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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SALMA MERRITT, ET AL,

Plaintiffs,

v.

KEVIN E. MCKENNEY, ET AL,

Defendants.

Case No. _ CV-13-01391-JSW

BRIEF OF *AMICUS CURIAE*

DATE: August 30, 2013
TIME: 9:00 a.m.
Courtroom: 11, 19th Floor
JUDGE: Jeffrey S. White

I. INTRODUCTION

On September 25, 2008, President George W. Bush signed Public Law 110-325, which became known as the ADA Amendments Act (ADAAA) of 2008. President Bush and the U.S. Congress produced the ADAAA in direct response to certain U.S. Supreme Court rulings which limited the state immunity and other provisions of the original Americans With Disability Act (ADA) of 1990. The ADAAA reversed those Supreme Court decisions.

This case concerns two disabled women, one elderly, and their aide who is alleged to have been charged with the tasks of securing what appears to be the most basics of accommodations. Namely: 1) To have the timing of proceedings delayed to permit adequate time for preparation of those proceedings; 2) For Aide to interpret for them what their needs were; 3) Order for telephone to be turned back on; and 4) Direct Conservator to not prevent communications with Aide.

The Aide himself is alleged to have been punished, or retaliated against, for the precise efforts of presenting the ADA Accommodation requests'.

The defendants have moved to dismiss on several grounds. Dr. Huffer, as *amicus curiae* respectfully urges the Court to deny the motions as to plaintiffs ADAAA and § 1982 claims, because contrary to the basis on which the Defendants seek to dismiss:

(1) Plaintiffs have pled *prima facie* claims under title II of the ADA and ADAAA;

(2) Congress expressly abrogated the States' eleventh amendment immunity for suits brought pursuant to these provisions;

(3) Under title II of the ADA and ADAAA, the defendants can be sued in their official capacities; and,

(4) The Plaintiffs have alleged clear administrative activities which does not permit the defendant judges to be shielded by absolute immunity.

Although the *Amicus,* cannot be a witness to the verity of the claims, she can assert, based upon a reading of the original, First and Second Amended Complaints, that it appears that the plaintiffs do allege facts which support claims under 42 U.S.C. §§ 12131 et seq., 12203 et seq. and § 1983.

II. INTERESTS OF AMICUS

Dr. Karin Huffer, of Equal Access Advocates, submits this brief after being contacted by a lawyer colleague about the existence of this case. Dr. Huffer interests' in this matter stems from her decades-old work in researching interactions of persons with disabilities with lawyers and the courts throughout the United States. She is not hired by, nor taking sides, of either party in this matter and simply wish to advance the implementation and enforcement of Federal Law, as regards to the ADAAA, in all fifty states.

III. STATEMENT OF FACTS

The ADA was enacted due to a pervasive history of disabled persons being discriminated against by both State and private actors. Congressional hearings from 1980 to 1988, produced volumes of evidence which demonstrated that disabled persons were not only facing discrimination from the general public, but that state agencies, including judges, were, at best, insensitive to the needs for accommodations, and in many cases discriminated directly against disabled persons. The pre-2008 U.S. Supreme Court decisions limited which disabilities would be acknowledged under the ADA. *13 Tex. J. on C.L. & C.R. 187* Westlaw.

. The ADAAA mandates for federal judges who are adjudicating discrimination claims post-ADAAA to focus on whether discrimination has occurred, rather than on whether the person seeking the law's protection has an impairment that fits neatly within the technical definition of the term "disability." And it retains the ADA's fundamental definition of disability as an impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. Yet critically, it does change the way that the statutory terms should be interpreted. *Ibid.*

According to the complaints on file, the women defendants have significant disabilities which prohibit both from working and performing other normal daily activities.[1] The Defendants are not challenging the fact of disabilities. *Defendants Mckenney et al* Motion to Dismiss.

Plaintiff Salma Merritt was undergoing medical treatment for her disability outside of the state and country. There were several court proceedings coming up, one of which was the March 2013 trial, and it is alleged that due to her disability limitations she: 1) Needed more time to prepare for a particular court hearing; 2) Under physician's orders sought to postpone commencement of trial in order to complete the medical treatment; 3) Sought to have depositions

[1] Amicus wishes to respect the medical and disability privacy of the plaintiffs, and do not see the need to rehash such information here, as the Court can readily access what they are.

limited to what California law limits it to, and not go beyond. *Plaintiffs First & Second Amended Complaints.*

The allegations suggest that plaintiff Salma Merritt has mostly limitations on how much time she can spend or endure certain things, and this is surmised from the fact that each of her ADA requests' involves time limitations. *Ibid.*

Plaintiff Starks-Pacheco has severe eye impairment, heart issues and according to defendants, dementia. Her requests' concerned her wishing to have: 1) Mr. Merritt be an interpreter for her before the Superior Court; 2) To be free to have continued communications with Mr. Merritt; and, 3) To have her telephone turned back on, apparently to not be isolated from the world. *Ibid.*

Plaintiff Starks-Pacheco appears to be in a much more dire state and condition as the allegations articulate an elderly person who is incapable of functioning without assistance. *Ibid.*

Defendant Mckenney is alleged to have totally prevented the Merritts from having their ADA requests' processed with the ADA Coordinator repeatedly and that the Coordinator appears to have gone along with this. This defendant is also alleged to have punished them by designating them vexatious (whether for making the ADA requests is unclear); and by refusing to suspend their March 2013 trial date in order to permit Plaintiff Salma Merritt to complete her disability medical care and treatment; therefrom controlled the ADA coordinator to ensure that she did not override his decision to not process the ADA requests'. *Ibid.*

Defendant Pierce is alleged to have denied the Merritts ADA requests' based on the premise that ADA requests for continuance was not legally authorized; failed to send the requests' on to the ADA coordinator and took up her role himself; then controlled ADA coordinator in a way which ensured that she did not override his decision. *Ibid.* On another occasion defendant Pierce is alleged to have ordered Mr. Merritt to acquire additional medical information regarding

accommodation need and once it was provided he again controlled the decision that the ADA coordinator made in denying the accommodation requests'. *Ibid.*

Defendant Manoukian is alleged to have denied the accommodation of limiting the time in which depositions could be conducted upon Plaintiff Salma Merritt and when depositions could actually be conducted based upon her currently undergoing disability medical treatment. He also controlled the decision making process of the ADA coordinator by taking on her role and publicly communicated doctor-patient information relating to her disability. *Ibid.*

Defendant Cain is alleged to have held an ADA review, taking on the role of ADA coordinator; directly threatened, intimidated and punished Mr. Merritt for aiding Plaintiff Starks-Pacheco. There was actually no case pending before defendant Cain or another other judge, so it is uncertain how or why he inserted himself into the ADA administrative process altogether. The allegations assert that Pacheco-Starks was commencing a new action, which had not been commenced and sought the ADA coordinator's assistance in ensuring that her access to her ADA Aide would not be interfered with in any way. *Ibid.*

Plaintiff David Merritt is alleged to have been a witness to these transactions, and was himself punished and retaliated against for aiding the other two. He alleges that he presented multiple ADA requests' to Defendants; that they were either ignored or denied; that when he insisted on advocating for the other Plaintiffs ADA rights, that actions were taken by them which held proceedings without affording the accommodation requests' and ultimately adverse rulings made as well as injunction being issued.

The overall allegations describes four state judges, and two lawyers, and ADA coordinator, being in close communication with one another; developing an agreement to conduct the job of ADA coordinator in addition to their job as judges; set into play policies or protocols which precludes Plaintiffs from submitting ADA requests directly to ADA coordinator; whenever their

request makes it to the ADA coordinator, the defendants substitutes themselves in her place and presumably, doing so without any authority under California law. E.g. CRC § 1.100. *ibid.*

IV. ARGUMENT

a. Plaintiffs Have Demonstrated *Prima Facie* Case

With all due respect to this Court based upon Fed. R. Civ. P. 12(b)(6), despite the assertions of the Defendants, there is no question that Plaintiffs have sufficiently pled their case pass the *prima facie* threshold under Title II of the ADAAA, Title 42 § 1983 and other laws.

No complaint should be dismissed under for failure to state a claim unless it appears beyond doubt that there is no set of facts that Plaintiffs' could prove entitling them to relief. *Conley v. Gibson,* ´355 U.S. 41, 46, 78 S. Ct. 99, 102 (1957); Fed. R. Civ. P. 12(b) (6). Additionally, the Court should construe *pro se* actions liberally as they should not be held to the same high standard as formal complaints submitted by lawyers. *Estelle v. Gamble,* 429 U.S. 97, 105, 97 S. Ct. 285, 291 (1976); *Haines v. Kerner,* 404 U.S. 519, 520, 92 S. Ct. 594, 595 (1972).

It is under this more lenient standard that this action should be read.

Title II of the ADA provides that "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 any such entity." 42 U.S.C. § 12132. Under § 12131(2) a qualified individual is one with a disability who "with or without reasonable modifications to rules, policies, or practices, the removal of … communication …barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Of course "public entity" is defined in § 12131(1) which clearly covers state courts and its personnel, judges included.

Section 12133 affords the Plaintiffs their right to enforce any violation of this federal law.

Moreover, under 42 U.S.C. § 12203, federal law bars any and all retaliation, coercion, interference or intimidation whatsoever against "any individual because such individual has opposed any act or practice made unlawful by this chapter, or because such individual made a charge, testified, assisted, or participated in any manner in the investigation, proceeding, or hearing under this chapter." Giving such and "aggrieved persons" a separate right to bring civil action against the violators.

Before this Court is a case where the allegations easily satisfies the elements for these and other causes of action. Plaintiffs have averred that they have impairments; they requested accommodations so they could participate in court activities and that accommodations were either ignored or not provided altogether. Read liberally, Plaintiffs have sufficiently alleged that they are "individual with a disability" under Title II. See § 12102(1) and (2). i.e. a qualified person is one who cannot care for "oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."

The Plaintiffs alleged stated that prior to prevailing in the California Court of Appeals on some legal issues, that they were generally granted all of their ADA requests', which evidences that they met all qualified individual requirements; however, after the legal issues were won, is when they were denied all of their requests'.[2] Finally, the Plaintiffs allege that they were discriminated against not once or twice, but numerous times by different Defendants which further implies a meeting-of-the-minds; and that they were punished by having some severe adverse ruling made and all communications cut off.

[2] The allegation is that the Court of Appeals ordered the disqualification of one of defendants' judge colleagues and a kind of tit-for-tat ensued.

The case at Bar therefore describes that Plaintiffs were "excluded from participation in or denied the benefits of" Defendants' activities. Thus, *prima facie* case has been pled.

As to the allegation of retaliation, it's the causal connection between the protected activity and the adverse ADA action that establishes *prima facie* case of retaliation. *Corneveaux v. CUNA Mutual Ins. Co.*, 76 F3d 1498, 1507 (10th 1996). Whether retaliatory motive exist is left to trier of fact, not summary judgment. *Leslie v. St. Vincent New Hope, Inc*. 916 F.Supp 879, 888 (SD In. 1996).

b. Congress Abrogated States Eleventh Amendment Immunity Defense

The Eleventh Amendment has been interpreted by the U.S. Supreme Court, basically bars judgment against an unconsenting state. *Hans v. Louisiana,* 134 U.S. 1, 15 (1890). However; it has held that Congress can abrogate states immunity without states' consent when it exercises its plenary powers, as long as it does this explicitly. *Seminole Tribe of Florida v. Florida,* 166 S. Ct. 1114, 1123 (1996). Also, *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976). *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985) (Congress must make "its intention unmistakably clear in the language of the statute").

The ADAAA of 2008 that President Bush signed into law, in pertinent part mandates:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State."
>
> 42 U.S.C. § 12202.

As such, the ADAAA explicitly abrogates eleventh amendment immunity and Defendants motion much be denied as meritless argument.

C. Defendants Mckenney, Pierce, Manoukian and Cain Not Immune From Suit

At the time that these Defendants committed the alleged acts or omissions, it was clearly established law that all State of California employees must provide qualified disabled persons, whether they are litigants or not, with accommodations to participate in court activities.

CRC § 1.100 mandates, under California law, that the processing of ADA requests' shall be an administrative act by whomever processes the request.

Additionally, the prohibition of discrimination and retaliation has been clearly established not only since the ADAAA passage in 2008, but going back to the original 1990 passage. Hence, in *Forrester v. White,* the Supreme Court affirmed that administrative acts of judges are not "regarded as judicial acts." 484 U.S. 219 at 228. It enunciated that "this Court declined to extend immunity to a county judge who had been charged … with discriminating on the basis of race in selecting trial jurors for the county's courts. The Court reasoned:

> "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge …. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?' *id.,* at 348"'

Forrester, ibid.

This Supreme Court case is illustrative of this case at Bar.

Here, four county of Santa Clara judges are charged with discriminating against persons known to be disabled; knew that they were disabled; were repeatedly cognizant of requests for accommodations; acted deliberately indifferent, at best, or as alleged, intentionally discriminated and retaliated against Plaintiffs precisely or proximately because of their disabilities. These are the precise set of circumstances that Congress, President Bush and other officials are seeking to rid our country of, or at least not have the Federal Government condone or sit idly by while such unlawful conduct occurs.

The *Forrester* case has a judge who injected himself in the juror selection pool in order to ensure that certain persons were excluded. Here, the allegations charge Defendants with injecting themselves into the ADA accommodations realm in order to ensure certain accommodations were not granted for the Plaintiffs. As we know from real world experience, affording one disability accommodation is not adjudicating the claims or facts of a case, but simply affording access to participate equally.

Of course in the Ninth Circuit itself, judge Thompson was stripped of his immunity because the judge was acting under color of state law and deprived Plaintiff Gregory of some right, privilege or immunity granted by the Constitution or laws, when judge Thompson assaulted him during a court proceeding. *Gregory v. Thompson*, 500 F.2d 59, 61-62. The *Gregory* Court also emphasized that judge Thompson could have called a deputy to handle Gregory versus assaulting Gregory himself.

In a similar manner, each of this case's Defendants' could have, and in fact are mandated to, have the ADA Coordinator handle each of Plaintiffs' ADA requests'. Instead the complaint alleges that they took on the role as ADA Coordinator. There is nothing in the complaints which shows that these requests' were judicial actions, but purely administrative.

Whenever an action by a judge does not involve the adjudication between parties of issues related to the claims of the case, it is less likely that it will be judicial act. *Cameron v. Seitz*, 38 F.3d 264, 271 (6th Cir. 1994).

The law is that "[i]n order to state a claim under section 1983, 'a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a constitutional right.' *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1305 (9th Cir.1989) (quoting *Balistreri v. Pacifica Police Dep't.*, 855 F.2d 1421, 1424 (9th Cir.1988))." *Lebbos v. Judges of Superior Court of Santa Clara*

County, 883 F.2d 810, 817 (9th Cir. 1989)[3]

As set forth *supra*, since the allegations demonstrate *prima facie* case of ADAAA violations, an established federal law, and Defendants are not immune from civil prosecution for actions taken in their administrative roles, the Defense argument that this action should be dismissed for failure to state a claim is without merit and should be rejected by this Court as a matter of law and a matter of Public Policy to exercise its powers as Congress intended this Court to exercise it.[4]

V. CONCLUSION

For the foregoing reasons, the *Amicus* respectfully requests that this Court deny the Defendants' motions to dismiss and to permit this case to be properly have its day in court.

Respectfully submitted,

Dated: July 31, 2013

By: Dr. Karin Huffer

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[3] The *Lebbos* Court rejected the idea that judges cannot be sued for injunctive relief. Ft nt 5.

[4] Defendants Mckenney, Pierce, Manoukian and Cain argument that they cannot be sued is misplaced. Not only have they misread the complaint, they also cite inapplicable case law. The Plaintiffs are citizens of Santa Clara County, continue to have other legal matters before the Superior Court, and will most likely have to have all of their future legal disputes resolved by it and its judges, including Defendants.

In order to correct past or future conduct, the Plaintiffs will need to enjoin Defendants from committing additional violations and to put in place protections that create an independent and competent ADA Coordinator who cannot have their ADA roles usurped by others wishing to discriminate or retaliate against Plaintiffs. Immunity does not extend to injunctive suits. *Pulliam v. Allen*, 466 U.S. 522 (1984) and Livingston v. Guice, 1995 U.S. App. Lexis 39238