IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 13-cv-0760-PAB-MJW

COLORADO CROSS-DISABILITY COALITION,
a Colorado non-profit corporation,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT,
a political subdivision of the State of Colorado

Defendant.

DEFENDANT'S MOTION TO DISMISS THE DEMAND FOR INJUNCTIVE RELIEF

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendant Regional Transportation District ("RTD") hereby moves to dismiss the demand for injunctive relief. In support of its motion, RTD states as follows.

I. INTRODUCTION.

Plaintiff Colorado Cross Disability Coalition ("CCDC") alleges that RTD violated the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12141 *et seq*., by failing to ensure that passengers in wheelchairs have access to RTD's fixed-route buses. CCDC alleges that RTD's policy, modeled after federal regulations, is discriminatory and that RTD bus operators do not follow that policy. RTD was collaborating with CCDC to implement a Campaign – a coordinated rollout of a clarified policy, refresher training for bus operators, and a public awareness message. Rather than cooperate with

RTD to implement the Campaign, CCDC seeks court intervention. The demand for injunctive relief must be dismissed because this Court does not have subject matter jurisdiction where CCDC lacks standing. CCDC cannot show a continuing injury or real and immediate threat of injury because it cut short efforts to resolve the very situation about which it complains. Federal courts give government entities like RTD wide latitude to resolve their own affairs by taking the exact type of actions like the Campaign. This is not the proper forum for CCDC to press its claim for injunctive relief; CCDC has an adequate remedy at law.

II. FACTUAL ALLEGATIONS.

RTD is a political subdivision of the State of Colorado organized pursuant to Colo. Rev. Stat. § 32-9-101 *et seq*. Complaint, Parties ¶¶ 28, 29. Its mission is to provide mass transit including fixed-route bus service. Complaint, Parties ¶ 33. CCDC, a non-profit, works for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities. Complaint, General Allegations ¶ 30.

RTD has a policy that strollers are permitted on RTD buses but that the stroller must be collapsed if the bus becomes full. Complaint, General Allegations ¶¶ 19, 20, 22, 24. Passengers must be prepared to move towards the rear of the bus, and bus operators must ask passengers in the securement area to move for a passenger in a wheelchair. *Id.* RTD intended to roll out a Campaign: a refined policy; refresher training for bus operators; and marketing to facilitate public cooperation. Complaint, General Allegations ¶¶ 80, 115, 116. RTD representatives sent the proposed materials to CCDC for review and comment and met with CCDC Executive Director Julie Reiskin from CCDC. Complaint, General Allegations ¶¶ 70, 81. In its Complaint, CCDC did not note the date of that meeting or the timing of when RTD intended to roll out its

Campaign. When CCDC filed this lawsuit on October 10, 2013, CCDC knew that RTD had not fully implemented the Campaign and had not asked for the measured results of the Campaign. In fact, based on a letter to Reiskin, attached as Exhibit A, RTD and CCDC only first met in September 2013 and training would not be complete until the end of October 2013.

III. ARGUMENT.

This Court does not have subject matter jurisdiction to award injunctive relief because CCDC lacks standing, and therefore any claim for injunctive relief should be dismissed. Fed. R. Civ. P. 12(b)(1) empowers a court to dismiss claims for "lack of jurisdiction over the subject matter." *Southway v. Cent. Bank of Nigeria*, 994 F. Supp. 1299, 1305 (D. Colo. 1998), *aff'd and remanded*, 198 F.3d 1210 (10th Cir. 1999). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is a facial attack on the complaint's allegations as to subject matter jurisdiction. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (citations omitted). A district court must accept the allegations in the complaint as true. *Id.*

A court may consider evidence beyond the allegations in the complaint without converting it to a motion for summary judgment when the evidence and the jurisdiction question are not intertwined with the merits. *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). The September 11, 2013 letter, attached as Exhibit A, is the only evidence submitted by RTD beyond the allegations in the Complaint. The letter is being submitted solely for the purpose of identifying dates that CCDC omitted from the Complaint. For that reason, the letter may be considered for purposes of determining subject matter jurisdiction – and this Court need not convert the motion to summary judgment – because the facts for which the letter is offered are not intertwined with the merits.

Because a federal court may adjudicate only a "case" or "controversy" in accordance with Article III of the U.S. Constitution, to establish standing, CCDC must demonstrate three elements: (1) it has suffered an injury in fact that is concrete and particularized as well as actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested. *See* U.S. Const. art. III, § 2, cl. 1; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693 (2000). "Standing must be analyzed from the facts as they existed at the time the complaint was filed." *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004) (citing *Laidlaw*, 528 U.S. at 184, 120 S.Ct. 693). "Each element of standing must be supported with the manner and degree of evidence required at the pertinent, successive stages of the litigation." *Id.* A "plaintiff must demonstrate standing separately for each form of relief sought." *Id.* (citing *Laidlaw*, 528 U.S. at 185, 120 S.Ct. 693).

To satisfy the first element for injunctive relief, the plaintiff must demonstrate that it is suffering a continuing injury or be under a real and immediate threat of being injured in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02, 111, 103 S.Ct. 1660 (1983). "[P]ast wrongs do not in themselves amount to that real and immediate threat of injury." *Id.* at 103. "A claimed injury that is contingent upon speculation or conjecture is beyond the bounds of a federal court's jurisdiction." *Tandy*, 380 F.3d at 1283. A court evaluates "'the *reality* of the threat of repeated injury, . . . not the plaintiff's subjective apprehensions.'" *Hulihan v. Regional Transp. Com'n of Sthn. Nevada*, 2012 WL 2060955 (D. Nev. June 7, 2012) (not reported) (quoting *Lyons*, 461 U.S. at 107 n.8, 103 S.Ct. 1660) (emphasis in original).[1] There will be

[1] This case is attached as Exhibit B.

instances where employees do not follow the prescribed policies but "it is no more than conjecture to suggest that in every instance" a legal right will be violated. *Lyons*, 461 U.S. at 108, 103 S.Ct. 1660.

In *Tandy*, the Tenth Circuit held that a plaintiff had no standing to seek prospective relief requiring drivers to call out stops or to offer designated seats. *Tandy*, 380 F.3d at 1288. Wichita Transit's policies required bus drivers to call out bus stops and offer riders a designated seat. *Id.* The plaintiff's past experience in which a driver failed to follow those policies did not meet the standard for future injury. *Id*. The court found the plaintiff "has neither demonstrated that drivers are authorized to decline to offer disabled passengers designated seats, or that *all* drivers *always* fail to offer disabled passengers designated seats." *Id*. (emphasis in original). In this case, in order to allege an actual controversy, CCDC must show either that all bus operators deny access to passengers in wheelchairs by failing to ask passengers with large items to move – which CCDC does not allege – or that RTD authorized bus operators to act in such a manner – which CCDC also does not allege. *See Lyons*, 461 U.S. at 105-106, 103 S.Ct. 1660.

In actions against state and local governments, there is a higher standard for showing an immediate threat of substantial injury. *See Midgett v. Tri-County Met. Trans. Dist. of Or.*, 254 F.3d 846, 850 (9th Cir. 2001). "Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Id.* at 850 (quoting *Rizzo v. Goode*, 423 U.S. 362, 378–79, 96 S.Ct. 598 (1976) (citations and internal quotation marks omitted)). "This 'well-established rule' bars federal courts from interfering with non-federal government operations in the absence of facts showing an immediate threat of substantial injury." *Id.* A federal court, "is not the proper forum" to pursue claims for equitable relief when the prerequisites of injunctive relief are not

satisfied. *Lyons*, 461 U.S. at 111-12, 103 S.Ct. at 1670. However sympathetic a court may be to the plaintiff's situation, it must be "mindful of the principles of federalism in determining the availability and scope of equitable relief . . ." *Casas v. City of El Paso*, 502 F. Supp. 2d 542, 550 (W.D. Tex. 2007) (citations and quotations omitted) (noting the need for respect of the function of local governments). "[A] federal court must exercise restraint when a plaintiff seeks to enjoin any non-federal government agency, be it local or state." *Midgett*, 254 F.3d at 851. Importantly, however, a plaintiff will not go unrecompensed when the injury has an adequate remedy at law. *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660.

Courts have hesitated to interfere with transit agencies who are actively working to resolve ADA-service-related issues. In *Midgett*, for example, Tri-Met, Portland's transit agency, "had procedures already in place" to monitor ADA compliance and operator performance. *Midgett*, 254 F.3d at 850. The district court and the Ninth Circuit both concluded there was no need for "a federal court's mandating substitute procedures of its own design to address the same issues." *Id.*; *see also Midgett v. Tri-County Met. Trans. Dist. of Or.*, 74 F.Supp.2d 1008 (D.Or. 1999). Also in *Casas*, the court found no need to interfere where the transit agency was willing to address the plaintiff's concerns and was subject to oversight by the U.S. Department of Transportation ("DOT") just as RTD is in this case. *See Casas*, 502 F. Supp. 2d at 550.

Similarly here, there is not a threat of immediate, irreparable harm where (1) RTD policy complies with federal regulations, and (2) RTD is actively working towards a resolution. RTD's policy, on its face, does not discriminate against disabled passengers. *See* Complaint, General Allegations ¶¶ 19, 20, 22, 24. Title II Part B of the ADA defines discrimination under the statute, and the DOT, which is the agency empowered to enforce the statute, has implemented

regulations that direct transit agencies on how to provide services to avoid discrimination. *See Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 675 (5th Cir. 2004); *Casas*, 502 F.Supp.2d at 545. DOT regulations require buses to have a wheelchair securement area and to provide signage designating the area as such; RTD complies. 49 CFR §§ 37.165, 38.27; Complaint, General Allegations ¶¶ 2-7. The regulations also require bus operators to ask passengers seated in the securement area to move to make room for a boarding passenger in a wheelchair; RTD's policy complies. 49 CFR § 37.167(j); Complaint, General Allegations ¶¶ 6, 7, 20, 22, 24, 53, 54, 59-61. RTD's policy does not authorize bus operators to deny access to the disabled; it affirmatively requires bus operators to act. *See* Complaint, General Allegations ¶¶ 24, 53, 54. Finally, the regulations require transit providers to train bus operators to proficiency. 49 C.F.R. § 37.173. The Campaign includes bus operator training. *See* Complaint, General Allegations ¶¶ 52, 66, 67, 90.q. CCDC cannot demonstrate an immediate threat of harm where it cannot allege that drivers will consistently continue to not follow a clear RTD policy in the future. *See Lyons*, 461 U.S. at 106, 103 S.Ct. at 1667; *Tandy*, 380 F.3d at 1288. Without such a showing, there is no threat of immediate harm. *See* Complaint, General Allegations ¶¶ 146, 155.

However sympathetic CCDC or its members may be, this is not the proper forum for CCDC to pursue equitable relief. Given the wide latitude accorded to RTD, this Court is not in a position to rewrite RTD policy, to second-guess RTD's plan to train its bus operators, or to continue to enforce its policy when it is already making efforts to do so. CCDC is not without a remedy; if this motion is granted, CCDC still has a remedy at law.

IV. CONCLUSION

For the reasons set forth above and pursuant to Fed. R. Civ. P. 12(b)(1), RTD respectfully

requests that the demand for injunctive relief be dismissed for lack of subject matter jurisdiction.

Respectfully submitted this 3rd day of December, 2013.

REGIONAL TRANSPORTATION DISTRICT

By: */s Jenifer M. Ross-Amato*

Jenifer M. Ross-Amato, No. 34665
Telephone: 303-299-2479
Email: jenifer.ross@rtd-denver.com
Derrick Black, No. 37919
Telephone: 303-299-2211
Email: derrick.black@rtd-denver.com
Rolf G. Asphaug, No. 18701
Telephone: 303-299-2203
Email: rolf.asphaug@rtd-denver.com
1600 Blake Street
Denver, CO 80202
Facsimile: 303-299-2217

This document was filed electronically. The original document and signature are on file in the undersigned attorney's office

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Defendant's Motion to Dismiss the Demand for Injunctive Relief** was served on **December 3, 2013**, via e-mail, addressed to:

Kevin W. Williams, Esq.
Andrew C. Montoya, Esq.
Colorado Cross-Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203
kwilliams@ccdconline.org
amontoya@ccdconline.org

/s Jenifer M. Ross-Amato
Jenifer M. Ross-Amato
Derrick Black
This document was filed electronically. The original document and signature are on file in the undersigned attorney's office.