

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Abner N. Martin, Jr.)
)
 Plaintiff,) Case No. 3:97-0740-19BD
)
 v.)
)
 South Carolina Department of)
 Transportation,)
)
 Defendant)
 _____)

**UNITED STATES' AMICUS MEMORANDUM
IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS,
OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

I. Nature of the Case

Martin brought this suit alleging that Defendant South Carolina Department of Transportation ("DOT") discriminated against him on the basis of disability first when it discharged him and again when it refused to reinstate him, in violation of the ADA.

II. Facts and Procedural History

Plaintiff alleges that after many years of employment as an engineer with DOT, DOT fired him because of his status as an alcoholic rather than an inability to perform the essential functions of his job, with or without reasonable accommodation. Plaintiff also alleges that DOT engaged in a campaign to mislead

him into sleeping on his rights until the 300-day filing limit for administrative complaints had lapsed. Finally, Plaintiff alleges that DOT's refusal to reinstate him in March 1996 constitutes an independent violation of the ADA.

On April 24, 1997, DOT filed a Motion to Dismiss or, In the Alternative, for Summary Judgment. Plaintiff filed a Response in Opposition on May 7, 1997, and DOT filed its Reply on May 12, 1997. Because title II coverage of employment was not clearly raised as an issue until DOT's Reply brief, the Court has allowed Plaintiff until July 1, 1997, to submit an additional brief addressing this subject. The United States, in a Motion filed concurrently with the instant Memorandum, has sought leave to participate as amicus curiae to address title II coverage as well.

III. Argument

DOT moves to dismiss this suit on two grounds. First, DOT mistakenly claims that title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq., ("ADA"), rather than title II, is the exclusive authority for this Court's jurisdiction over this suit and that Martin has failed to meet title I's administrative exhaustion requirement in a timely manner. Second, DOT claims that even under title II, Martin's suit is barred by the one-year statute of limitations in the South Carolina Human Affairs Law.¹

¹ The United States will not address Defendant's arguments

Even if the Court declines to adopt the United States' position that title II governs this suit, and regardless of which State statute of limitation is held to apply, the Court should not grant DOT's motion without a more complete factual record. It is well established that the Court must view the facts in the light most favorable to the plaintiff at this stage of the proceedings and permit the plaintiff an opportunity to develop the record. White v. University of South Carolina-Columbia, 1996 WL 276540, *3 (D.S.C.) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)).

A. MARTIN HAS ASSERTED A VALID CLAIM UNDER TITLE II OF THE ADA.

Title II is an appropriate statutory authority for Martin's complaint and title II procedures may be followed by someone claiming employment discrimination by a public entity. Title II procedures do not require a plaintiff to exhaust administrative remedies, so there is no procedural bar to Martin's claim under title II of the ADA.

1. Title II reaches employment discrimination by public entities.

DOT is wrong to suggest that title II does not cover employment discrimination by public entities. Although some district courts have split from the majority view on this issue, most courts that have considered the issue have concluded that

regarding the appropriate statute of limitations.

title II does reach employment discrimination.² The Fourth Circuit has reached the same conclusion by implication, but without acknowledging or specifically addressing the issues. See Doe v. Univ. Of Maryland Medical Systems Corp., 50 F.3d 1261, 1264 (4th Cir. 1995). This Court should adopt the majority view that title II covers discrimination in employment by public entities, based upon a careful review of (1) the statutory language and structure; (2) the legislative history; and (3) Department of Justice's title II regulation.

a. **Statutory language and structure.**

"We start, as we must, with the language of the statute." Bailey v. United States, 116 S. Ct. 501, 506 (1995). "[T]he Court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" Sullivan v. Everhart, 494 U.S. 83, 89 (1990) (quoting K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)). The ADA is divided into five titles, the first two of which are relevant here.³ Title I prohibits discrimination on the basis of

² The first appeal of a Federal district court decision that squarely acknowledged and addressed the split of authority is currently pending before the Court of Appeals for the Eleventh Circuit, Bledsoe v. Palm Beach Soil and Water Dist., CA No. 96-5375 (notice of appeal filed Nov. 13, 1996). The appeal is scheduled to be heard in Summer 1997.

³ Title III prohibits discrimination by public accommodations and commercial facilities, as well as the owners and administrators of certain types of courses and tests. Title IV covers telecommunications. Title V covers a diverse group of miscellaneous matters.

disability by most larger private and public employers.⁴ Title II prohibits discrimination by public entities, generally, without regard to the size of the entity.

i. **Section 202**

Section 202 of Title II 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 such entity." 42 U.S.C. § 12132 (emphasis added). Nearly all courts which have directly considered this language have found it to be sufficiently broad to reach employment by public entities. See, e.g., Davoll v. Webb, 943 F. Supp. 1289, 1297 (D. Colo. 1996); Wagner v. Texas A & M Univ., 939 F. Supp. 1297, 1309 (S.D. Tex. 1996); Graboski v. Guilinai, 937 F. Supp. 258, 267-68 (S.D.N.Y. 1996); Silk v. City of Chicago, 1996 WL 312074 *10 (N.D. Ill. 1996); Bruton v. Southeastern Pennsylvania Transp. Authority, 1994 WL 470277 *2 (E.D. Pa. 1994); Ethridge v. Alabama, 847 F. Supp. 903, 906 (M.D. Ala. 1993); Eisfelder v. Michigan Dept. of Nat'l Resources, 847 F. Supp. 78, 83 (W.D. Mich. 1993); Finley v. Giacobbe, 827 F. Supp. 215, 219-220 (S.D.N.Y. 1993); Peterson v. Univ. of Wisconsin Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wisc. 1993); Bell v. Retirement Bd. of the Firemen's Annuity and

⁴ Title I covers employers whose industries affect commerce and who have fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks.

Benefit Fund of Chicago, 1993 WL 398612 *4 (N.D. Ill. 1993); see also Dertz v. City of Chicago, 912 F. Supp. 319, 325 (N.D. Ill. 1995).

A minority of courts, however, including the Federal District Court in Bledsoe v. Palm Beach Soil and Water Conservation District, 942 F. Supp. 1439 (S.D. Fla. 1996) (pending on appeal, CA No. 96-5375 (11th Cir., filed Nov. 13, 1996)), upon which DOT relies heavily, have reached the opposite conclusion. See also Roberts v. County of Fairfax, Virginia, 937 F. Supp. 541, 547 n.6 (E.D. Va. 1996) (The Court granted summary judgment to defendant on a title I claim. However, the Court explicitly ruled that because plaintiff's counsel could not provide authority when questioned at oral argument about coverage of title II over "government employment," the complaint failed to state a claim pursuant to title II.); Iskander v. Rodeo Sanitary Dist., 1995 WL 56578 *9 (N.D. Cal. 1995)(Court states that plaintiff did not produce, and Court did not find, authority for title II coverage of government employment. No authority cited by the Court for its holding that title I is exclusive authority for employment claims.). These Courts, in finding that the plain language of the statute does not encompass a cause of action for employment, have focused entirely on the portions of section 202 that protect qualified individuals with disabilities from being "excluded from participation in or be[ing] denied the benefits of the services, programs, or activities of a public entity."

Significantly, DOT's argument overlooks an important portion of the operative language of section 202. Read in full, the provision is written broadly to encompass employment practices. If the Court were to ignore the language "or be subjected to discrimination by any [public] entity," a significant portion of section 202 would be meaningless and redundant. It is an elementary canon of statutory construction that statutes must be read "with the assumption that Congress intended each of the terms to have meaning. Judges should hesitate to treat [as surplusage] statutory terms in any setting." Bailey v. United States, ___ U.S. ___, 116 S. Ct. 501, 506 (1995); Dept. of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 340 (1994). Whether the terms "services, programs, or activities" include the term "employment" is largely irrelevant to the prohibition in the final clause of section 202, which is not tied to the "services, programs, or activities" of the public entity. It simply provides protection to qualified individuals with disabilities from being "subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Although admittedly section 202 does not state on its face that discrimination in employment based on disability is covered, the "expansive" language noted above has been interpreted by the Supreme Court in the context of similar Federal civil rights statutes to encompass a cause of action for employment discrimination. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) (section 504 of the Rehabilitation Act of 1973); North

Haven Board of Education v. Bell, 456 U.S. 512 (1982) (title IX of the Education Amendments of 1972). Similar language here should be given the same interpretation.

As the Second Circuit recently found in Innovative Health Systems, Inc. v. City of White Plains, No. 96-7797 WL 349853 *____ (June 26, 1997), "the language of title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context."

The Fourth Circuit has implicitly recognized that the language of section 202 parallels section 504 of the Rehabilitation Act and, therefore, reaches employment discrimination:

Section 504 of the Rehabilitation Act, 29 U.S.C.A. § 794, and Title II of the ADA, 42 U.S.C.A. § 12132, prohibit discrimination against an otherwise qualified individual with a disability. In order to establish a violation of either of these statutes, a plaintiff must prove: (1) that he has a disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment or benefit due to discrimination solely on the basis of disability.

Doe v. Univ. of Maryland Medical Sys. Corp., 50 F.3d 1261, 1264-65 (4th Cir. 1995)(employment case brought by HIV positive surgeon who was rejected from a neurosurgical residency program at a public hospital)(esp. at note 9: "Because the language of the two statutes is substantially the same, we apply the same analysis to both. Cf. 42 U.S.C. § 12133 (incorporating the

'remedies, procedures, and rights' of 29 U.S.C.A. § 794a into Title II of the ADA)"(excluding some parenthetical remarks)).

Certainly, the Fourth Circuit's application of title II to an employment matter in Doe v. Univ. of Maryland Medical Sys. Corp. is consistent with the weight of judicial authority, and inconsistent with the minority position, represented by the Bledsoe District Court, the primary authority relied upon by DOT. Even the Bledsoe District Court believed that the Fourth Circuit had adopted the majority position and had found title II to cover employment discrimination by public entities. Bledsoe at 1443, citing Univ. of Maryland Medical Systems.

ii. Section 204

Section 204(b) states that, with certain exceptions not relevant here, "regulations [to implement title II] shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations . . . applicable to recipients of Federal financial assistance under section 794 of title 29 [section 504 of the Rehabilitation Act of 1973]." 42 U.S.C. § 12134(b). Those section 504 regulations incorporated by reference in the title II regulatory mandate expressly prohibit employment discrimination on the basis of disability. See 28 C.F.R. §§ 41.52-41.55. Again, in explaining the intent underlying title II, Congress has referred to provisions that expressly reach employment practices.

"Interpreting a statute or regulation 'is a holistic endeavor.'" Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 528

(1994) (quoting United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 371 (1988)). The combined effect of these statutory provisions strongly supports Martin's contention that Congress intended employment discrimination to be covered under title II.

b. Legislative history.

Even if the statutory provisions were ambiguous, reference to the legislative history confirms the United States' interpretation of title II as reaching employment discrimination by public entities.

A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment – that to which it gave rise as well as that which gave rise to it – can yield its true meaning.

United States v. Thompson/Center Arms Co., 504 U.S. 505, 516 n.8 (1992) (quoting United States v. Monia, 317 U.S. 424, 432 (1943) (J. Frankfurter, dissenting)).

In promulgating title II regulations providing for employment coverage, the Department of Justice relied upon statements in the report of the House Education and Labor Committee that title II "essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of State and local governments," and that "the forms of discrimination prohibited by section 202 [are] identical to those

set out in the applicable provisions of titles I and III of this legislation." 56 Fed. Reg. 6545 (Feb. 28, 1991), citing H.R. Rep. 101-485(II), 101st Cong., 2d Sess. 84 (1990).

The Report noted that section 204 of the ADA requires that the regulations issued to implement section 202 be consistent with the section 504 regulations. Id. Elaborating on that directive, the Report states (id.)(emphasis added):

The Committee intends . . . the construction of 'discrimination' set forth in section 102(b) and (c)[re: employment discrimination] and section 302(b) [re: public accommodations] should be incorporated in the regulations implementing [title II]. In addition, however, section 204 also requires that regulations issued to implement this section be consistent with regulations issued under 504. Thus, the requirements of those regulations apply as well, including any requirements such as program access that go beyond titles I and III. In addition, activities which do not fit into the employment or public accommodations context are governed by the analogous section 504 regulations.

In addition, the House Judiciary Report states (H.R. Rep. 101-485(III), 101st Cong., 2d Sess. 50 (1990)(emphasis added)):

The general prohibitions set forth in the section 504 regulations are applicable to all programs and activities in title II. The specific sections on employment and public access in existing facilities are subject to the "undue hardship" and "undue burden" provisions of the regulations which are incorporated in section 204. No other limitation should be implied in other areas.

And again, at page 51, the Judiciary Committee Report states that "[i]n the area of employment, title II incorporates the duty set forth in the regulations for sections 501, 503, and 504 of the Rehabilitation Act to provide a 'reasonable accommodation' that does not constitute an 'undue hardship.'"

The directives in the House Reports reflect the intent of Congress that title II extend the protections of section 504 to the field of employment by State and local governments. "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report in this instance." Zuber v. Allen, 396 U.S. 168, 186 (1969).⁵

The statutory language, coupled with this unambiguous direction by Congress that regulations issued pursuant to title II should be consistent with regulations issued under section 504, which do cover employment discrimination, demonstrate that section 202 was intended to cover employment discrimination.

Finally, DOT places undue emphasis on the disparity between coverage of only larger private employers and all public employers, regardless of size. Rational distinctions are based upon the view that public employers should be at the forefront in eliminating discrimination against their employees. Alternatively, cost considerations in the area of small private employers are less prevalent when public entities are involved.

⁵ The Bledsoe District Court's reliance on Shannon v. United States, 512 U.S. 573 (1994), as authority for dismissing the statements in the Report, is misplaced. Unlike the statement in the Senate Report at issue in Shannon, this statement of congressional intent in enacting the ADA is "anchored in the text of the statute," Shannon at 583, because it can be said to "explain or interpret" both sections 202 and 204 of the ADA.

In any event, the plain language of title II, along with the legislative history, makes clear that title II was intended to cover employment practices of all public entities, resulting in an Act that reaches all public employers.

c. Department of Justice regulation.

If, after examining the statute and its legislative history, the Court seeks further guidance, it need look no further than the Department of Justice title II regulation, which is entitled to considerable deference. Warren v. North Carolina Dept. Of Human Resources, 65 F.3d 385, 391 (4th Cir. 1995)(citing Chevron USA, Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837 (1984)). "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute," (quoting Chevron at 843), "that is, whether the agency's construction is 'rational and consistent with the statute.'" Sullivan v. Everhart, 494 U.S. 83, 88 (1990) (quoting NLRB v. Food and Commercial Workers, 484 U.S. 112, 123 (1987)).

In its regulation implementing title II, the Department of Justice explicitly prohibits employment discrimination by public entities. 28 C.F.R. pt. 35, subpart C. In doing so, the Department followed Congress' directive as expressed in the legislative history of the title II (see discussion, supra). Section 35.140(a) of the title II regulation provides: "No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under

any service, program, or activity conducted by a public entity.”

28 C.F.R. § 35.140(a)(emphasis added).⁶

Congress explicitly delegated authority to the Department of Justice to construe title II of the ADA by regulation. 42 U.S.C. § 12134. The Department's implementing regulation – including Subpart C which prohibits employment discrimination by public entities – should be accorded "controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute." ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 324 (1994); United States v. Morton, 467 U.S. 822, 834 (1984). See also Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Fort Mill Telephone Co. v. FCC, 719 F.2d 89, 91 (4th Cir. 1983); Commonwealth of Virginia ex rel. Coleman v. Califano, 631 F.2d 324, 327 (4th Cir. 1980); Tugg v. Towey, 864 F. Supp. 1201, 1205 n.6, 1208 (S.D. Fla. 1994) (according Department of Justice's ADA title II regulation controlling weight regarding coverage of discrimination on the basis of association); Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993) (applying Chevron to give controlling weight to Department of Justice interpretation of title II of the ADA); Petersen v. University of Wisconsin Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wisc. 1993) (same).

⁶ In section 35.140(b)(1), the Department clarifies that the substance of title I [not its procedures] applies to public entities which have fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks, while section 35.140(b)(2) applies the regulatory employment provisions of section 504 to smaller public entities. 28 C.F.R. §§ 35.140(b)(1) and (2).

"To sustain the [agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'" Udall v. Tallman, 380 U.S. 1, 16 (1965) (quoting Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 153 (1946)); Shanty Town Associates Ltd. Partnership v. EPA, 843 F.2d 782, 790 (4th Cir. 1988). Even if a court disagrees with the wisdom of Congress' preference that title II procedures govern employment cases against public entities, agency regulations reflecting that preference should be upheld. Chevron at 842-43; Hicks v. Cantrell, 803 F.2d 789, 792 (4th Cir. 1986); Motley v. Heckler, 800 F.2d 1253, 1254-55 (4th Cir. 1986).

2. Title II does not contain an administrative exhaustion requirement.

Unlike title I of the ADA, "[c]laims under title II of the ADA do not require exhaustion of administrative remedies." ⁷

⁷ As explained, supra, enforcement of title I parallels that of title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-4 to 2000e-6, 2000e-8 to 2000e-9, which includes a requirement of administrative exhaustion.

Persons alleging discrimination under title II have the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act, 29 U.S.C. § 794a. Section 505(a)(2), in turn, incorporates by reference the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. 29 U.S.C. 794a(a)(2). Congress understood that private litigants could sue recipients of Federal financial assistance pursuant to section 504, which incorporates the remedies of title VI. Cannon v. Univ. of Chicago, 441 U.S. 677, 702-03 n.33 (1979); 124 Cong. Rec. 37,508 (1978) (statement

Noland v. Wheatley, 835 F. Supp. 476, 482 (N.D. Ind. 1993). See also Bell v. Retirement Brd. of the Firemen's Annuity and Benefit Fund of Chicago, 1993 WL 398612 at *45 (N.D. Ill. 1993) (same); Finley v. Giacobbe, 827 F. Supp. 215, 219 n.3 (S.D.N.Y. 1993) (same); Peterson v. Univ. of Wisc. Brd. Of Regents, 818 F. Supp. 1276, 1278 (W.D. Wisc. 1993) (same).

DOT places undue emphasis on the fact that Martin filed a charge with the South Carolina Human Rights Commission. DOT argues that this is indicative of Martin's own belief that he was subject to the charge-filing and exhaustion requirements of title I. DOT Reply at 3. Under title II, persons who believe that they have been subjected to discrimination by public entities are permitted, though not required, to file administrative complaints. Federal agencies investigate these complaints and attempt to resolve them through formal or informal means before resorting to litigation. Even if the Federal government files suit on behalf of an individual, that person is not required to participate in the litigation. Many people, therefore, choose to file title II complaints with Federal agencies instead of, or prior to, filing a private suit.

of Sen. Stafford) ("To date we have permitted certain rights of private enforcement of [section 504]."); Doe v. Attorney General, 941 F.2d 780, 786-791 (9th Cir. 1991), vacated on other grounds, Reno v. Doe by Lavery, ___ U.S. ___, 116 S. Ct. 2543 (1996). Significantly for this case, section 504 does not include a requirement to exhaust administrative remedies. Lau v. Nichols, 414 U.S. 563, 566-69 (1974); Hills v. Gautreaux, 425 U.S. 284, 286 (1976).

In fact, many employees who have been subjected to discrimination by public employers have claims under both section 504 and the ADA, as many State and local governments receive some form of Federal financial assistance. It would be anomalous to interpret the ADA such that an employee of a public entity had to exhaust administrative remedies under the ADA, but could proceed directly to litigation under section 504 for the same claim.

The legislative history of the ADA establishes that Congress did not intend to require exhaustion where none had been required before under section 504, and so title II did not include an exhaustion requirement. "Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action." H.R. Rep. 101-485 (II) (House Education and Labor Committee), 101st Cong., 2d Sess. at 98. Insofar as title I created a new cause of action, requiring exhaustion did not create a procedural hurdle where none had existed before as private employers are rarely subject to section 504.⁸

⁸ In fact, there is dual coverage by titles I and II over claims of disability-based employment discrimination of public entities with 15 or more employees. Dertz v. City of Chicago, 912 F. Supp. 319, 324 (N.D. Ill. 1995) ("Indeed, we recognize that because Count I is an employment discrimination claim, Dertz could have brought Count I under Title I of the ADA. However, he chose to bring Count I under Title II."); Peterson v. Univ. of Wisc. Bd. of Regents, 818 F. Supp. 1276 (W.D. Wisc. 1993) (Court recognized that plaintiff could have brought employment claim under Title I of the ADA, but chose to bring it under Title II).

Whether or not, therefore, the South Carolina Human Rights Commission received a timely complaint of discrimination based on DOT's discharge of Martin, there is no procedural bar to Martin's suit.

B. DISMISSAL IS INAPPROPRIATE AND SUMMARY JUDGMENT IS PREMATURE BASED ON THE LIMITED RECORD BEFORE THE COURT.

DOT wrongly argues that Martin's allegation of discriminatory discharge was time-barred under two alternate theories: (1) that under title I of the ADA the suit is barred because Martin failed to file a timely charge of discrimination with the South Carolina Human Affairs Commission or the EEOC;⁹ or (2) that under title II the suit is barred because the one-year statute of limitations borrowed from the historic State Human Affairs Law applies to title II cases.¹⁰ As discussed, supra,

⁹ Title I requires complainants to file charges of discrimination within 180 days of the violation with the EEOC, or within 300 days with the EEOC or State agency in States that provide for a separate administrative review of charges of disability-based employment discrimination. South Carolina is one such State. Martin, therefore, if bound by title I, would have had 300 days within which to file his charge of discrimination with the EEOC or South Carolina Human Affairs Commission.

¹⁰ It should be noted that Martin's allegations that DOT discriminated against him by refusing to reinstate him – as opposed to his allegation of discriminatory discharge – is timely even under the 300 day filing requirement for title I or a one-year statute of limitation. Refusal to reinstate a discharged employee can be an independent act of discrimination in some circumstances. See, e.g., EEOC v. City of Norfolk Police Dept., 45 F.3d 80, 84-85 (4th Cir. 1996) (denial of a request for reinstatement of a discharged employee could constitute a discrete act of discrimination where the basis of discharge –

the procedures of title I do not govern this case. Moreover, regardless of which State statute of limitations is borrowed for title II purposes, DOT's motion should be denied because Martin has alleged sufficient facts with respect to his charge of discriminatory discharge that, if true, would trigger the doctrines of equitable estoppel or equitable tolling to postpone the dates on which any period of limitation would have run.

DOT's motion before the Court is styled as a motion to dismiss or, in the alternative, for summary judgment. The motion should be denied because DOT has not met the standard for dismissal nor that for summary judgment.

1. **DOT's Motion to Dismiss should be denied.**

In considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept as true all well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). "Dismissal for failure to state a claim is proper where 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Randall v. United States, 95 F.3d 339, 343 (4th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 1085 (1997)(quoting Biggs v. Meadows, 66 F.3d 56, 59 (4th Cir. 1995) (citations omitted)).

pending criminal charges against the employee – were dropped prior to the refusal to reinstate).

Martin and DOT disagree about when the 300-day filing period began: Martin believes that it began in April 1996, while DOT believes it began as early as June 21, 1995. Martin alleges that he had a continued expectation of permanent employment with DOT until April 1996 because he was told that as long as he continued to be sober, he would be reinstated within the year and all of his back benefits would be restored (i.e., that his status was somewhat akin to that of an employee in an indefinite period of leave without pay). He further alleges that he held this expectation in good faith until being informed, in April 1996, that he would not be reinstated. Taking Martin's allegations as true for the purposes of the Motion to Dismiss, the last relevant date of discrimination was April 1996.

Even if the Court were to accept DOT's argument that Martin was finally discharged on June 21, 1995, Martin has made sufficient other allegations – allegations which must be presumed to be true for the purposes of a motion to dismiss -- that would support the conclusion that equitable concepts such as tolling and estoppel gave him additional time within which to file a charge of discrimination or file suit. “[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in Federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.” Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3)). See also English v. Pabst Brewing

Co., 828 F.2d 1047, 1049 (4th Cir. 1987), cert. denied, 486 U.S. 1044 (1988); Vance v. Whirlpool Corp., 716 F.2d 1010, 1011-12 (4th Cir. 1983). In borrowing State statutes of limitation for Federal civil rights cases, Courts must also refer to State rules of equity for tolling statutes of limitations and applying the doctrine of equitable estoppel. Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980); see also Shofer v. Hack Co., 970 F.2d 1316, 1320 (4th Cir. 1992).

2. DOT's alternative Motion for Summary Judgment is premature and should be denied.

Summary judgment is only appropriate when there are no genuine issues of material fact in dispute. Fed. R. Civ. P. 56. Facts presented in the record require the Court to view them "in the light most favorable to the nonmoving party so that any doubt as to the existence of a genuine issue of material fact will be resolved in favor of denying the motion." White v. University of South Carolina-Columbia, 1996 WL 276540, *1 (D.S.C.) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)). In the instant case, DOT's motion should be denied because there are many important factual disputes that will remain unresolved until further discovery has been completed. Some of these issues are central to DOT's claim that Martin has satisfied neither the statute of limitations nor the deadline for filing an administrative charge.

For instance, Martin alleges and DOT denies the following:

- Martin was finally told that he would not be reinstated in April 1996 (Complaint at ¶ 12; Amended Complaint at ¶ 15; Martin Affidavit at ¶¶ 17-18; Answer at ¶ 12);
- Martin was told by DOT in July 1995 not to hire a lawyer or to protect his rights administratively, in an attempt by DOT to mislead and coerce Martin into sleeping on his legal rights (Amended Complaint at ¶¶ 15, 16; Martin Affidavit at ¶ 9);
- Martin filed a timely charge of discriminatory discharge with the South Carolina Human Affairs Commission (Complaint ¶¶ 6; Letter of June 12, 1996, from Herbert W. Louthian to State Human Affairs Commission; Affidavit of Paula C. Hollis; Answer at 1, ¶ III; Answer at ¶ 6); and
- Martin diligently checked on his employment status throughout late 1995 and early 1996, but was consistently denied access to his personnel records (Complaint at ¶ 12; Amended Complaint at ¶ 14; Martin Affidavit at 12-17; Answer at ¶ 12).

Denying the motion for summary judgment and allowing more discovery to take place will give Martin a fair opportunity to develop his case intending to show that both parties had a continued expectation of employment or that he was misled into sleeping on his rights. For instance, Martin will likely be able to satisfy the doctrines of equitable tolling and equitable estoppel if he is able to show that he was misled by DOT into sleeping on his rights. "To invoke equitable tolling, the plaintiff must . . . show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge." English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987) (citing Lawson v. Burlington Industries, 683 F.2d 862, 864 (4th Cir.

1982)). "Equitable estoppel applies where, despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline." Id. (citing Felty v. Graves-Humphreys, 818 F.2d 1126 (4th Cir. 1987); Price v. Litton Business Systems, 694 F.2d 963, 965 (4th Cir. 1982)).

At the conclusion of discovery, the trier of fact will have an opportunity to judge the veracity and credibility of the parties' conflicting versions of events. DOT's current Motion for Summary Judgment should be denied because many disputes of material fact remain that are central to determining the ultimate issues underlying DOT's motion: e.g., whether Martin filed his suit on time or, if the Court determines that title I's requirement of administrative exhaustion applies, whether Martin

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filed a timely charge of discriminatory discharge with the South Carolina Human Affairs Commission.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Defendant's Motion to Dismiss Or, In the Alternative, for Summary Judgment.

Dated: June _____, 1997

Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the United States of America, do hereby certify that on this date, I served on the persons listed below, by first class mail, postage prepaid, a true and correct copy of the foregoing United States' Opposition to Motion to Dismiss:

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