

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

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|------------------------|---|----------------------|
| SUZANNE DECK, et al.,  | ) |                      |
|                        | ) |                      |
| Plaintiffs,            | ) |                      |
|                        | ) | CASE No.: 3:98CV7451 |
| v.                     | ) | JUDGE DAVID A. KATZ  |
|                        | ) |                      |
| CITY OF TOLEDO, et al. | ) |                      |
|                        | ) |                      |
| Defendants.            | ) |                      |

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**UNITED STATES' REPLY MEMORANDUM AS AMICUS CURIAE  
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Ms. Deck and others allege that the City of Toledo has failed to install accessible curb ramps during street resurfacing projects that occurred before and after the statute of limitations period. Through the "continuing violation" doctrine, courts have recognized an exception to the rigid application of

statutes of limitations: if at least one incident in a pattern of related violations occurs within the limitations period, the court can grant relief for any of the related violations, regardless of whether the plaintiff had notice of the violations prior to the limitations period. Nevertheless, the defendants assert that the continuing violations doctrine does not apply because Ms. Deck and others had notice of the violations prior to the limitations period.

The United States submits this reply memorandum in further support of plaintiffs' opposition to defendants' motion for partial summary judgment.

#### I. Background

On January 15, 1999, the defendants filed their motion for partial summary judgment, arguing simply that a two-year statute of limitations applied in this case and that the City of Toledo should be relieved of any obligation to correct any curbs constructed or altered prior to May 5, 1996. The plaintiffs filed their opposition to this motion on February 17, 1999. On March 22, the United States filed its motion for leave to participate as amicus curiae and its memorandum in support thereof and in support of plaintiffs' opposition to defendants'

motion for partial summary judgment. In its memorandum, the United States argued that, because the violations before and after the limitations period represented a continuing violation of title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12165, none of the violations should be subject to the statute of limitations. On March 25, this Court granted the United States' motion for leave to participate as amicus curiae. On April 12, the City of Toledo filed its reply memorandum in support of partial summary judgment. In their brief, the defendants incorrectly assert that the continuing violations doctrine does not apply, because Ms. Deck and other plaintiffs had either actual or constructive knowledge of street resurfacing projects. Defendants' Reply Memorandum at 3-6.

## II. Argument

The defendants assert that "use of 'continuing violation' principles to, in effect, equitably toll a virtually undisputed two-year statute of limitations is not appropriate in this case." Defendants' Reply Memorandum at 4. However, the defendants offer no legal support for this claim, except for a quote from Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982),

"Statutes of limitation ... are intended to

keep stale claims out of the court." Havens 455 U.S. at p. 380. The staleness factor does not disappear where the parties seeking relief have been part of the ongoing process and have continuous notice of the claimed injuries.

Defendants' Reply Memorandum at 7. The Havens analysis, however, does not stop here; the full quote from the Court's opinion reads,

Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the court. Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act.

Havens at 380. Defendants do not cite any support for their proposition that the continuing violations doctrine does not apply where a plaintiff has knowledge of violations prior to the limitations period but fails to bring suit. By contrast, the purpose of the continuing violations doctrine is precisely to allow a plaintiff to seek relief for violations prior to the limitations period, if those violations are part of a pattern of related violations that continue into the limitations period.

In this regard, Martin v. Voinovich, 840 F. Supp. 1175 (S.D. Ohio 1993) is particularly instructive. In Martin, plaintiff

represented a class of persons with mental retardation and developmental disabilities. The plaintiffs were routinely denied community placement by the state, in violation of their rights under the Constitution, title II of the ADA, and other federal legislation. The defendants argued that the two-year statute of limitations barred those claims occurring more than two years before the filing of the complaint. The court rejected this argument.

First, the Martin court acknowledged that notice is ordinarily critical to determining the commencement of a statute of limitations.

The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence.

Id. at 1188 (quoting Sevier v. Turner, 742 F.2d 262, 272 (6<sup>th</sup> Cir. 1984)). The court specifically recognized that plaintiffs had notice of the violations before the limitations period:

[s]ome of the violations alleged by plaintiffs occurred beyond the two year statute of limitations, and plaintiff knew or had reason to know of the alleged injury beyond the two year statute of limitations period.

Id.

Second, the Martin court reviewed the Supreme Court's holding in Havens and concluded that each denial of community placement to a class member constituted an alleged violation. Id. at 1189. The court concluded that, because these acts were part of an ongoing and continuous pattern, the continuing violations doctrine permitted the plaintiffs to seek relief for violations outside the limitations period. Id.

Each time a position becomes available in the community and a plaintiff or member of the plaintiff class is denied that position, there is an alleged violation. Therefore, the Court finds that the acts of discrimination alleged by plaintiffs are not based solely on isolated incidents. Instead the alleged discrimination is an ongoing and continuous violation manifested in a number of incidents, and at least one of the alleged discriminatory acts occurred within the two year statute of limitations.... Accordingly, because the alleged violations which occurred more than two years ago are part of a continuous pattern of alleged discrimination, they are not barred by the statute of limitations.

Id. at 1189.

Similarly, each time the City of Toledo resurfaces a street without installing an accessible curb ramp, a violation of plaintiffs' rights under title II of the ADA occurs. Deck v. City of Toledo, 29 F. Supp.2d 431, 433 (1998); 28 C.F.R. § 35.151(e). This discrimination is a continuous violation that is manifested

in repeated and related incidents both before and after the limitations period. Therefore, these incidents constitute a continuing violation and are not barred by the statute of limitations.

Last week, the Sixth Circuit addressed the continuing violations doctrine in Tolbert v. State of Ohio Department of Transportation, No. 98-3299, 1999 WL 218722 (6<sup>th</sup> Cir. Apr. 16, 1999), by relying heavily on its opinion in Kuhnle Brothers, Inc. v. County of Geauga, 103 F.3d 516 (6<sup>th</sup> Cir. 1997). Both of these cases directly support the application of the continuing violations theory in this case.

In Kuhnle Brothers, a trucking company challenged the constitutionality of a county ordinance that restricted travel by trucks on certain county roads, including a road to a quarry serviced by the plaintiff. The ordinance was passed outside of the limitations period, but was enforced during the limitations period. The trucking company's complaint alleged several constitutional violations. First, the company alleged that the ordinance constituted a "taking" or a deprivation of property under the Due Process clause. The court held that these allegations were untimely because they constituted a "single harm, measurable and compensable when the statute was passed."

Kuhnle Brothers, Inc., 103 F.3d at 521 (quoting Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 688 (9<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1093 (1994)). The trucking company's complaint, however, also alleged that the ordinance deprived it of liberty interests to intrastate travel. The Court noted that, with respect to these interests, "each day that the invalid resolution remained in effect, it inflicted 'continuing and accumulating harm' on [the company]." Kuhnle Brothers, Inc., 103 F.3d at 522 (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502 n. 15 (1968)). Looking to the Seventh Circuit's opinion in Baker v. F & F Investment Company, 489 F.2d 829 (7<sup>th</sup> Cir. 1973), the court noted that three key criteria were met: the defendants' wrongful conduct continued after the initial injury, the plaintiff's injuries continued to accrue after the initial injury, and further injury to the plaintiffs could have been avoided if the defendants ceased their wrongful conduct. Kuhnle Brothers, Inc., 103 F.3d at 522.

In Tolbert v. State of Ohio Department of Transportation, the Sixth Circuit applied this three-part standard to bar a claim for an isolated incident with continuing effects. In Tolbert, plaintiffs challenged the decision by the Ohio Department of Transportation to install sound barriers along recently

constructed highway projects adjoining white neighborhoods, but not black neighborhoods. The plaintiffs alleged that the defendants' 1982 Environmental Impact Statement (EIS), recommending against the need for sound barriers along a highway adjoining a black neighborhood and which was approved by the Federal Highway Administration in 1984, was incorrectly performed. The court noted that this claim failed the three-prong test set forth in Kuhnle Brothers, Inc. First, the court noted that approval of the EIS was a discrete event; thus, the defendants' wrongful conduct did not "continue after the precipitating event that began the pattern." Tolbert, at \*5. Second, plaintiff's injury from the improper EIS was complete when it was approved by the Federal Highway Administration. Id., at 6. Third, the last prong of the Kuhnle Brothers, Inc. test could not be met because defendants' conduct was not a "continuing course of conduct." Id.

By contrast, Ms. Deck's complaint satisfies each of the three standards articulated in Tolbert and Kuhnle Brothers, Inc. Ms. Deck alleges that the City of Toledo has installed curbs, both before and during the limitations period, without accessible curb ramps. Therefore, each time the city installs a curb without an accessible ramp, the defendants have engaged in

another violation of title II of the ADA. Second, each of these violations constitutes a new injury to Ms. Deck's class of plaintiffs. Third, further injury to plaintiffs could be avoided if defendants refrained from further violations of the title II standards.

Finally, the defendants characterize portions of briefs of plaintiffs and the United States as "rather disingenuous," because plaintiffs and the United States argue that limited information about street resurfacing projects may impose an unfair burden on prospective plaintiffs. Defendants' Reply Memorandum at 4. The defendants present information that they claim "plainly appear to refute Plaintiffs' arguments." Defendants' Reply Memorandum at 4. While the information raised by the defendants has little bearing on Ms. Deck's constructive or actual knowledge of street resurfacing projects prior to the limitations period, the defendants' argument misconstrues the importance of the arguments raised by plaintiffs and the United States.

The ADA is remedial legislation intended to "break down barriers to the integrated participation of people with disabilities in 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. Congress recognized that basic physical access, as provided through curb ramps, was critical to the rights of people who use wheelchairs. H. R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 84 (1990). This important remedial purpose of title II is inconsistent with requiring persons with disabilities to continually monitor local street resurfacing projects and then bring suit for each related violation independently in order to satisfy a statute of limitations. As the Supreme Court and the Sixth Circuit have noted, the continuing violations doctrine preserves the remedial intent of Congress in advancing important federal goals. Havens, at 380; Roberts v. North American Rockwell Corp., 650 F.2d 823, 827 (6<sup>th</sup> Cir. 1981).

### III. Conclusion

Where a defendant engages in discriminatory conduct that is manifested in a series of continuing violations, an injured party can seek relief for all related incidents if at least one incident was within the limitations period. This "continuing violations" doctrine is particularly important where it supports the most basic rights embodied in important remedial legislation, such as title II of the ADA. For the reasons stated above and in the United States' Memorandum in Support of Plaintiffs'

Opposition to Defendants' Motion for Partial Summary Judgment,  
the United States respectfully urges the Court to deny the  
defendants' motion for partial summary judgment in its entirety.

Dated: Washington D.C.  
April 22, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing United States' Reply Memorandum as Amicus Curiae in Support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment was served by regular U. S. mail this 22<sup>nd</sup> day of April, 1999, upon following:

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