10-2058

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DANNY ABRAHAMS, ANTHONY CELARDO, KEVIN CHRISTMAN, LAUREN EPSTEIN, MERYL JACKELOW, EVAN SKIDMORE, DAVID TINDAL and LEE WOLBROM,

Plaintiffs-Appellants

-against-

MTA LONG ISLAND BUS,

Defendant-Appellee

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS IN AN APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Table of Statutes and Regulations

INTRODUCTION

To quote the classic movie line, "what we have here is a failure to communicate." By failing to communicate with Nassau County people with disabilities about reductions in the transportation services they have relied upon for years, defendant MTA Long Island Bus acted in violation of Title II of the Americans With Disabilities Act ("ADA") and its accompanying regulations.

For the most part, the facts in this case are not in dispute. Defendant MTA Long Island Bus has provided an extensive paratransit system throughout Nassau County known as "Able-Ride" for many years. People with disabilities like the plaintiffs in this case have depended upon that system and have made life decisions such as where to live, where to work, and where to receive medical services based upon the Able-Ride system.

Due to fiscal shortfalls, defendant MTA Long Island Bus now seek to reduce the system by eliminating 9% of the paratransit service throughout Nassau County and 100% of the service for people with disabilities in the northeastern section of Nassau County. At ECF p. 16 of its brief, MTA Long Island Bus concedes that the contraction of the system will cause hardship for people with disabilities.

While MTA Long Island Bus can implement service reductions to the non-mandatory portion of the system, that action is not the issue in this case and plaintiffs do not dispute that defendant can ultimately reduce service. Much of

defendant's brief is addressed at defending MTA's right to implement service reductions in non-mandatory service – an issue not raised by plaintiffs.

However, defendant fails to address plaintiffs' principal argument - that the paratransit section of Title II of the ADA and its regulations require MTA Long Island Bus to create a mechanism to permit people with disabilities to participate in the continued development and assessment of paratransit services. Even though the defendant may have the right to reduce paratransit services to the minimum required by the ADA, defendant must before making such cuts at least listen to people with disabilities and their advocates who may have suggestions as to how the defendant can meet its budgetary shortfalls without eviscerating the system for some riders.

Instead of seeking to listen to people with disabilities and their advocates, defendant MTA Long Island Bus has done the opposite. It has gone out of its way to avoid listening to people with disabilities and even now is fighting the attempts of people with disabilities to have their suggestions heard.

Under the paratransit section of the ADA and its regulations, a failure to communicate with people with disabilities is just as much of a violation of the law as direct discrimination in the provision of services. In failing to follow the paratransit section of the ADA and its regulations pertaining to communication with people with disabilities, defendant MTA Long Island Bus has violated the

ADA and its regulations just as much as if it had engaged in discrimination in the actual provision of services.

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT THE PUBLIC PARTICIPATION REQUIREMENTS WERE INAPPLICABLE HERE.

This case turns on a reading of 49 C.F.R. §37.137(c), which places an ongoing requirement on entities like the defendant to "create an ongoing mechanism for the participation of individuals with disabilities in the continued development and assessment of services to persons with disabilities." [Emphasis added]. The defendant's decision to eliminate some paratransit services would constitute both the "continued development" and "assessment" of services, necessitating the need for participation of individuals in the decision. The fact that the services being eliminated are not mandated by the ADA is not material. The regulation requiring public participation contains no language excluding service reductions in non-mandatory services.

Both the district court and the defendant erroneously read the word "assessment" out of the regulation (J.A. 206), and the district court's decision is in error because, at the very least, it overlooked the word "assessment." In any event, the defendant's change in service would also fall under the "continued

development" section of the regulation, requiring participation of individuals with disabilities.

As discussed at page 23 of our initial brief, the district court also erred in holding that because the defendant was otherwise in compliance with the ADA, it was exempt from the provisions of 49 C.F.R. §37.137(c). As discussed previously, the regulation relied upon by the lower court, 49 C.F.R. §37.135(c)(1) (J.A. 206), provides an exemption from the provisions of §§37.137(a) and (b) but omits any mention of 49 C.F.R. §37.137(c).[1] Wisely, the defendant in its brief does not attempt to defend the district court's holding in this regard.

The defendant makes two other arguments: (a) there was an "agreement" between the defendant, Nassau County and the Federal Transit Administration of the United States Department of Transportation allowing it to eliminate paratransit services as proposed here without public participation (J.A. 126-34) and (b) that a Department of Transportation statement relied upon by the district court (J.A. 206-

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[1] As both parties would agree, defendant is only required to provide paratransit services under the standards set by the ADA and there is no allegation here that the defendant's proposed cuts would place it out of compliance with the ADA. However, if defendant were not in compliance with those standards, logically, a lawsuit would not be brought under the "public participation" regulation asserted here but instead as a discrimination claim on the merits on the ground that services were not provided in accordance with the standards of the ADA. Therefore, the "public participation" regulation would really only have vitality in a situation such as here where the provider proposed changes in service but those service changes would not place the provider out of compliance with the ADA.

07) justifies the elimination of paratransit services as proposed here without public participation. Both of those arguments are wrong.

The 1998 "agreement" referred to by the defendant was apparently unsigned by any representatives of the Federal Transit Administration. The purported agreement merely restates the law and does not place any special requirements on the defendant. The purported agreement contains no provisions authorizing the defendant to eliminate paratransit service to a large section of Nassau County or immunizing the defendant from the public participation requirements of the paratransit statute and accompanying regulations in such event.

With regard to the district court and defendant's citation to the statement of the Department of Transportation, as discussed at page 23 of plaintiffs' initial brief, that statement appears only to pertain to §§37.137(a) and (b) and specifically notes that "because the regulation already contains a mechanism for continuing public participation (see §37.137(c))..." Therefore, the Department of Transportation statement inaptly cited by both the district court and the defendant explicitly recognizes the applicability of §37.137(c).

Consequently, the district court erred in dismissing plaintiffs' action on the ground that the public participation requirement of §37.137(c) was not applicable here.

POINT II

PLAINTIFFS HAVE DEMONSTRATED A CLEAR LIKELIHOOD OF SUCCESS ON THE MERITS AND IRREPARABLE HARM AND ARE ENTITLED TO A PRELIMINARY INJUNCTION.

Defendant does not argue that plaintiffs have failed to demonstrate irreparable harm from its actions. As plaintiffs demonstrated a likelihood of success on the merits,[2] the district court erred in not granting a preliminary injunction.

There are three areas of legal contention between the parties in this case. The first issue, whether 49 C.F.R. §37.137(c) is applicable here (and the only issue ruled upon by the district court) is addressed in the previous point. This point will address the other two areas of contention: whether the plaintiffs have a private cause of action under the paratransit portion of Title II of the ADA (42 U.S.C. §12143) and its accompanying regulations and whether the defendant indeed violated the "public participation" regulation, to wit, 49 C.F.R. §37.137(c).

The plaintiffs extensively addressed the "private cause of action" issue at pages 24-31 of their initial brief and those arguments need not be repeated here.

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[2] The district court used the correct "likelihood of success" standard. (J.A. 209). While defendant argues at ECF page 30 of its brief that the standard is "clear likelihood of success" standard, as defendant notes, that standard is only application where a plaintiff seeks to overturn the status quo. In this case, plaintiffs are seeking to keep the status quo and it is defendant that is seeking to change the status quo. In any event, plaintiff can meet either the "likelihood of success" or "clear likelihood of success" standard here.

Defendant largely ignored plaintiff's arguments and, at ECF pages 25-28 of its brief, cited four cases from other jurisdictions involving other statutes and regulations. All of those cases are inapplicable.

None of the statutes involved in those cases contained provisions like that of 42 U.S.C. §12143(e)(1) stating that a violation of the regulations adopted pursuant to the statute constituted privately actionable discrimination. Similarly, none of the regulations involved in those cases merely applied or authoritatively construed a statute as is the case with the regulation at issue here. See Stamm v. New York City Transit Authority, 2006 WL 1027142 *12 (E.D.N.Y. 2006) (district court found a private right of action because the transportation regulations involved under 49 C.F.R. Part 37 of which the regulation at issue here is a part "do no more than apply or interpret the provisions of Title II of the ADA.")

As also discussed at pages 30-31 of our initial brief, in Anderson v. Rochester-Genesee Regional Transportation Authority, 337 F.3d 201 (2d Cir. 2003), this Court implicitly found a private right of action to enforce the "customer service" regulations connected to 42 U.S.C. §12143. As discussed at length in our initial brief and not challenged by the defendant in its brief, under 42 U.S.C. §12143, the "public participation" discrimination involved here should be treated no differently from the "customer service" regulations as violations of the "public participation" portions of the paratransit statute constitute "discrimination" just as

much as violations of the "customer service" portions of the paratransit statute. Compare 42 U.S.C. §12143(e)(1) to 42 U.S.C. §12143(a). Consequently, as the "public participation" regulations involved here should be treated no differently from "customer service" regulations and this Court has already implicitly held that there is a private right of action to enforce the "customer service" regulations, there is likewise a private right of action to enforce the "public participation" regulations connected to 42 U.S.C. §12143 at issue here.

At ECF pages 28-29 of its brief, defendant MTA Long Island Bus makes the curious arguments that plaintiffs' request for public participation "would as a practical matter discourage transit entities from ever voluntarily providing an enhanced level of service beyond what the ADA specifically requires" and that "transit entities would likely not offer any voluntary service enhancement if they understood that to do so would obligate them for all time."

Besides not being supported by the law, those statements represent a complete misunderstanding of plaintiffs' argument. Plaintiffs' position is not that they have a right to force defendant to provide services above the minimum standards set by the ADA, but that defendant must communicate with plaintiffs and people with disabilities prior to eliminating services even if the proposed cuts would leave the remaining system in compliance with the ADA.

In sum, the defendant here is addressing an argument not made by plaintiffs and fails to address the plaintiffs' argument that they are entitled to some form of communication under the circumstances involved here. Indeed, since it is conceded that defendant can eliminate non-mandatory paratransit services, the enforcement of the legal requirement that paratransit ridersihip have an opportunity to provide input and suggestions to defendant MTA Long Island Bus before cuts are implemented is even more important since the provision of such input is essentially the only right conferred upon paratransit ridership with respect to these cuts.[3]

Finally, the defendant's brief has no specific point disputing the arguments made at pages 31-34 of plaintiffs' initial brief that defendant's actions violated 49 C.F.R. §37.137(c). While defendant outlines the steps it took at ECF pages 16-18 of its brief, those steps hardly constituted "public participation" by people with disabilities.

The defendant first notes at ECF page 16 of its brief that a memorandum outlining the service changes "was provided to Long Island Committee members of the MTA Board." However, provision of a memorandum to the Long Island

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[3] Indeed, an advocate for people with disabilities made some suggestions on cost-cutting without the elimination of services that was ignored by defendant. J.A. 100-01.

Committee members of the MTA Board hardly constitutes public participation by people with disabilities.

While the defendant goes on to discuss its communications with the Accessible Transportation Oversight Committee (a committee comprised of people with disabilities) at meetings on January 12, 2010 and March 9, 2010, the unrebutted record indicates that the details of the service eliminations were not discussed at the January 12, 2010 meeting (J.A. 68, 102-03) and that the service eliminations were already a fait accompli at the March 9, 2010 meeting that was held one day before notification of the cuts was given to Able-Ride users. J.A. 103.

While the defendant notes at ECF page 17 of its brief that there was a public hearing held on March 1, 2010, defendant ignored the fact that the notice for the hearing stated that the Able-Ride changes "do not require public hearing" (J.A. 70) and thus people with disabilities were led to believe that Able-Ride was not a subject of discussion at the hearing. J.A. 103 As discussed at length at pages 15-18 of plaintiffs' initial brief, the notice of the hearing given by the defendant was vague, did not inform people with disabilities of the specific cuts proposed in Able-Ride service, and required people with disabilities to go to a library to read and comprehend the ADA and its regulations and then consult a bus map in order to determine if their service was being eliminated.

Finally, the public information meeting held by the defendant on April 22, 2010 discussed at ECF pages 17-18 of its brief was exactly that - a public information meeting to describe the reductions in service. By April 22, 2010, defendant had already determined that it was going to implement its service eliminations and held the meeting to provide the public with information about the cuts rather than to listen to people with disabilities and their advocates about possible alternatives before a decision was made.

Consequently, besides irreparable harm, plaintiffs have demonstrated (a) that the "public participation" regulation connected to the paratransit part of Title II of the ADA is applicable here, (b) that plaintiffs have a private cause of action to enforce the "public participation" regulation and (c) the defendant totally failed to comply with that regulation and did everything possible to avoid communication with people with disabilities with regard to its service eliminations. Therefore, as plaintiffs have demonstrated either a likelihood of success or a clear likelihood of success on the merits as well as irreparable harm, the court below erred in denying plaintiffs a preliminary injunction.

CONCLUSION

The order of the district court dismissing this action and denying plaintiffs' application for a preliminary injunction should be reversed and plaintiffs' application for a preliminary injunction should be granted.

Dated: Garden City, New York
August 16, 2010

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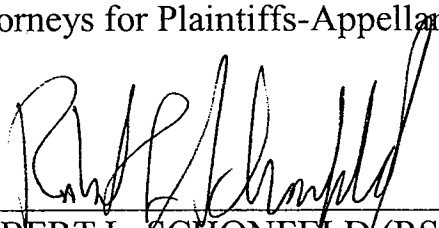
By:



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Dated: August 16, 2010