IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 13-cv-02760-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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Regional Transportation District ("RTD") hereby submits this Reply in Support of its Motion to Dismiss [Docket No. 9] ("Mtn. to Dismiss"). As stated in this Reply and in its Motion to Dismiss, RTD respectfully requests that this Court dismiss the demand for injunctive relief.

I. INTRODUCTION.

In response to RTD's Motion to Dismiss, Plaintiff Colorado Cross-Disability Coalition ("CCDC") argues that it would rather seek court intervention than continue to work with RTD. CCDC acknowledges that RTD's policy, on its face, complies with the Americans with Disabilities Act ("ADA") and its implementing regulations. *See* Plaintiff's Response to the

Motion to Dismiss[1] [Docket No. 10] ("Pl. Resp."), at 12 ("RTD has had policies in place that should solve the problem . . ."). RTD's policy explicitly requires bus operators to ask passengers in the securement area to move to make room for a passenger in a wheelchair in compliance with 49 C.F.R. § 37.167(j)(1). *See* Complaint, General Allegations ¶¶ 19, 20, 22, 24. Instead, CCDC argues that RTD has not properly *implemented* its policy. *See* Pl. Resp., at 3, 5 & 7 ("RTD has made repeated attempts at setting forth policies that look like these regulations on paper, but they do not achieve the result required by the ADA in practice."). CCDC concludes that the incidents of bus operators not following the policy must be widespread if the individuals identified in the Complaint had difficulty boarding and because of CCDC's history of raising the issue with RTD chronicled generally (but not specifically) in both the Complaint and response brief. *See e.g.* Pl. Resp., at 3-4. At the same time, CCDC alleges the factual basis for its organizational injury as being that "CCDC devoted time and resources to working with RTD to resolve these issues." *See* Pl. Resp., at 3. CCDC's response to RTD's Motion to Dismiss is that responding to RTD's offer to get involved in implementing the 2013 Campaign would have been useless because the 2013 policy was just more of the same failed implementation scheme. *See* Pl. Resp., at 4.

CCDC's contention that further collaboration in 2013 would have been useless misses the mark. Given CCDC's own admission that the "problem" is not the policy but the implementation, CCDC prematurely sought court intervention when implementation of the policy that CCDC has itself helped develop is nowhere near complete. The Campaign was not

[1] This Court may disregard Plaintiff's response on the grounds that it was untimely. The local rule provides that a responding party shall have 21 days after the date of the service of the motion to file a response. *See* D.C.COLO.LCivR. 7.1.C; *see also* D.C.COLO.LCivR. 56.1.A. RTD filed and served Plaintiff with its Motion to Dismiss on December 3, 2013. *See* Docket No. 9. Given the timeframe set out in the Local Rules, Plaintiff's response was due 21 days thereafter or on December 24, 2013. Plaintiff did not file its response until December 27, 2013. *See* Docket No. 10. Accordingly, Plaintiff's response is untimely.

scheduled to be fully rolled out until weeks after CCDC filed its Complaint. *See* Motion to Dismiss [Docket No. 9] ("Mtn. to Dismiss"), at 2-3. CCDC cannot concurrently rely upon its lengthy involvement with RTD as a basis for both its allegation of a systemic failure to implement the policy and its injury for purposes of standing – *and then* seek injunctive relief asking this Court to further sanction its continuing involvement with RTD while at the same time disavowing RTD's efforts to collaborate. *See* Mtn. to Dismiss, at 2-3 (discussing the RTD Campaign). CCDC must accept some ownership in the performance of RTD bus operators. By its own admission, CCDC has been actively involved with RTD in that same policy. *See* Pl. Resp., at 9-10. If, as both parties seem to agree, RTD and CCDC have worked together for years to implement a federally compliant policy, a federal court probably cannot do any better. This is not the type of legal issue that federal courts are intended or equipped to address. For that reason, this Court lacks jurisdiction to award injunctive relief and RTD's Motion to Dismiss should be granted.

II. ARGUMENT.

CCDC's response brief does not address two critical issues raised in RTD's Motion to Dismiss. First, the principles of federalism make clear that an order for injunctive relief will not improve implementation of a federally compliant policy. Second, the alleged incidents of noncompliance are not significant and do not rise to the level of a pattern warranting federal court intervention.

A. A FEDERAL COURT IS NOT THE PROPER FORUM TO IMPLEMENT A FEDERALLY COMPLIANT POLICY.

In its response brief, CCDC completely ignores RTD's federalism argument. *See* Mtn. to Dismiss [Docket No. 9], at p. 5-6. When considering whether a court has jurisdiction to award

injunctive relief, the principles of federalism are quite relevant. *See Casas v. City of El Paso*, 502 F. Supp. 2d 542, 550 (W.D. Tex. 2007). This is particularly true when, as here, a plaintiff has an adequate remedy at law. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 101–02, 111, 103 S.Ct. 1660 (1983). Accordingly, the individual incidents identified in the Complaint, if found to arise to actionable discrimination under the ADA, can be remedied by monetary damages, leaving the equitable aspect of this case to be about how best to get bus operators to follow the policy and ask people to move out of the securement area. No federal court is equipped to substitute its own judgment on how to achieve that result, particularly when both parties have worked together for years towards that result.

To remedy the alleged problem of implementation, CCDC asks the court to issue an injunction requiring RTD to comply with the law. Such an order will not solve the problem because RTD is already attempting to comply: just look at its policy. *See Casas,* 502 F. Supp. 2d at 550 (finding plaintiff did not show an immediate threat of substantial harm where city took actions to address the complaints and there were no violations after the city took such remedial actions). CCDC acknowledged in its response brief that the stated purpose of the policy is to comply with federal law. *See* Resp. Brief, at 8 (citing Exhibit A to Mtn. to Dismiss). CCDC has not offered an alternative approach. What specifically could a federal court do that RTD and CCDC, working together, have not been able to accomplish? The actions that would be required by an injunction are the very actions that RTD asked CCDC to participate in: clarifying a federally compliant policy; retraining; discipline; and a public campaign designed to encourage cooperation. *See* Mtn. to Dismiss, at 2. Accordingly, any court decree would order RTD to take the actions it has already taken.

CCDC is no better equipped than a federal court to oversee implementation. CCDC has made no allegation that it represents a class of passengers, and a class has not been certified. Although RTD has sought out CCDC's involvement immediately prior to CCDC filing this lawsuit, CCDC's involvement was completely voluntary. *See* Pl. Resp., at 9.

While a court and CCDC are not equipped to oversee RTD's transit operations, such is the purpose and expertise of federal regulatory agencies overseeing RTD and other transit agencies. As a result, courts have seen little need to exercise jurisdiction to award injunctive relief where the transit agency is subject to oversight by the U.S. Department of Transportation ("DOT"). *See Casas*, 502 F. Supp. 2d at 550 (considering oversight of transit system by FTA makes injunction an inappropriate remedy). In *Midgett*, for example, the Ninth Circuit did not step in when a recent FTA review found Tri-Met was in compliance with the ADA. *Midgett*, 254 F.3d at 850; *see also Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp.2d 1362, 1382 (N.D. Ga. 2002) (noting contrast). In a case cited by CCDC in which the transit agency was sued for ADA violations, the federal court relied upon the findings of the Federal Transit Administration ("FTA"), an agency of the DOT, when it concluded MARTA's paratransit service was not in compliance with the ADA. *Martin*, 225 F. Supp.2d at 1382. In other ADA-based challenges to transit agency policies and practices, federal courts have generally found no ADA violation where the transit entity is in compliance with DOT regulations. *See e.g. Boose v. Tri-County Met. Transp. Dist. Of Or.*, 587 F.3d 997, 1006 (9th Cir. 2009); *Melton v. Dallas Area Rapid Trans.*, 391 F.3d 669, 674 (5th Cir. 2004). Here, RTD is subject to the same oversight by the FTA as Tri-Met and MARTA; the FTA has not made any adverse findings or taken any adverse action against RTD based on how it has implemented its federally compliant policy.

It is significant that none of the cases cited by CCDC involve a state or local government, and none of those cases establish a precedent in the Tenth Circuit in which a federal court oversees a transit agency's implementation of its own policies. *See Henrietta v. Bloomberg*, 331 F.3d 261, 290 (2d Cir. 2003); *Moeller v. Taco Bell Corp.*, 816 F. Supp.2d 831 (N.D. CA. 2011)[2]; *Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 2011 WL 2173713 (D.Colo. June 2, 2011). For those reasons, CCDC has identified no specific reason why this court should substitute its own judgment in order to implement a federally compliant policy.

B. CCDC HAS NOT ALLEGED AN ACTUAL INJURY THAT WARRANTS COURT INTERVENTION.

CCDC's motion also fails to identify at what point a few incidents in which a passenger has difficulty boarding the bus rise to the level that a federal court should intervene. "The regulations implementing the ADA do not contemplate perfect service for wheelchair-using bus commuters." *Midgett v. Tri-County Met. Trans. Dist. of Or.*, 254 F.3d 846, 849 (9th Cir. 2001). The Tenth Circuit has reached the same conclusion. In *Tandy*, the Tenth Circuit made clear that in order to allege an actual injury that warrants court intervention, a plaintiff must show that *all* bus operators *always* fail to follow the policy. *Tandy v. City of Wichita*, 380 F.3d 1277, 1288 (10th Cir. 2004). "[O]ccasional problems do not, without more, establish a violation of the ADA." *Midgett*, 254 F.3d at 850. The evidence must support an inference that the plaintiff faces a real and immediate threat of continued, future violations. *Id.*

CCDC does not offer any specific allegations of a significant pattern in which passengers in wheelchairs were denied service. In its response brief, CCDC relied on *Martin v. Metro.*

[2] The *Moeller* case is not binding precedent and is distinguishable for several other reasons. The court considered an entirely different standing issue than the one at issue in this case – mootness. *See Moeller*, 816 F. Supp.2d at 848-50. The case also involved the Architectural Barriers Act, which raises different issues for compliance. *Id.* at 846-47. Finally, that case was a class action in which there was extensive evidence of past violations. *Id.* at 859.

Atlanta Rapid Transit Authority. In that case, the federal court found that the plaintiffs did *not* offer enough evidence of a "significant pattern of violations" in which bus operators asked non-disabled passengers to give up seats or wheelchair securement locations for disabled riders. *Martin*, 225 F. Supp.2d at 1381; *see also Kramer v. Port Auth. Of Allegheny Cty.*, 876 A.2d 487, 493 (Pa. Commw. Ct. 2005) (a high compliance rate demonstrates that the incidents of noncompliance are "isolated or temporary interruptions in service" permissible under the regulations). Similarly in *Casas*, the court found that the alleged 17 incidents of rudeness over a two-year-plus period, at a rate of 15 bus trips per week, "does not constitute the kind of severe and pervasive harassment required for recovery for disability-based harassment." *Casas*, 502 F. Supp.2d at 549.

In this case, the alleged systemic problem is not denial of service. Of the 13 specific incidents identified in the Complaint over a seven month period, in only three of those incidents were the passengers unable to board. *See* Complaint, Gen. Alleg. ¶¶ 78.e; 84.g; 102.i. Julie Reiskin, CCDC's Executive Director, is a good example. The Complaint alleges four incidents involving her over a three-month period from July through September 2013. *See* Compl., at Gen. Alleg. ¶¶ 68-75. In each of those incidents, Ms. Reiskin was *not* denied service and was actually able to board the bus. *Id.* at ¶¶ 72.i; 73.k; 74.a; 75.b. Similarly for Douglas Howey, in four of the five incidents involving him, Mr. Howey was *not* denied service and boarded the bus. *See id.* at ¶¶ 86.o, 88.g, 89.m & 90.f. Accordingly, when CCDC alleges that bus operators are not following the policy, it does not mean that bus operators are denying wheelchair passengers service. Instead, CCDC's allegation is that the bus operator did not automatically ask passengers in the securement area to move, thereby forcing the passenger to *remind* the bus operator to ask

other passengers to make room in the securement area. *See* Pl. Resp., at p.3 (describing the alleged problem). A federal court cannot possibly issue an injunction directly addressing such a subtle alleged dynamic; this is not the type of widespread noncompliance that other federal courts have identified as warranting an injunction. *See e.g. Midgett*, 254 F.3d at 849; *compare Martin*, 225 F. Supp.2d at 1382 (finding a strong factual record of noncompliance corroborated by the findings of the FTA).

Furthermore, when looking at the data in the Complaint, there does not appear to be a pattern at all, let alone a significant one. When compared to the total number of trips taken, the incidents identified in the Complaint appear to be isolated. Of the 13 incidents identified in the Complaint, nine involve only two people: Julie Reiskin and Douglas Howey. In her Declaration, Ms. Reiskin states that she rides RTD buses five to seven days each week, using approximately four to 12 buses each day. *See* Exhibit 2 to Pl. Resp., at ¶¶ 7-8. Based on that information, Ms. Reiskin takes a range of as little as 20 bus trips and as many at 84 bus trips each week. Therefore, during the three-month timeframe identified in the Complaint, Ms. Reiskin was never denied service and allegedly experienced a problem adversely impacting her service approximately no more than 1.67% of the time and as little as .4% of the time.[3]

The frequency of incidents is similar for Douglas Howey, also identified in the Complaint. Mr. Howey experienced five incidents over a seven-month timeframe. Complaint, Gen. Alleg. ¶¶ 84-91. In his Declaration, Mr. Howey states that in good weather, he rides RTD buses five to six days each week, using approximately four to eight buses each day. *See* Exhibit 1 to Pl. Resp., at ¶ 11. In bad weather, he uses four to eight buses each week. *Id.* at ¶ 12. Based on

[3] This is a general calculation assuming an average of four weeks in each month.

that information, Mr. Howey takes a range of as little as 20 bus trips and as many as 48 bus trips each week during good weather. In total, Mr. Howey claims to have experienced a problem adversely impacting his service in good weather approximately no more than .89% of the time and as little as .37% of the time.

CCDC states that *Midgett*, differs from this case on its facts but CCDC does not explain what that difference is. *See* Pl. Resp., at 12. In *Midgett*, the plaintiff used a wheelchair and had difficulty boarding several buses because the lift each of those buses failed to properly operate. *Midgett*, 254 F.3d at 847. Like the plaintiff in this case, the plaintiff in *Midgett* asked for an injunction requiring the transit agency to take the following actions, among others: revise its procedures, implement new systems for tracking customer reports, implement operator discipline, post data on its website, develop new performance measures, develop new training programs, as well as allow plaintiff's counsel to monitor compliance. *Id.* at 848. The federal court expected the plaintiff to identify a particular reason why a court should substitute its own judgment for that of the transit agency. *Id.* at 850. In view of the wide latitude given to non-federal governments to dispatch their own affairs, the Ninth Circuit found that the incidents of the lift malfunctioning and poor treatment suffered by the plaintiff did not support an inference that he faced a real and immediate threat of continued, future violations. *Id.* at 850.

Similarly, the court in *Casas* cited *Midgett* when it denied the plaintiff's request for equitable relief. *See Casas*, 502 F. Supp.2d at 550. That court looked at the following together: (1) the relative infrequency of the alleged violations, (2) the willingness to address the plaintiff's concerns, and (3) the FTA oversight, to conclude that an injunction would not make an appropriate remedy. *Id.* This case is quite similar to both *Midgett* and *Casas* because all three

factors weigh in the same direction. The alleged violations are relatively infrequent. RTD has demonstrated its willingness to address CCDC's concerns up through the date this lawsuit was commenced. Finally, RTD is subject to FTA oversight. As in *Midgett* and *Casas*, there is nothing about this case that affords a federal court an opportunity to substitute its own procedures.

CCDC's reliance on cases determining whether to uphold a jury's punitive damages award applying the *Kolstad* defense in employment discrimination cases is not relevant to this case. The most relevant and binding case is *Tandy v. City of Wichita*, which stands for the binding principle that a plaintiff has standing to seek injunctive relief only when it can establish a significant pattern of noncompliance. Here, the definition of noncompliance is subtle, at best, and the data does not establish a significant pattern. Accordingly, CCDC has failed to establish the first element of standing: that it be suffering a continuing injury or be under a real and immediate threat of being injured in the future.

III. CONCLUSION.

For the reasons set forth above and in its Motion to Dismiss, RTD respectfully requests that the demand for injunctive relief be dismissed for lack of subject matter jurisdiction.

Respectfully submitted this 10th day of January, 2014.

REGIONAL TRANSPORTATION DISTRICT

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Reply In Support of its Motion to Dismiss was served on January 10, 2014 via e-mail, addressed to:

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