discrimination is shown by an intentional, or willful violation of the Act itself. . . [even if the defendants] believed themselves to be within the confines of the law," Id. at 10 (quoting Bartlett v. New York State Board of Law Examiners, 970 F. Supp. 1094, 1151 (S.D.N.Y. 1997).

The Second Circuit Court of Appeals reached a similar conclusion when it considered the case of Bartlett v. New York State Board of Law Examiners, 156 F.3d 321 (2d Cir. 1998). In Bartlett a woman with a learning disability sued the Board of Law Examiners for failing to provide her with requested accommodations. The Board had repeatedly denied her request for accommodations based on use of a diagnostic test that the Court found to be an inaccurate indicator of the plaintiff's learning disability. Id. at 331. The Court found that by repeatedly

using a test that was inaccurate the defendants had exercised sufficient intent for an award of damages to be appropriate under the ADA and Rehabilitation Act. The Court found that "intentional discrimination may be inferred when a policymaker acted with at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result," Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 331 (2d Cir. 1998)(internal quotation marks and citations omitted).

The Supreme Court recently addressed the issue of the availability of compensatory damages under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (Title IX) in Gebser v. Lago Vista Ind. School Dist., 524 U.S. 274, 118 S. Ct. 1989 (1998).[6] In Gebser, a high school student brought suit against a school district under Title IX, claiming that she had been sexually harassed by one of the school district's teachers. The Supreme Court ruled that the school district was not liable for damages under Title IX for actions about which it had no knowledge. In an opinion by Justice O'Connor, the Court found that in cases that do not involve the official policy of a recipient entity, damages would only be available where "an

[6]Because Title IX borrows the remedial scheme of Title VI of the Civil Rights Act of 1964, the same remedial scheme incorporated into the Rehabilitation Act and Title II, decisions regarding damages interpreting one of the statutes often are used by courts to apply to all three.

official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on recipients' behalf has actual knowledge of the discrimination . . and fails adequately to respond." 118 S. Ct. at 1999.

The evidence put forth by the plaintiff raises a genuine issue of material fact as to eligibility for damages under both Gebser and Pandazides. In her memoranda opposing defendants' motions to dismiss, plaintiff relied upon facts taken from inspection forms, official memoranda, and deposition testimony, including that of drivers, mechanics, dispatchers, and Peter Pan and City officials to support her claim that defendants continuously and knowingly violated various provisions of the Department of Transportation regulation in violation of the ADA and Rehabilitation Act. Among other things, plaintiff alleged that defendants 1) failed to maintain the platform lifts on the buses, in part because they did not employ mechanics qualified to repair them, Memorandum in Opposition to Peter Pan's Motion for Summary Judgment, 7, 17; 2) failed to check the platform lifts on a regular basis, Id. at 7; 3) failed to take buses out of service that they knew had non-working lifts, Id. at 7, 12-13; 4) failed to ensure that all of the buses in service were equipped with working securement equipment to stabilize passengers in wheelchairs, Id. at 10-11; and 5) failed to properly train all of the drivers on the proper use of the wheelchair lifts and

securement equipment. Id. at 14-17. Plaintiff also cites evidence that indicates that Peter Pan and City officials knew of the acts of discrimination and in some cases may have specifically directed that it occur.[7] While the City does not claim that its officials, or officials from Peter Pan did not know of the longstanding problems with the CAT Connector service, plaintiff cites evidence that reports and memoranda informed City officials of many of the problems. Memorandum in Opposition to Defendant City's Motion for Summary Judgment, at 2. Plaintiff alleges that as a result of these violations people with disabilities were often delayed or left stranded, were forced to miss appointments and, on at least one occasion, received physical injuries.

The Magistrate Judge, who had full access to the record in this case, clearly found the plaintiff's evidence persuasive. He stated that the evidence indicated that passengers with disabilities, including the plaintiff, were continuously denied

[7]Plaintiff put forth evidence in her brief opposing the City's motion for summary judgment that indicates that the contract provisions insisted on by the City would encourage Peter Pan to fail to comply with the ADA and Rehabilitation Act. According to plaintiff, the scheduling requirements present in the contract do not allow sufficient time to board and unload passengers with disabilities using the platform lifts. The contract also specifies that liquidated damages be paid to the City by Peter Pan when they fail to meet the required schedule. As a result, use of the lifts is discouraged because it may result in the imposition of these fines. Memorandum in Opposition to Defendant City's Motion for Summary Judgment, at 9-10.

service on CAT Connector vehicles. Recommendation and Order at 5-8, 14. He found that the evidence indicated that defendants failed to maintain the platform lifts or to inspect them on a regular basis, Id. at 13-15; that the buses were left in service with non-functioning lifts for more than three days (the regulatory maximum), Id. at 15; and that drivers were not properly trained to use the platform lifts. Id.[8]

Nor does it matter that the defendants may have attempted to address individual problems as they arose. To the extent that the terms and practices embodied in and permitted by their contract with Peter Pan resulted in violations of the regulations and the provision of a reduced level of public transportation service to people with disabilities, discrimination occurred. The longstanding failure to correct these problems in a meaningful way indicates a failure to effectively address these issues, which center on maintenance of City-owned vehicles,

[8]In Frye v. Board of Ed. of the County of Ohio, 1999 WL 22733 (4th Cir. 1999), the Fourth Circuit used the Gebser standard to determine that a school board was not liable for sexual harassment committed by one of its teachers because the plaintiff failed to show that the board knew of the harassment "and was deliberately indifferent to it." 1999 WL 22733 at 2. In Frye, however, the Court relied on facts that showed the school reacted almost instantly and took decisive corrective action within days of learning of the sexual harassment allegations. Id. That is hardly comparable to the findings of Magistrate Denson, who found evidence that discriminatory treatment continued repeatedly over several years.

training of employees, and the treatment of individuals with disabilities in a public transportation setting.

Because the plaintiff has clearly set forth evidence that she was discriminated against in receipt of public transportation service, and that such discrimination occurred with the knowledge of those with authority at Peter Pan and the City, the City's objections should be denied.

IV. CONCLUSION

For the reasons set forth above, the United States respectfully requests that defendants objections to the Magistrate Judge's Recommendation and Order be rejected to the extent they pertain to plaintiff's ADA and Rehabilitation Act claims.

Respectfully submitted this 1st day of March, 1999.

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