IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JEFFREY GORMAN,	)	
	)	
Plaintiff	)	No. 95-0475-CV-W-8
	)	
and	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Intervenor	)	
	)	
vs.	)	
	)	
	)	
STEVEN BISHOP, Chief, KCMO Police Dept., et al.,	)	
	)	
Defendants.	)	

UNITED STATES' SUGGESTIONS IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

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I. BACKGROUND

On May 30, 1995, Jeffrey Gorman, an individual with a disability who uses a wheelchair, filed this civil action against Steven Bishop, Chief of Police of the Kansas City, Missouri Police Department ("KCMOPD"), Neal Becker, a police officer with the KCMOPD, and several persons who, on and prior to May 31, 1992, were members of the KCMOPD's Board of Commissioners ("the Board"). The complaint alleges violations of title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12115-12161, and section 504 of the Rehabilitation Act of 1973, (as amended) ("section 504"), 29 U.S.C. § 794.[1]

[1] The same acts and omissions complained of by the plaintiff in this action were the basis of a lawsuit that the

The plaintiff alleges that on May 31, 1992, defendant Becker detained him, arranged for his transport in connection with his arrest, removed him from his wheelchair, and transported him to police headquarters in a vehicle that was not suitable for individuals with his disability. As a result of this conduct, the plaintiff claims he sustained injuries and his wheelchair was damaged during transport. See Complaint at ¶¶ 14, 19, and 20. The plaintiff also claims that defendant Bishop, as Chief of Police of the KCMOPD, and the remaining defendants, as members of the Board, failed to fulfill their responsibility to implement the requirements of the ADA and section 504 within the KCMOPD. This responsibility included, the plaintiff contends, providing vehicles suitable for transporting individuals who use wheelchairs, id. at ¶ 15; making reasonable modifications in departmental policies, practices, and procedures that were

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plaintiff filed in 1993. Gorman v. Guitars & Cadillacs, L.P., et al., No. 93-0487-CV-W-8 (W.D. Mo.). In their motion for summary judgment in that case, the present defendants argued that, for exactly the same reasons as they have stated in their motion and supporting suggestions in this case, title II is unconstitutionally vague. They also argued that title II and section 504 do not apply to arrest procedures.

This court granted the United States leave to intervene in that case with respect to the constitutional issue and leave to participate as amicus curiae with respect to the coverage issues. On June 17, 1994, the United States circulated to all parties a brief, as intervenor and amicus curiae, in support of the plaintiff's opposition to the defendants' motion for summary judgment. On June 24, 1994, this court dismissed case No. 93-0487-CV-W-8 without prejudice, following a June 21, 1994 agreement between the parties that permitted re-filing of the action within one year of dismissal. The complaint in the present action was filed in accordance with that agreement.

necessary to avoid discriminating against the plaintiff on the basis of his disability, id. at ¶ 16; and training police officers in the proper handling of arrestees with spinal cord injuries, like the plaintiff. Id. at ¶ 17.

On June 7, 1995, defendants served upon the plaintiff and upon the United States copies of their Partial Motion to Dismiss ("motion") and their Suggestions in Support of Partial Motion to Dismiss ("Suggestions" or "Def. Mem."), in which they argued that the plaintiff's claims based upon title II of the ADA should be dismissed on the ground that the statute is unconstitutionally vague. Pursuant to 28 U.S.C. § 2403(a), the United States has filed a motion to intervene in this case as of right with respect to the issue of the ADA's constitutionality. This brief argues that title II of the ADA is not unconstitutionally vague.

II. TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS NOT UNCONSTITUTIONALLY VAGUE.

It is well-settled that when interpreting the meaning of words in a statute challenged as unconstitutionally vague, courts must consider not only the words of the statute themselves, but the limiting construction given to them by the statute's legislative history, see, e.g., U.S. v. Articles of Drug, 825 F.2d 1238, 1244 (8th Cir. 1987), by the agencies charged with enforcing the statute, see, e.g., Ward v. Rock Against Racism,

491 U.S. 781, 795 (1989),[2] Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982), and by caselaw interpreting the particular words at issue. See, e.g., Ginsburg v. New York, 390 U.S. 629, 643 (1968); Moore v. Clarke, 904 F.2d 1226, 1233 (8th Cir. 1989).

The language of title II itself is sufficiently clear to have put defendants on notice of their obligations to make modifications to existing police department policies, practices, and procedures and to remove "transportation barriers," in order to avoid discriminating against individuals with disabilities. The ADA's legislative history supports the plaintiff's claim that a failure to train police officers in the proper manner of interacting with individuals with disabilities may constitute discrimination within the meaning of title II. The regulation implementing title II, 28 C.F.R. Pt. 35 (1994) ("the regulation" or "the title II regulation"), that was promulgated by the Department of Justice pursuant to statutory directive,[3] and the Department's interpretation of the regulation in the regulation's Preamble, 28 C.F.R. Pt. 35, App. A (1994), support this theory as well, and also define the extent of the defendants' obligation to provide vehicles suitable for arrestees with mobility

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[2] See also United States v. Schneiderman, 968 F.2d 1564, 1568 (2d Cir. 1992) (administrative regulations and interpretations may provide sufficient clarification for statutes that might otherwise be deemed vague).

[3] Section 204(a) of the ADA, 42 U.S.C. § 12134(a), requires that within one year after enactment of the ADA, "the Attorney General shall promulgate regulations in an accessible format that implement this subtitle."

impairments. Finally, a Federal court has upheld, against a vagueness challenge, terms in title III of the ADA, 42 U.S.C. §§ 12181-12189, that are intended to have the same meaning as the same terms in title II. See Pinnock v. International House of Pancakes, 844 F. Supp. 574 (S.D. Cal. 1993), cert denied, 114 S. Ct. 2726 (1994), appeal dismissed as moot, No. 94-55030 (9th Cir. July 21, 1994). That case strongly favors a finding in the instant case that title II is not unconstitutionally vague.

A. Police Departments Are Required to Provide Police Officers With Training in the Proper Treatment of Persons With Disabilities, Including Arrestees.

The plaintiff has alleged that the defendants violated title II by failing to make "reasonable modifications" to existing policies, practices, and procedures, see Complaint at ¶ 16, and, with respect to the Chief of Police and the members of the Board, by failing to ensure that police officers were adequately trained in arresting and transporting persons with mobility impairments. Id. at ¶ 17. Title II specifically contemplates that in some circumstances modifications to a public entity's policies, practices, and procedures will be necessary to avoid discrimination. Section 202 protects from discrimination by public entities any "qualified individual with a disability," see 42 U.S.C. § 12132, whom section 201(2) defines as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids or services, meets the

> essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12181(2) (emphasis added).

Section 35.130(b)(7) of the title II regulation perhaps most pointedly defines the obligation. It states that modifications to policies, practices, and procedures shall be made when "necessary to avoid discrimination on the basis of disability," unless it can be demonstrated that making the modifications would "fundamentally alter the nature of [a] service, program, or activity." 28 C.F.R. § 35.130(b)(7).

A police department's obligation to provide adequate training to officers in the proper treatment of individuals with disabilities is a specific application of this general rule.[4] The House Judiciary Committee Report states that title II requires such training when it is necessary to avoid discriminating against persons with disabilities, including persons arrested by the police:

> In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail,

[4] The obligation may also as a specific application of section 202's general requirement that individuals with disabilities not be "subjected to discrimination" by public entities. See 42 U.S.C. § 12132.

> resulting in further seizures. Such discriminatory treatment based on disability can be avoided by proper training.

H.R. Rep. No. 485(III), 101st Cong., 2d Sess., at 51, reprinted in, 1990 U.S.C.C.A.N. 445, 473 (hereafter "House Judiciary Report"). The discussion of section 35.130(b) of the title II regulation found in the Preamble says essentially the same thing. See 28 C.F.R. Pt. 35, App. A, at 451.[5]

B. The Statute and the Title II Regulation Make it Clear That Public Entities Must Provide Vehicles Accessible to persons With Disabilities, or at Least Modify Existing Vehicles, Where Necessary to Avoid Discriminating on the Basis of Disability.

The plaintiff also alleges that the KCMOPD should have had vehicles suitable for arrestees with mobility impairments. Complaint at ¶ 15. This allegation is consistent with section 201(2) of the ADA, which requires "the removal of architectural, communication, or transportation barriers," 42 U.S.C. § 12131(2), and with section 35.150(b)(1) of the regulation, which states that, in meeting the requirement to provide access to programs, services, and activities, public entities may undertake

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[5] The Department of Justice declined to add a provision specifically requiring that police officers receive training on the subject of how to treat persons with disabilities because the Department believed that

> [d]iscriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.

28 C.F.R. Pt. 35, App. A, at 449.

"alteration of existing facilities and construction of new facilities" and may use "accessible rolling stock or other conveyances." 28 C.F.R. § 35.150(b)(1).

Of course, this obligation, like the obligation to make reasonable modifications to policies, practices, and procedures, is not without limitation. Section 35.150(a)(3), for example, says that public entities are not required to take any actions to afford access to their services, programs, and activities that would result in a "fundamental alteration" of those services, programs, and activities or in "an undue financial or administrative burden." 28 C.F.R. § 35.150(a)(3). The regulation itself does not define the terms "fundamental alteration" and "undue financial and administrative burden." However, the Preamble discussion of section 35.150(b)(3) clearly indicates that these terms are intended to be defined in the same way that cases interpreting the same terms under section 504, including Southeastern Community College v. Davis, 442 U.S. 397 (1979), and the Circuit court decisions following Davis, have defined them. See 28 C.F.R. Pt. 35, App. A, at 457, 463.[6] The

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[6] The purpose of title II is to extend the same rights and remedies available under section 504 to those State and local government entities that do not receive Federal financial assistance. See House Judiciary Report at 49, reprinted in, 1990 U.S.C.C.A.N. 445, 472. Compare 42 U.S.C. § 12132, with, 29 U.S.C. § 794(a). Consistent with this Congressional intent, section 204(b) of the ADA reads as follows:

> (b) Relationship to Other Regulations. Except for "program accessibility, existing facilities" and "communications", regulations [promulgated by the Attorney General] under subsection (a) shall be

Eighth Circuit has had no difficulty applying the standards set out in Davis. See, e.g., Pottgen v. Missouri State High School Activities Association, 40 F.3d 926 (8th Cir. 1994); Kohl v. Woodhaven Learning Center, 865 F.2d 930 (8th Cir. 1989), cert. denied, 493 U.S. 892 (1990).

It is true that there is no regulatory language or caselaw interpreting title II that specifically tells police officers how to arrest and transport individuals who have disabilities like the plaintiff's. See Def. Mem. at 2. This degree of specificity, however, is not required to withstand a vagueness challenge. It is firmly established that statutes that regulate economic conduct and impose civil rather than criminal liability, like the ADA, are subject to less stringent vagueness standards than are statutes that impose criminal liability or abridge constitutionally protected rights. Hoffman Estates, 455 U.S. at

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> consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). With respect to "program accessibility, existing facilities" and "communications", such regulations shall be consistent with analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to Federal conducted activities under such section 504.

42 U.S.C. § 12134(b). It is noteworthy that despite the linkage between title II and section 504, the defendants have not challenged section 504 as unconstitutionally vague. Their motion and supporting evidence suggestions offer no explanation of what differences exist between title II and section 504 that would justify challenging the former as unconstitutional while apparently conceding the constitutionality of the latter.

495 n.7 & 498; Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); U.S. v. Articles of Drug, 825 F.2d at 1244; D.C. & M.S. v. City of St. Louis, 795 F.2d 652, 654 (8th Cir. 1986); Horn v. Burns & Roe, 536 F.2d 251, 254 (8th Cir. 1976).[7] Indeed, the Supreme Court has upheld, in the face of vagueness challenges, statutes imposing criminal liability that have language similar to title II's. See, e.g., Boyce Motor Lines v. United States, 342 U.S. 337, 339 (1952) (upholding a statute requiring truck drivers who carry explosives or flammable liquids to avoid driving into congested thoroughfares "so far as practicable, and where feasible").

C. Caselaw Has Upheld as Constitutional Words, Phrases, and Concepts in Title III of the ADA That Are Similar to Those in Title II.

We are aware of at least one case in which a court upheld title III of the ADA in the face of a vagueness challenge. See Pinnock, supra. In Pinnock, the court held that the title III implementing regulation, 28 C.F.R. Pt. 36 (1994), and its Preamble, 28 C.F.R. Pt. 36, App. B (1994), sufficiently clarified the meaning of the term "reasonable modifications" so as to avoid

[7] In Horn, the plaintiff challenged as unconstitutionally vague a Nebraska statute which provided for a two-year statute of limitations of claims based upon "professional negligence." The Eighth Circuit dismissed the plaintiff's claim, noting that he had not suggested more specific language that would have withstood the vagueness challenge short of a list of those professions that were covered. "Even if more specific language could be devised," the court observed, "it is apparent that the absence of criminal sanctions requires less literal exactitude in order to comport with due process." Horn, 536 F.2d at 254-55.

a claim that this term was vague. Pinnock, 844 F. Supp. at 582.[8] Pinnock also relied upon the fact that several cases have interpreted the term "fundamental alteration" under section 504 when it concluded that the same term in title III was not unconstitutionally vague. Id.

The concepts of "reasonable modifications" and "fundamental alteration" found in title II are intended to carry essentially the same meanings as they do in title III. See 28 C.F.R. Pt. 35, App. A, at 451; House Judiciary Report at 52, reprinted in, 1990 U.S.C.C.A.N. at 475.[9] Pinnock's analysis of title III is, we

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[8] Section 302(b)(2)(A)(ii) defines as unlawful discrimination a public accommodation's

failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford [a public accommodation's] goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity could demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii). The regulation implementing this section of the ADA is found at 28 C.F.R. § 36.302.

[9] The Judiciary Committee Report unequivocally states the Committee's intention that "the regulations under title II incorporate interpretations of the term discrimination set forth in titles I and III of the ADA to the extent that they do not conflict with the Section 504 regulations." House Judiciary Report at 52, reprinted in, 1990 U.S.C.C.A.N. at 475. The Preamble to the title II regulation makes it clear that this general directive applies specifically to the terms "reasonable modifications" and "fundamental alteration" found in section 35.130(b)(7) of the title II regulation. 28 C.F.R. Pt. 35, App. A, at 451. Section 35.130(b)(7) is essentially the same requirement as that found in section 302(b)(2)(A)(ii), except that the former requirement applies to public entities while the latter applies to public accommodations. See 42 U.S.C. § 12182(b)(2)(A)(ii).

believe, careful and persuasive, and no Federal court has reached a contrary conclusion. Pinnock, therefore, strongly supports the government's position in the present case that title II of the ADA is not unconstitutionally vague.[10]

III. CONCLUSION

For all of the foregoing reasons, the United States asks this Court to deny Defendants' Partial Motion to Dismiss.

Respectfully submitted,

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[10] See Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ill. 1993). In Noland, the court was faced with the question of whether the ADA creates an enforceable right sufficient to support a claim brought pursuant to 42 U.S.C. § 1983. The court held that "[t]he ADA's use of the term "reasonable" in 42 U.S.C. § 12131(2) to describe the required modifications of programs or services [did] not render [plaintiff's] interest, and that of all other individuals with disabilities, "vague and amorphous." Id. at 484.