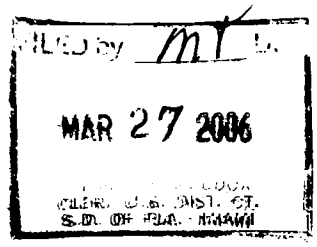
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 05-10073-CIV-MOORE

FLORIDA DISABLED OUTDOORS ASSOCIATION, a Florida not-for-profit corporation, THE ASSOCIATION FOR DISABLED AMERICANS, INC., a Florida not-for-profit corporation, DONNA DICKENS, an individual, BILL GANNON, an individual, CATHY GANNON, an individual, and MICHELLE WISNIEWSKI, an individual,



Plaintiffs,

vs.

ORDER

CORAL REEF PARK CO., INC., a Florida Corporation, FLORIDA DIVISION OF RECREATION AND PARKS, a division of the State of Florida, and MIKE BULLOCH, Director, in his Official Capacity,

Defendants.
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THIS CAUSE came before the Court upon the Defendants Florida Division of Recreation and Parks and Mike Bullock's Motion to Dismiss Plaintiffs' Amended Complaint With Prejudice (DE #18) and Defendant Coral Reef Park Co., Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint (DE #21).

UPON CONSIDERATION of the motion and being otherwise fully advised in the premises, the Court enters the following Order.

I. Background

This case arises out of Coral Reef Park Co., Inc.'s ("Coral Reef"), Florida Division of Recreation and Parks's and Mike Bullock's (collectively, "Defendants") alleged violations of the Americans with Disabilities Act ("ADA"). The Plaintiffs are four individuals, three of whom qualify as individuals with disabilities as defined by the ADA, and one of whom is the wife of one

of these disabled individuals. There are also two "corporate" Plaintiffs -- Florida Disabled Outdoors Association and the Association for Disabled Americans, Inc.. The Plaintiffs allege violations of Titles II (Count I) and III (Count II) of the ADA, as well as violations of the Florida Building Code (Count III) and the Rehabilitation Act (Count IV). Each of the individual Plaintiffs allege that he or she has been excluded from certain areas and activities in John Pennekamp Park due to his or her disability (or in the case of Cathy Gannon, her husband's disability). The corporate Plaintiffs allege injury as a result of Defendants' alleged discriminatory practices as well. The Plaintiffs now seek various forms of injunctive and declaratory relief with respect to all Counts, as well as compensatory damages[1] with respect to Count IV. Defendants Florida Division of Recreation and Parks and Mike Bullock (the "State Defendants") move to dismiss the Complaint, arguing that all Counts should be dismissed due to Plaintiffs' lack of standing and Count I should be dismissed due to Defendants' Eleventh Amendment immunity. Coral Reef adopts the State Defendants' argument on standing, and further argues that Counts II and III should be dismissed because (1) Coral Reef is not required to comply with proposed (but not implemented) passenger vessel guidelines; and (2) Coral Reef is a private entity and therefore not subject to ADA rules that govern public entities.

II. Standard of Review

A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. Milburn v. United States, 734 F.2d 762, 765 (11th Cir. 1984). On a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir. 1988). Further, the Court should not grant a motion to dismiss "unless it appears

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[1]Only the individual Plaintiffs seek compensatory damages.

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (citations omitted); South Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996). Specifically, "[i]t is a well-settled principle of law that a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on *any* possible theory." Bowers v. Hardwick, 478 U.S. 186, 201-02 (1986) (Blackmun, J., dissenting) (quotations omitted); see Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997). Nonetheless, to withstand a motion to dismiss, it is axiomatic that the complaint must allege facts sufficiently setting forth the essential elements of a cause of action.

III. Discussion

A. Standing

Defendants first argue that Plaintiffs lack standing. In order to establish standing, the plaintiffs must have suffered an injury in fact, i.e., the invasion of a legally protected interest which is concrete and particularized, not conjectural or hypothetical. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "Moreover, there must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type likely to be redressed by a favorable decision." See Gutherman v. 7-Eleven, Inc., 278 F.Supp.2d 1374, 1378 (S.D.Fla. 2003) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985)). Furthermore, "[i]n ADA cases, courts have held that a plaintiff lacks standing to seek injunctive relief unless he alleges facts giving rise to an inference that he will suffer future discrimination by the defendant." Schotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001). The Defendants contend that the individually named Plaintiffs "merely allege that they will visit the property in the future," and therefore the Amended Complaint has failed to demonstrate a real and immediate injury. See Defendants Florida Division of Recreation and Parks and Mike Bullock's Motion to Dismiss Plaintiffs' Amended Complaint

With Prejudice ("State Defendants' Motion to Dismiss"), at 4. The Plaintiffs, however, have actually alleged far more than that. In a section of the Amended Complaint entitled "The Parties and Standing," the Plaintiffs allege in detail that each of the four individual Plaintiffs have visited the property, intends to visit the property in the near future, and has been denied certain access to the property on the basis of that Plaintiff's applicable disability. See Amended Complaint, at ¶¶ 23-27. These allegations are sufficient to withstand a motion to dismiss.

As to the standing of the corporate Plaintiff, it is well settled that an association may have standing to sue on behalf of its members if it meets the criteria established in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). Under the Hunt test, an association seeking to bring suit on behalf of its members must show: (1) that its members would have standing to sue in their own right; (2) that the interests that it seeks to protect are germane to the organization's purpose; and (3) that neither the claim asserted nor the relief requested require the participation of individual members. Id. (finding that an association may have standing to assert the claims of its members even where it has not been injured by the challenged activity); see also Greater Los Angeles Council on Deafness, Inc. v. Baldrige, 827 F.2d 1353, 1358 (9th Cir. 1987).

First, Plaintiffs have alleged that the members of the corporate Plaintiffs' organizations, as individuals with disabilities as defined by the ADA who have been injured by Defendant's noncompliance with the ADA, would have standing to sue in their own right. See Amended Complaint, ¶ 34. Second, Plaintiffs have asserted that the interests the corporate Plaintiffs seek to protect in the filing of this suit, the interests of individuals with disabilities in gaining access to public places, are germane to the purpose of the organization. See id., ¶¶ 30-33. Finally, the third prong of the Hunt test is satisfied where, as here, a plaintiff seeks prospective or injunctive relief for its members, rather than monetary damages. See United Foods and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 545 (1996); Hunt, 432 U.S. at 343.

Plaintiffs' Complaint seeks temporary and permanent injunctive relief in the form of a court order requiring Defendants to make its facility readily accessible to and usable by individuals with disabilities. The Court concludes that neither the claim asserted nor the relief requested in the instant case require the participation of individual members of the corporate Plaintiffs' organization. See Wein v. American Huts, Inc., 313 F.Supp.2d 1356, 1360 (S.D.Fla. 2004). Taking the allegations set forth in Plaintiffs' Complaint as true, the Court finds that Plaintiffs have asserted sufficient facts to permit the corporate Plaintiffs to sue Defendants on behalf of the members of its organization.[2]

B. Eleventh Amendment Immunity

The Defendants' final argument is that Count I should be dismissed because Defendant Florida Division of Recreation and Parks is "an arm or instrumentality of the State of Florida" and therefore immune from a lawsuit. State Defendants' Motion to Dismiss, at 7. The Eleventh Amendment grants States immunity to suits brought by private citizens in federal court. Nonetheless, "Congress can abrogate that immunity where (1) Congress 'unequivocally expressed its intent to abrogate' the States' sovereign immunity in the statute at issue and (2) 'Congress acted pursuant to a valid grant of constitutional authority.'" Association for Disabled Americans, Inc. v. Florida International Univ., 405 F.3d 954, 956-7 (11th Cir. 2005) (quoting Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000)). As the Court of Appeals recognized, Congress satisfied the first requirement by writing the following language into Section 12202 of the ADA: "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court . . . for a violation of" the ADA. Id. (quoting 42 U.S.C. § 12202). Thus, the issue before the Court is whether Congress acted pursuant to a valid grant of

[2]The Defendants also argue that certain paragraphs alleging specific violations should be dismissed because the Plaintiffs have failed to link the individual Plaintiffs to those specific alleged violations. Defendants cite to no law for this proposition. In any event, the Defendants have not demonstrated why those alleged violations should be stricken in light of the presence of the corporate Plaintiffs.

constitutional authority.

In Association for Disabled Americans, the Court of Appeals for the Eleventh Circuit determined that the statutory provision removing Eleventh Amendment immunity for private suits under Title II of the ADA is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, so long as it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 405 F.3d at 956 (citing City of Boerne v. Flores 521 U.S. 507, 519-20 (1997)). The "congruence and proportionality" test is three-pronged: (1) what was the constitutional right or rights that Congress sought to enforce when it enacted the ADA? (2) was there was a history of unconstitutional discrimination to support Congress's determination that prophylactic legislation was necessary; and (3) is Title II an appropriate response to this history and pattern of unequal treatment? Id.

The Supreme Court has recognized that Title II "seeks to enforce [the Fourteenth Amendment's] prohibition on irrational disability discrimination." Tennessee v. Lane, 541 U.S. 509, 522 (2004). The Court further held that "classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose." Id. Thus, this court must determine if there exists a rational basis for Defendants' actions. The discrimination suffered by Plaintiffs here should not be taken lightly. In stating the purpose of the ADA, Congress specifically referred to recreation and public services as "critical areas" for application of the statute. 42 U.S.C. § 12101(a)(3).

With respect to the second prong of the Boerne test, the Court of Appeals recently held that "Congress had documented a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment." Association for Disabled Americans, 405 F.3d at 958. Thus, the second Boerne inquiry is satisfied as well.

Congruence and proportionality of the remedies "should be judged on an individual or 'as-

applied' basis in light of the particular constitutional rights at stake in the relevant category of public services." Id. The Court finds that Title II of the ADA, as applied to access to public parks and recreational facilities, constitutes a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment. Although Defendants may argue that unequal treatment of disabled persons in the education context (as in Association for Disabled Americans) is more egregious than discrimination in the context of recreational activities and public parks, the Court nonetheless finds that the Florida Division of Recreation and Parks may not exclude disabled persons from their parks by reason of disability. Furthermore, Title II only requires reasonable modifications. Thus, the Court finds that the relief available under Title II "is congruent and proportional to the injury and the means adopted to remedy the injury." Id. at 959. Finally, the Defendants have provided no argument as to how the State's actions in this case are in any way related to a legitimate government purpose. Accordingly, the Court finds that Defendants Florida Division of Recreation and Parks and Mike Bullock are not immune from suit under the Eleventh Amendment.

C. The Adoption of ADA Guidelines for Passenger Vessels

Coral Reef contends that because accessibility guidelines for passenger vessels have not yet been adopted by the Architectural and Transportation Barriers Compliance Board, Plaintiffs' claims that certain tour boats are not in compliance with the ADA are ill-founded. See Coral Reef Park Co., Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint ("Coral Reef Motion to Dismiss") at 3. As this Court has held, however, "[a]lthough Title III does not identify commercial, passenger vessels as covered public accommodations, the Eleventh Circuit has held that 'those parts of a cruise ship which fall within the statutory enumeration of public accommodations are themselves public accommodations for purposes of Title III' . . . . Thus, the areas of commercial, passenger vessels that serve the public must comply with Title III's general rule prohibiting discrimination, on the basis of disability (i.e., a physical or mental impairment), in

the provision of goods, services, facilities, privileges, advantages, or accommodations." Association for Disabled Americans, Inc. v. Concorde Gaming Corp., 158 F.Supp.2d 1353, 1360 (S.D.Fla. 2001) (quoting Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1241 (11th Cir.2000)). Thus, notwithstanding the Architectural and Transportation Barriers Compliance Board's abdication of its responsibility to implement accessibility guidelines for passenger vessels, this Court and the Court of Appeals have held that a public accommodation on a passenger vessel is a public accommodation nonetheless.[3]

D. The ADA's Application to Private Entities

Coral Reef's final argument consists entirely of a quote from 28 C.F.R. 35.149, which states that no disabled person shall "be excluded from participation in, or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity." Coral Reef Motion to Dismiss, at 5. The Court presumes that Coral Reef is attempting to make an argument to the effect of: "Because this statute only references public entities, and Coral Reef is a private entity, the statute is inapplicable to Coral Reef and Counts II and III must be dismissed." To state a claim under Title III of the ADA, the Plaintiffs must show that 1) they are disabled; 2) that John Pennekamp Park is a place of public accommodation; and 3) that the Plaintiffs were denied full and equal treatment because of their disabilities. Access Now, Inc. v. South Florida Stadium Corp., 161 F.Supp.2d 1357, 1361 (S.D.Fla. 2001). For the purposes of the present motion, the Plaintiffs have stated a claim in this regard. Indeed, the Court finds that the Amended Complaint has alleged that the Plaintiffs are disabled (Amended Compl. ¶¶ 20-21, 25-26), that John Pennekamp Park is a place of public accommodation (see e.g., id. ¶¶ 33, 60, 71-73), and the Plaintiffs were denied equal treatment due to their disabilities (id. ¶¶ 23-27).

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[3]Furthermore, in Counts II and III, Plaintiffs allege many violations that do not concern passenger vessels. Thus, dismissal of those Counts would be inappropriate in any event.

IV. Conclusion

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendants Florida Division of Recreation and Parks and Mike Bullock's Motion to Dismiss Plaintiffs' Amended Complaint With Prejudice (DE #18) is DENIED. It is further

ORDERED AND ADJUDGED that Defendant Coral Reef Park Co., Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint (DE #21) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 28th day of March 2006.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record