

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD FRAME, WENDELL
DECKER, and SCOTT UPDIKE,

Plaintiffs,

v.

THE CITY OF ARLINGTON, TEXAS,

Defendant.

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CIVIL ACTION NO. 4:05-CV-0470-Y

**DEFENDANT CITY OF ARLINGTON’S THIRD RENEWED RULE 12(b)(6) MOTION
TO DISMISS PLAINTIFFS’ CLAIMS**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Arlington, Texas (“Defendant”) files this third renewed motion to dismiss Plaintiffs’ claims, pursuant to Fed. R. Civ. P. 12(b)(6) and this Court’s Order Amending Initial Scheduling Order, dated April 12, 2007, because notwithstanding the changes and additions made in Plaintiffs’ Third Amended Complaint, filed October 18, 2006, Plaintiffs have failed to state a claim upon which relief may be granted and Defendant is entitled to dismissal of Plaintiffs’ claims. In support hereof, Defendant respectfully shows the Court the following:

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiffs filed this action on July 22, 2005. *See* Court’s Docket. After being served, Defendant filed, as its initial pleading, Defendant City of Arlington’s Rule 12(b)(6) Motion to Dismiss Plaintiffs’ Claims and Brief, on August 22, 2005. *Id.* In response, Plaintiffs’ First Amended Complaint was filed on September 12, 2005, pursuant to Fed. R. Civ. P. 15(a). *Id.* Plaintiffs also filed a response to Defendant’s dismissal motion urging that, because of the

amended pleading, Defendant's Rule 12 motion was moot. *Id.* The Court denied Defendant's Rule 12 motion as moot by Order, dated September 15, 2005. *Id.*

The parties conferred, pursuant to the Court's Order to Submit Joint Status Report and Proposed Discovery Plan, dated August 24, 2005, and thereafter submitted and filed the Parties' Proposed Discovery Plan and Joint Status Report on September 23, 2005. *Id.* The parties simultaneously filed an agreed stipulation concerning Plaintiffs' desire to file a second amended complaint, and the stipulation also specified the timing of Defendant's response thereto, on September 23, 2005. *Id.* Plaintiffs' Second Amended Complaint was filed on October 20, 2005, and Defendant City of Arlington's Renewed Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claims was filed on November 4, 2005, the deadline agreed to in the parties' stipulation. *Id.* Plaintiffs' Response to Defendant's Renewed Motion to Dismiss, and Plaintiffs' Corrected Response to Defendant's Renewed Motion to Dismiss, were filed on December 15 and 16, 2006, respectively. *Id.* Defendant's Reply to Plaintiff's Response to Defendant's Renewed Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claims was filed on January 6, 2006, and Defendant's Supplemental Authority Regarding Pending Rule 12(b)(6) Motion to Dismiss was filed on July 7, 2006. *Id.*

On July 31, 2006, the Court's Order Denying as Moot Motion to Dismiss and Directing Amended Complaint ("Court's Order") was entered, ordering Plaintiffs to file a third amended complaint, and thereby mooting Defendant's pending motion to dismiss. *See* Court's Order, pp. 2-3. The Court's Order further provided that, upon Plaintiffs' filing a third amended complaint, Defendant may file another motion to dismiss. *Id.* After Plaintiffs requested additional time, which the Court denied by Order Denying Motion for Extension of Time, dated October 17, 2006, Plaintiffs' Third Amended Complaint was filed on October 18, 2006. Defendant City of Arlington's Second Renewed Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claims was filed

pursuant to the Court's Order and as a result of the Plaintiffs' Third Amended Complaint's failure to state a cognizable claim, on October 30, 2006. *See* Court's Docket.

The Parties thereafter participated in Court-ordered mediation and settlement discussions, during which time the parties jointly requested a stay of all proceedings during those discussions; the Court granted the parties' stay requests. *See* Court's Docket.¹ During the stay period, the Court dismissed Defendant's renewed dismissal motion without prejudice, and without ruling on the merits presented in said motion, providing that such a motion may be re-filed if the case does not settle. *Id.* At the conclusion of the stay and after receiving the parties Joint Report on Settlement Negotiations, filed April 11, 2007, the Court's Order Amending Initial Scheduling Order, dated April 12, 2007, was entered, establishing updated deadlines for events to occur in this case (including, at p. 2, the deadline for filing Defendant's responsive pleading to Plaintiffs' current complaint). *Id.*² This motion is therefore filed pursuant to the Court's order.

II. CASE BACKGROUND

Plaintiffs' Third Amended Complaint is ostensibly brought pursuant to 28 U.S.C. §§ 1331 and 1343; Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131-12134, and ADA regulations provided in 28 CFR Part 35, specifically, 28 CFR §§ 35.149-35.151; and § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, *et seq.* (the "Rehabilitation Act"), complaining of Defendant's alleged intentional discrimination against Plaintiffs and all persons with disabilities in the City of Arlington. *See* Plaintiffs' Third Amended Complaint, pp. 1-5. Defendant has not yet answered in this case, and instead hereby files this

¹ As a result of the stay of proceedings, Plaintiffs did not file a response to Defendant's second renewed motion to dismiss. *See* Court's Docket.

² The Court's Order Amending Scheduling Order references "Plaintiffs' second amended complaint," obviously taking its cue from the reference made in the Joint Report on Settlement Negotiations, filed April 11, 2007, at p. 2. Defendant apologizes for that incorrect reference by the parties; there is no dispute that the current live pleading is Plaintiffs' Third Amended Complaint, to which this motion is directed. *See* Court's Docket.

third renewed motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *See* Court's Docket. This motion is filed to address Plaintiffs' allegations against Defendant in light of various statutory defenses and pleading deficiencies that exist in Plaintiffs' Third Amended Complaint.

Plaintiffs make allegations of egregious conduct against Defendant under the ADA. Despite those allegations, Defendant understands, complies with, and embraces the important public policy considerations that form the basis for the ADA and the Rehabilitation Act. The City of Arlington does not intend to discriminate against anyone on the basis of race, gender, national origin, sexual orientation or disability. The need to determine whether Plaintiffs have alleged any viable intentional discrimination causes of action in this case is of paramount importance, however; if a cause of action is alleged, then Defendant is entitled to, and by this motion requests the Court to, provide definition and clarification to such cause(s) of action. This is a crucial and necessary first step in formulating Defendant's defensive response to this case of first impression in the Fifth Circuit. As pleaded, Plaintiffs' Third Amended Complaint seems to allege that Defendant's ADA obligations are unlimited under the law. As set forth herein and in the brief accompanying this Motion, the deficiencies that exist in Plaintiffs' Third Amended Complaint instead mandate dismissal of Plaintiffs' claims as a matter of law.

III. GROUNDS FOR DISMISSAL

The grounds upon which this Motion is based are:

1. The applicable statute of limitations either bars Plaintiffs' discrimination claims in their entirety, or the statute limits Plaintiffs' claims to only those events that occurred within two (2) years prior to the filing of this lawsuit, and Plaintiffs' revised allegations in their Third Amended Complaint do not remedy this defect.

2. Plaintiffs lack legal standing to bring this lawsuit to allege discrimination on behalf of disabled persons in general, to complain of non-specific acts of alleged discrimination,

to complain generally under Section 504 of the Rehabilitation Act that Defendant's general receipt of federal funding triggers court review, to bring suit against Defendant's transition plan and self-evaluation, or to complain of Defendant's alleged violation of other regulations.

3. Plaintiffs' allegations fail to assert that the City has discriminated against them:
 - a. Plaintiffs have failed to allege facts that indicate a sufficient alteration to existing facilities to trigger ADA scrutiny.
 - b. Sidewalks and other facilities in the public rights-of-way are not a program, activity or service under the ADA, and there are no existing accessibility standards.
 - c. Alternatively to the preceding issue, if there is such an obligation to perpetually maintain, construct, or retrofit all sidewalks in the City, then such a finding renders the ADA and Rehabilitation Act unconstitutional.
 - d. There are no viable ADA or Rehabilitation Act claims to complain of Defendant's transition plan and self-evaluation actions, to complain of Defendant's paratransit waivers and releases, or to complain of Defendant's alleged violation of ADA regulations.

As set forth in Defendant's Brief filed concurrently with this Motion, these issues should be granted in Defendant's favor, rendering Plaintiffs' Third Amended Complaint subject to dismissal as a matter of law for its failure to state a viable claim of intentional discrimination, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

IV. CONCLUSION

The City of Arlington remains committed to following and complying with the ADA, the Rehabilitation Act, and its implementing regulations. It has followed those important laws since Congress passed them so many years ago. Plaintiffs' Third Amended Complaint seeks to impose

substantially greater burdens upon the City than are required by law, however, in a manner that would be unreasonable and that would create potentially unlimited liability. This Motion presents important issues that warrant certification to the Fifth Circuit Court of Appeals under 28 U.S.C. 1292(b), if this Court does not grant Defendant's motion and dismiss Plaintiffs' Third Amended Complaint. Defendant has advised Plaintiffs, through their counsel, that it will be requesting such appellate relief in this matter, if necessary. Based upon the argument and authority presented in the Brief accompanying this Motion, such appellate relief should not be necessary at this stage of the case. This Court should dismiss this case because the allegations of intentional discrimination in Plaintiffs' Third Amended Complaint fail to state a claim under existing jurisprudence.

WHEREFORE, PREMISES CONSIDERED, Defendant City of Arlington, Texas, prays that the Court grant this Motion and dismiss Plaintiffs' claims against it, and Defendant prays for such other and further relief to which it is justly entitled.

Respectfully submitted,

By: /s/ Edwin P. Voss, Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this document was served by certified mail, return receipt requested, upon Mr. John M. Nevins, Moseley Law PC, 3878 Oak Lawn Avenue, Suite 400, Dallas, Texas 75219-4469 (Plaintiffs' local counsel), and upon Messrs. Miguel M. de la O and Charles D. Ferguson, De la O, Marko, Magolnick & Leyton, 3001 S.W. 3rd Avenue, Miami, Florida 33129, lead counsel for Plaintiffs, on the 30th day of April, 2007, in addition to service provided by the Court's ECF procedures.

By: /s/ Edwin P. Voss, Jr.
Edwin P. Voss, Jr.