

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE,  
EASTERN DIVISION

FAYE NORED and	)	Civil Action No.: 1-98-1357
CYNDI SHAFER,	)	
	)	Judge Todd
Plaintiffs,	)	
	)	UNITED STATES' REPLY
v.	)	MEMORANDUM
	)	
WEAKLEY COUNTY EMERGENCY	)	
COMMUNICATIONS DISTRICT,	)	
	)	
Defendant.	)	

---

**BACKGROUND**

On November 4, 1999, the United States filed a Motion to Intervene as a plaintiff in the above-captioned case, naming Weakley County and the State of Tennessee as additional defendants and challenging the enactment and implementation of an unlawfully discriminatory standard in five state statutes relating to qualifications for law-enforcement employment. The plaintiffs, Faye Nored and Cyndi Shafer, agreed with the United States' Motion to Intervene; the defendant, Weakley County Emergency Communications District (ECD), did not file any opposition.

On November 19, 1999, the State of Tennessee (State) filed a Motion for Permission to Make a Limited Appearance, not to oppose the right of the United States to intervene as a plaintiff in this case, but to challenge the "scope and manner" of its proposed intervention. Essentially, the State seeks to limit the United States' claims while avoiding becoming a defendant in the case, and asks the Court to issue one of two alternative orders

in an effort to accomplish this purpose. Weakley County, the other party named as a defendant in the United States' proposed Complaint in Intervention, has not indicated any opposition to the United States' Motion to Intervene.

The United States has moved to intervene in this case rather than institute a separate action against the same defendant based upon the same facts, in order to conserve judicial resources and ensure the consistent application of federal law. For the reasons set forth below, the United States opposes the State's Motion and requests the Court to grant its Motion to Intervene as proposed.

#### **ARGUMENT**

##### **A. The Department Is Entitled To Intervene As Of Right**

The State does not oppose the right of the United States to intervene as a plaintiff in this case. It does not argue that the Department has failed to satisfy any of the four requirements for intervention as of right under Fed. R. Civ. P. 24(a), nor does it dispute the United States' assertion that because it meets those requirements, it is entitled to intervene and to become a plaintiff in this case.

Since it cannot challenge the United States' right to become a plaintiff in this action, the State instead seeks to avoid becoming a defendant. Rather than waiting until the United States' Complaint in Intervention has been filed to raise its defenses, the State has sought to preemptively limit the United States' claims and even to prevent the United States from naming it as a party defendant. This kind of back-door maneuver is

improper and should not be permitted. The State is effectively moving to dismiss a complaint before it has even been filed, thereby requiring the Court to decide substantive legal issues that are not properly before it, and without the benefit of briefing and legal analysis common on a motion to dismiss or a motion for summary judgment.

The only issue before the Court at this time is a procedural one: whether the United States has met the criteria for intervention as of right under Fed. R. Civ. P. 24(a).<sup>1</sup> As cited in the United States' Motion to Intervene, those criteria are as follows: (1) the motion to intervene is timely; (2) the United States has a substantial legal interest in the case; (3) without intervention, its ability to protect its interests will be impaired; and (4) its interests cannot be adequately represented by the existing plaintiffs. The United States has argued that it has met each of these requirements, and neither the State nor any of the parties to this case have disputed this assertion. Any substantive arguments which the State may wish to make regarding its susceptibility to suit by the United States, to liability under the Americans with Disabilities Act (ADA) or to assessment of damages, are properly raised, not in this type of anticipatory motion, but in its answer to the United States' Complaint in Intervention.

---

<sup>1</sup> The United States has also argued, in the alternative, that it should be granted leave to intervene by permission under Fed. R. Civ. P. 24(b).

1. **The State of Tennessee is a Proper and Necessary Party in This Case and Can Be Held Liable For Damages**

The State repeatedly asserts that the United States should not be permitted to name it as a party defendant in this case for any purpose. State's Motion, p. 2; State's Memorandum, p. 2, 3, 4 and 6. In order to accomplish this goal, the State asks this Court to issue one of two alternative orders, ruling either that: (1) The United States may not challenge any statutes other than the one which has been challenged by the existing plaintiffs; or (2) The United States may challenge the "four allegedly invalid state statutes that are unrelated to this case," but it cannot name the State as a party "on this basis." State's Proposed Orders, p. 2.<sup>2</sup>

The State has erred in its analysis of the issue. It repeatedly asserts that "the professed basis upon which the State is to be named as a party is the existence of four additional Tennessee statutes that are similar or identical to the statute at issue in this case, and which run afoul of the ADA in the same ways." State's Memorandum, p. 3 (footnote omitted.)<sup>3</sup> But this is not the United States' argument. The basis upon which the

---

<sup>2</sup> It is worth noting that while the State clearly intends these alternative orders to protect it from being named as a defendant at all, the orders are not drafted in a manner that would accomplish this goal: by its terms, neither order would preclude the United States from naming the State as a defendant with respect to the one statute challenged by the individual plaintiffs in this case.

<sup>3</sup> In other places, the State argues that it cannot be named as a party defendant "based upon the existence of four allegedly invalid state statutes that are unrelated to this

United States intends to name the State as a party defendant in this action – just as it would name the State as a defendant in any action it instituted separately – is the State’s enactment of all five state statutes. As part of its responsibility for implementing and enforcing the ADA, the Department is empowered to institute legal action against states and local government entities for their violations of the statute. 42 U.S.C. § 12117(a); 42 U.S.C. § 12132. Thus, even if the State had enacted only one statute in violation of the ADA (such as the one challenged by the plaintiffs in this case), the United States would still intend to name the State as a defendant pursuant to its statutory authority to do so.

An implicit assertion of the State’s Motion is that the United States cannot directly sue a state merely because the state has enacted statutes which violate federal law. This argument mischaracterizes the United States’ position. The United States is not simply attacking the validity of generic state statutes which conflict with, and are therefore preempted by, federal law. Instead, the United States is alleging that by enacting, implementing, applying and failing to revoke these five statutes, the State has affirmatively committed a pattern or practice of unlawful discrimination on the basis of disability, in direct violation of the ADA. 42 U.S.C. § 12117(a); 42 U.S.C. § 12133.

---

case.” State’s Motion, p. 2; State’s Memorandum, p. 9; and State’s proposed Order, p. 2.

There is a good reason why the ADA prohibits this kind of state action. When a state enacts laws that require persons and entities within its jurisdiction to choose between violating a federal civil rights law or risking a state enforcement action, it is responsible for unlawful discrimination and violation of federal law. Even if the threat of a state enforcement action might never materialize, it poses a real deterrent to ADA compliance by persons and entities within the state. In such circumstances, the state entity will often conclude that its chances of avoiding legal action are better if it complies with state law, even if that means committing unlawful discrimination under federal law.

In addition, the fact that state statutes of this kind were used to discriminate against specific individuals is sufficient to make a state liable for monetary damages and other remedial relief. Unable to cite any authority to the contrary, the State instead cites two cases which purportedly support its claim that only declaratory and injunctive relief are available in actions against states. However, these cases are inapposite. In Lewis v. Continental Bank Corporation, 494 U.S. 472 (1990), the plaintiff bank holding company was awarded declaratory and injunctive relief in its constitutional challenge to two state banking statutes, but lost its entitlement to that relief after its claims became moot. In Davoll v. Webb, 955 F. Supp. 110 (D.Colo. 1997), after prevailing in an ADA case against the City and County of Denver, the United States was denied injunctive relief until such time as the class of disabled individuals could

be defined with more precision. That case is still pending, mediation is being actively pursued, and the court will not decide what relief to award until after trial for damages, which is set for March 2000. Moreover, a state was not a named defendant in either case, and neither of these cases says anything about the availability of monetary damages when a state is charged with violating a federal civil rights law in a complaint filed by the United States.

In its brief, the State apparently misunderstands the United States to be arguing that "the State is a proper defendant in this case because of the defenses that Weakley County has pled." State's Memorandum, p. 8. In its original brief, the United States did not argue that the reason the State of Tennessee could be sued under the ADA was that defendant Weakley County ECD has asserted that it was acting in compliance with state law. As discussed above, a state can be sued for violating the ADA regardless of any actions taken or defenses raised by a third party. Rather, the United States argues that the fact that Weakley County ECD was complying with the mandate of state law when it unlawfully discriminated against the plaintiffs underscores the propriety of joining the State as a party in this case. Even though Weakley County ECD is still separately liable for its own violations of the federal statute, the State is responsible for its illegal conduct in enacting discriminatory laws.

Not only is the State a proper defendant in this case, it also qualifies as a necessary party under the compulsory joinder

rule. Under Rule 19(a) of the Federal Rules of Civil Procedure, a party must be joined if "in the person's absence complete relief cannot be accorded among those already parties."<sup>4</sup> The United States' Complaint in Intervention seeks injunctive, declaratory and monetary relief from the State with respect to its claim that the State has violated the ADA. The United States will not be able to obtain complete relief with respect to all of its claims on behalf of the public interest unless the State is joined as a party in this case. The State does not oppose the motion of the United States to become a plaintiff in this case; it cannot simultaneously argue that the United States as plaintiff-intervenor, unlike other plaintiffs, should be prohibited from pursuing all of its claims and seeking all available relief.

**2. The State's Decision Not to Voluntarily Intervene Does Not Insulate It From Suit**

In its brief and proposed Orders, the State appears to assert that the only way it could become a proper party to this suit would be if it voluntarily intervened, which it has declined to do. With respect to its first proposed Order, which would limit the United States to challenging only the statute used to discriminate against these plaintiffs, the State declared prior

---

<sup>4</sup> Because the State's liability in this case is based in part on the discrimination suffered by these plaintiffs, the State also qualifies as a permissive party under Fed. R. Civ. P. 20(a), which states that a party may be joined with other defendants if "there is asserted against [the defendants] jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

to the United States' Motion to Intervene that it did not intend to defend that statute. It now suggests that such determination should preclude its further involvement in the case. With respect to its alternative proposed Order, which would allow the United States to challenge the other four statutes, the State argues that the United States is constrained to merely complying with the Rule 24 notification requirement, at which point the State can intervene, or not, at its option.

However, whether or not the State elects to defend the validity of its statutes does not alter the fact of its liability for having enacted them. It is the nature of an enforcement action such as this that states, like other defendants, do not have a legal right to choose whether or not they will be sued by the Attorney General under Title II of the ADA. 42 U.S.C. § 12133. The source of the State's confusion on this point appears to be a fundamental misreading of the notification requirement of Rule 24 of the Federal Rules of Civil Procedure. Rule 24 addresses the issue of intervention in civil litigation, and is in fact the basis for the United States' Motion to Intervene in this case. In addition to providing general criteria to determine which parties under what circumstances may intervene in a given case, either as of right or by permission, the rule also provides for mandatory notification of the state (or the United States) whenever the constitutionality of a state (or federal) statute is challenged.<sup>5</sup> The purpose of this notification

---

<sup>5</sup> Fed. R. Civ. P. 24(c) states: "When the constitutionality of an act of Congress affecting the public

requirement is to allow the governmental entity responsible for enacting a statute an opportunity to intervene, pursuant to this rule and the federal statute, in order to have some input on the question of the statute's constitutionality. By its terms, the requirement only applies when that entity is not already a party to the litigation, because as a party it would obviously have notice of any claims or defenses which were raised and an opportunity to make its views known.

Inexplicably, the State interprets this provision of Rule 24 to mean that being properly notified of a challenge to a statute's validity<sup>6</sup> is the only way that a State can be made a party to a lawsuit which includes such a challenge, and furthermore, that a State can only be made a party in this manner if it "chooses to intervene." State's Memorandum, p. 4. Under

---

interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403."

<sup>6</sup> The State claims that the United States' proposal to "join the State as a defendant...contraven[es] Rules 24 of both the Federal and the Tennessee Rules of Civil Procedure... ." State's Memorandum, p. 8. It thus urges the Court to apply (and to similarly misinterpret) the state counterpart of Rule 24 in this case, which goes further than the federal rule to require notification to the state attorney general even when a statute's general validity is challenged. Tenn. R. Civ. P. Rule 24.04. While the United States is not challenging the constitutionality of any of the five statutes, implicit in its claim that the State has violated the ADA is the assertion that the statutes are invalid.

the State's interpretation, whenever the validity of a state statute is in question, the State is immune from suit with respect to any violations of federal law that may have attended its enactment of the invalid statute.

This is a complete misreading of this rule. Rule 24 describes the procedures and criteria for a party's voluntary intervention in a case; it has nothing whatsoever to do with the capacity of a state to be sued. Much as it may wish otherwise, the State's decision not to defend the validity of its statutes does not insulate it from suit for violating the ADA. By declining to defend Tenn. Code Ann. § 7-86-201 in this case, the State has not in any way diminished the right of the United States to sue the State with respect to its violation of the ADA and to obtain appropriate relief, nor can the State prospectively insulate itself from suit with respect to the other four statutes by declining to defend them as well.

**3. The Department's Proposed Intervention Is Appropriate in Scope**

Finally, the State argues that by seeking to intervene as it has proposed, naming the State and Weakley County as additional defendants and challenging four other statutes which contain the identical discriminatory standard<sup>7</sup>, the United States will "greatly expand" the scope of the existing case. It cites only one case in support of this conclusory assertion, United States v. State of Oregon, 913 F.2d 576 (9<sup>th</sup> Cir. 1990), and that case

---

<sup>7</sup> All five statutes broadly exclude from various types of public law-enforcement employment all persons who are not free of "apparent mental disorders."

bears little resemblance to this one. In that case, a small Indian tribe sought to intervene in a twenty-year-old legal battle between multiple state and federal government entities and private parties over the allocation of the Columbia River fish harvest, in order to expand the geographical scope of the case to include its downstream ocean fishery. Because the complex litigation had been ongoing for more than two decades, the district court concluded (and the 9<sup>th</sup> Circuit affirmed) that it was "too late in the proceeding to change the nature of the suit so dramatically." Id. at 588. The State's reliance upon that case here is misplaced.

Because the State's liability under the ADA is premised on the simple and uncontested fact that it enacted the identical discriminatory standard in five statutes, any potential fact dispute would relate, not to its liability, but to the assessment of damages. The purely legal analysis that the Court will employ in order to strike down the one statute challenged by the plaintiffs is the same analysis it will use to strike them all down. If the United States does not name the State as a defendant in this case, or if it does not challenge the State's enactment of all five statutes in this case, it will be forced to institute a separate suit against the State for that purpose. It makes no sense to require this Court, the State of Tennessee and the Department of Justice to go through the same legal analysis in two separate legal actions.

While the United States does not know precisely how many individuals, other than the plaintiffs, have been adversely

affected by these five statutes, it is aware of at least one other individual who has been discriminated against pursuant to Tenn. Code Ann. § 7-86-201 (relating to public dispatchers) and two individuals who have been discriminated against pursuant to Tenn. Code Ann. § 38-8-106 (relating to police officers). The State argues that allowing the United States to challenge all five statutes in one forum will result in an "enormous expansion of the existing lawsuit in order to accommodate this group of prospective plaintiffs." State's Memorandum, p. 7. If there is indeed such a large number of adversely affected individuals, that is all the more reason for the Court to alleviate the prospective burden on the court system and attempt to resolve as many of those claims as possible now, and in one forum. This fulfills the primary rationale for the rule on intervention, which is to further judicial economy by ensuring that all claims growing out of the same facts are resolved, if at all feasible, in one action. It also underscores the necessity of striking down all five statutes at once, instead of in a piecemeal fashion over time by different plaintiffs in front of different courts.

#### **CONCLUSION**

In sum, the United States has shown, and neither the State nor any party has disputed, that it meets all four requirements for intervention as of right: its motion to intervene is timely and will not prejudice the existing parties; it has a substantial legal interest in the action; without intervention, its interests may be impaired; and its interest along with the public interest are not and cannot be adequately protected by any of the private

parties to this action. The State's preemptive motion to prevent it from being named as a defendant in the case and to limit the United States' claims is improper and should be denied. The United States should be granted leave to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2), or alternatively, by permission pursuant to Fed. R. Civ. P. 24(b).

Respectfully Submitted,

BILL LANN LEE  
Acting Assistant Attorney General  
Civil Rights Division

By: \_\_\_\_\_  
JOHN L. WODATCH  
RENEE M. WOHLNHAUS  
JEANINE WORDEN  
M. CHRISTINE FOTOPULOS  
Attorneys  
Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035-6738  
(202) 307-6556  
(202) 305-7475

Dated: December \_\_\_\_\_, 1999  
Washington, D.C.