

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-00598-LTB-MEH

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation,
JULIE REISKIN,
LORAINA A. JOHNSON,
BARBARA MOCZYGEMBA, and
EILEEN HOPE KRAUSE,

Plaintiffs,

v.

GREYHOUND LINES, INC., a Delaware Corporation,
BURLINGTON STAGE LINES, LTD., d/b/a BURLINGTON TRAILWAYS, an Iowa
limited liability company,
TEXAS, NEW MEXICO AND OKLAMOMA (TNM&O) COACHES, INC., a Delaware
corporation, and
BUSCO, INC., d/b/a BUSCO, INC. ARROW STAGE LINES, a Nebraska corporation, and
BLACK HILLS STAGE LINES, INC., a Nebraska corporation,

Defendants.

**DEFENDANT BUSCO, INC. AND BLACK HILLS STAGE LINES'
MOTION TO DISMISS PLAINTIFFS' FIRST CLAIM FOR RELIEF**

Defendants, Busco, Inc., d/b/a Busco, Inc. Arrow Stage Lines (“Busco”) and Black Hills Stage Lines, Inc. (“Black Hills”) (collectively referred to as “Defendants”), by and through their counsel, Marcel Krzystek of JESTER & GIBSON, LLP, and pursuant to F.R.C.P. 12(b)(6), hereby move the Court to enter an order dismissing Plaintiffs’ first claim for relief, and in support thereof Defendants state as follows:

FACTUAL ALLEGATIONS

1. On April 11, the Court granted the Plaintiffs’ Unopposed Motion for Leave to File First Supplemental and Second Amended Complaint [75] (“Amended Complaint”).

2. In this case, several individual Plaintiffs and organizational Plaintiff Colorado Cross-Disability Coalition assert three claims for relief against various over-the-road bus transportation companies. Plaintiffs generally allege that the Defendant bus companies have discriminated against Plaintiffs in violation of the Americans with Disabilities Act, 42 U.S.C. § 12184(a) and the Rehabilitation Act, 29 U.S.C. § 794. Plaintiffs also assert Colorado Consumer Protection Act claims against some of the Defendants (although not Busco or Black Hills).

3. The only individual Plaintiff to assert a claim against Busco and Black Hills is Eileen Hope Krause, and her allegations relate to incidents outlined in paragraphs 40 and 41 of the Amended Complaint. Accepting all well-pleaded allegations of the Amended Complaint as true, Ms. Krause's claims are as follows:

- a. On June 1, 2007, Ms. Krause contacted Black Hills forty-eight hours in advance of a June 3 trip from Fort Morgan to Denver. Ms. Krause alleges that she spoke with "Connie" and was assured that she would be provided a bus with a lift for both legs of the trip. *See* Amended Complaint, ¶ 40.
- b. Ms. Krause alleges that on June 3, she and an assistant arrived at the bus station for the 6:00 p.m. trip. However, Ms. Krause alleges that the bus driver advised her that the bus did not have a wheelchair lift or ramp, and stated that he was unaware of a request for an appropriately equipped bus. In either event, Ms. Krause alleges, the bus driver advised her that the next bus would arrive at 4:00 a.m. and that she would need to take that bus. *See* Amended Complaint, ¶ 40.
- c. In response, Ms. Krause contacted the CCDC Legislative Liaison, who then spoke with the bus driver. According to Ms. Krause, the bus driver advised

the Liaison that dispatch was not open, but the Liaison insisted that someone at Black Hills be contacted. Ultimately, the driver did contact dispatch and asked Ms. Krause where she could be picked up. Ms. Krause provided the bus driver her home address and telephone number and returned home. Approximately three hours later, a Black Hills bus picked up Ms. Krause at her home and drove her and her assistant to Denver. *See* Amended Complaint, ¶ 40.

- d. Ms. Krause attempted to contact Black Hills on February 23, 2008, forty-eight hours prior to her departure from Fort Morgan to Denver on February 26; however, the office was closed and she was unable to make a request for an accessible bus at that time. Ms. Krause successfully contacted Black Hills on February 25, explained that she had attempted to contact Black Hills on February 23, and requested a bus with a lift, at which time she received a verbal confirmation number from Black Hills. *See* Amended Complaint, ¶ 41.
- e. On this trip, the bus driver was rude to Ms. Krause and told her that she needed to make a request for a lift equipped bus. However, the bus was equipped with a lift, and Ms. Krause makes no further allegations related to discrimination regarding the February 26 trip. *See* Amended Complaint, ¶ 41.

4. Based upon those factual allegations, the Amended Complaint asserts two claims for relief against Defendants Busco and Black Hills: (1) violation of the Americans with Disabilities Act, 42 U.S.C. § 12184(a); and (2) violation of the Rehabilitation Act, 29 U.S.C. § 794.

STANDARD OF REVIEW

5. Defendants Busco and Black Hills move this Court to dismiss the Plaintiffs' first claim for relief on the grounds that Plaintiffs have failed to state a claim upon which relief can be granted.¹ When deciding a motion to dismiss under Rule 12(b)(6), a court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *David v. City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996).

6. The United States Supreme Court has recently ruled that the standard for review previously applied under Rule 12(b)(6) – "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" – is "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1969, 167 L.Ed.2d 929, 945 (2007). Although the Supreme Court did not clearly articulate the proper standard for a Rule 12(b)(6) dismissal, its opinion in *Bell Atlantic Corp.* and its subsequent opinion in *Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) "suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, n.2 (10th Cir. 2007), *citing Iqbal v. Hasty*, 490 F.3d 143 (2nd Cir. 2007).

7. Under this new "plausibility" standard, "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of

¹ Defendants also filed a Motion for Summary Judgment seeking to dismiss Plaintiffs' second claim for relief contemporaneously with this Motion Dismiss.

mustering factual support for *these* claims.” *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original). A court “must determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed.” *Lane v. Simon*, 495 F.3d 1182, 1186 (10th Cir. 2007).

ARGUMENT

8. Ms. Krause’s factual allegations fail to plausibly support a legal claim for relief against Busco or Black Hills. As Plaintiffs correctly cite, the Americans with Disabilities Act provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.” 42 U.S.C. § 12184(a). Compensatory damages are not available under the ADA unless the plaintiff establishes intentional discrimination. *See, e.g., Tyler v. City of Manhattan*, 118 F.3d 1400 (10th Cir. 1997). Absent intentional discrimination (which Plaintiffs have not plead), a plaintiff’s remedies under the ADA are limited to injunctive relief. *See* 42 U.S.C. § 12188; *Chambers v. Melmed*, 141 Fed. Appx. 718, 720 (10th Cir. 2005).

9. Even if Ms. Krause’s factual allegations are proven true, the fact of one isolated incident in which she suffered a three hour delay as a result of Black Hills’ failure to arrive with a lift equipped bus is insufficient to afford relief under the ADA. In *United States v. W. T. Grant Co.*, 345 U.S. 629, 97 L. Ed. 1303, 73 S. Ct. 894 (1953), the Supreme Court stated that the purpose of injunctive relief is to prevent future violations and the moving party must demonstrate that there exists some cognizable danger of recurrent violations, something more than a mere possibility, which serves to keep the case alive. An isolated incident fails to provide a basis for

the entry of an injunction. *See, e.g., Immigration & Naturalization Service v. Delgado*, 466 U.S. 210 (1984) (holding that an ambiguous, isolated incident in which an INS agent allegedly attempted to prevent an employee from leaving the work premises during a factory survey conducted by the INS failed to entitle plaintiff to injunctive relief); *Griffith v. Colorado Div. of Youth Servs.*, 17 F.3d 1323 (10th Cir. 1994) (isolated, infrequent instances of misconduct did not constitute a hostile work environment justifying entry of injunction).

10. Perhaps forecasting this problem, Ms. Krause now also recites facts regarding her February 2008 trip in which the bus driver allegedly treated her rudely and claimed to have no notice of her request for a lift equipped bus. Ms. Krause admits, however, that the bus was equipped with a lift, and she make no allegations whatsoever about any discriminatory conduct during that trip. Consequently, with respect to the February 2008 trip, Ms. Krause fails to state a claim that she was “discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services.” 42 U.S.C. 12184(a).

11. In sum, the Amended Complaint fails to state a claim under the ADA against Black Hills upon which relief can be granted; there exists only one allegation of discriminatory conduct (a three hour delay) for which, as is set forth above, no legal relief is available.

12. Neither Ms. Krause nor any other Plaintiff make any direct factual allegation of discriminatory conduct toward Busco; Busco is a defendant based upon Plaintiffs’ allegation that Busco “either operates, is affiliated with or is the parent company of Defendant, Black Hills Stage Lines, Inc.” Amended Complaint, ¶ 13. Because Plaintiffs have failed to assert a viable ADA claim against Black Hills, their ADA claim against Busco also necessarily fails.

CONCLUSION

13. Ms. Krause alleges only that Black Hills failed to arrive with a lift equipped bus

one single, discrete occasion. Furthermore, she acknowledges that Black Hills remedied the problem in approximately three hours by arriving at her home with a lift equipped bus and driving her to Denver. Accepting all of Ms. Krause's allegations as true, her ADA claim fails to state a claim for which relief can be granted.

WHEREFORE, Defendants Busco and Black Hills respectfully move the Court to (1) dismiss Plaintiffs' first claim for relief against them; (2) grant Defendants their reasonable attorneys' fees and costs; and (3) for any further relief the Court deems just and proper.

Dated this 25th day of April, 2008.

Respectfully submitted,

JESTER & GIBSON, LLP

s/ Marcel Krzystek

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2008, a true and correct copy of the foregoing **DEFENDANT BUSCO, INC. AND BLACK HILLS STAGE LINES' MOTION TO DISMISS PLAINTIFFS' FIRST CLAIM FOR RELIEF** was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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