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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Californians for Disability R <p style="text-align: right;">Plaintiff/Petitioner(s)</p> <p style="text-align: center;">VS.</p> California Department of Tr <p style="text-align: right;">Defendant/Respondent(s) (Abbreviated Title)</p>	No. <u>RG08376549</u> Order Demurrer to the First Amended Complaint Overruled
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The Demurrer to the First Amended Complaint was set for hearing on 12/19/2008 at 02:00 PM in Department 20 before the Honorable Robert B. Freedman. The Tentative Ruling required that the parties appear, and the matter came on regularly for hearing.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Demurrer of defendants California Dept. of Transportation and Will Kempton, in his official capacity ("Defendants") to the Complaint of plaintiffs Californians for Disability Rights, Inc., California Council for the Blind, Ben Rockwell and Dmitri Belser, on behalf of themselves, and on behalf of all others similarly situated ("Plaintiffs") is ruled on as follows:

BACKGROUND:

The operative complaint in this case (First Amended Complaint, filed on April 9, 2008, hereafter "Complaint") contains causes of action for 1) Violation of California Civil Code sections 54, et seq., 2) Violation of California Government Code sections 4450, et seq., 3) California Government Code sections 11135, et seq. [newly constructed or altered sidewalks, streets, roads and/or highways; maintenance; temporary routes during construction; information], 4) California Government Code section 11135(b) - Self-Evaluation and Transition Plan, and 5) Taxpayer's Action for Injunctive Relief, California Code of Civil Procedure section 526a.

Defendant's demur to the 4th cause of action only.

SUMMARY OF DEFENDANTS' ARGUMENTS:

First, Defendants argue that the 4th cause of action is barred by res judicata. These claims were already adjudicated in the related federal action between the same parties, entitled CDR v. Caltrans, Case No. C-06-5125 SBA ("Federal Action"), where the court found that there is no private right of action to enforce 28 CFR sections 35.105(a) & 35.150(d) ("self-evaluation and transition plan regulations").

Second, Defendants argue that the 4th cause of action is barred under the collateral estoppel doctrine. In Defendants' view, the issue of whether Plaintiffs have a private right of action to enforce the self-evaluation and transition plan regulations under California law (Government Code sections 11135(b) and 11139) is identical to the one already decided in the Federal Action.

Third, the 4th cause of action fails to state a claim because there is no private right of action to enforce the self-evaluation or transition regulations. Where state anti-discrimination law is modeled after federal law, courts rely on case law interpreting federal law to interpret state law. When the California Legislature incorporates a non-California statute, it is presumed to have acted with knowledge and in light of decisions interpreting the incorporated statute. (*Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 555-56.) Here, several federal courts, including the District Court in the Federal Action, have held that there is no private right of action under the ADA to enforce the self-evaluation and transition plan regulations. This court should thus interpret section 11135(b) in accordance with the federal courts' interpretations of the federal law that it incorporates.

Allowing enforcement under state law would create a conflict between federal and state law and frustrate the federal regulatory scheme. Any enforcement of the self-evaluation and transition plan regulations should be left to the U.S. Dept. of Justice.

SUMMARY OF PLAINTIFFS' ARGUMENTS:

The plain meaning of sections 11135(b) and 11139 unambiguously creates a private right under state law to enforce the self-evaluation and transition plan requirements, and federal case law interpreting the enforceability under federal law cannot be used to contradict that plain meaning. Where federal construction was rendered after the adoption of a statute by the state, it is not binding on state courts. (*Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 387.)

Section 11135(b) was adopted in 1992, and in 1999 section 11139 was amended and clarified that there was a private right of action to enforce section 11135. It was not until 2004 (*Ability Center of Greater Toledo v. City of Sandusky* (6th Cir. 2004) 385 F.3d 901, 914) that enforceability truly came into question. The federal cases finding no private right of action all premised their analysis on *Alexander v. Sandoval*, 532 U.S. 275, which was not decided until 2001. Furthermore, federal courts remain divided on the question. (See, e.g., *Chaffin v. Kansas State Fair Bd.* (10th Cir. 2003) 348 F.3d 850, 858-59 and 861-62.)

Because federal law has no analog to section 11139, the reasoning of *Sandoval* is not applicable here. (*Darensberg v. Metropolitan Transportation Commission* (2008 N.D.Cal.) 2008 WL 3915349 (Slip Copy).

Private enforcement would supplement, not impede, public enforcement. No conflict is created.

Res judicata does not apply because there has been no final judgment on the merits in the Federal Action. Furthermore, since the District Court was deprived of its jurisdiction over Plaintiffs' state law claims due to Defendants' assertion of sovereign immunity, res judicata does not bar Plaintiffs from bringing their claims under section 11135(b) in this court.

Collateral estoppel does not apply because the issues are not identical.

DISCUSSION:

The Court is not persuaded by Defendants' arguments with respect to the applicability of the principles of res judicata and/or the collateral estoppel doctrine. Whether or not the Court were to treat the District Court's ruling on the unavailability of a private right of action to enforce the self-evaluation and transition plan regulations under federal law as a "final judgment" as to those claims in the Federal Action, the manner in which the state law claims were eliminated from the Federal Action would preclude a finding of res judicata. As to collateral estoppel, Plaintiffs' assertion that their claims in the this case are not identical to the claims in the Federal Action is correct. The District Court did not decide any issues regarding sections 11135(b) or 11139.

With respect to whether a private right of action to enforce the self-evaluation and transition plan regulations exists under California law, Defendants have not convinced the Court that the plain language of section 11139 should, in effect, be ignored in this instance. As pointed out by Plaintiffs, the federal authority on the existence of a private right of action under the ADA was, for the most part, developed after sections 11135(b) and 11139 in their current iterations had taken effect, and as such have no real bearing on what the California Legislature had in mind at the time. Recognizing that the

unpublished opinion in *Darcensburg v. Metropolitan Transportation Commission*, supra, is not binding authority, the Court finds its reasoning to be persuasive. Section 11139, to which there is no federal analogue, expressly provides a private right of action. (Id, at 14.)

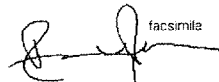
Nor do Defendants' arguments regarding potential conflicts and/or preemption have merit.

RULING:

Defendants' demurrer is **OVERRULED**. Defendants shall answer the First Amended Complaint forthwith, and no later than January 25, 2009.

Defendants' and Plaintiffs' requests for judicial notice are **GRANTED**.

Dated: 12/19/2008



Judge Robert B. Freedman