IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

JEFFREY GORMAN,	)	
	)	
Plaintiff,	)	No. 95-0475-CV-W-8
v.	)	
	)	
	)	
STEVEN BISHOP, et al,	)	
	)	
Defendants.	)	
	)	

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO DEFENDANTS' SEPARATE MOTIONS FOR SUMMARY JUDGMENT

I. BACKGROUND

The plaintiff, who has paraplegia as the result of a spinal cord injury, alleges that defendants violated his rights under title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12115 et seq., and section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 749, in connection with his arrest and subsequent transportation on May 31, 1992. Defendants are Neil Becker, the officer with the Kansas City, Missouri Police Department ("KCMOPD") who detained and transported the plaintiff; Steven Bishop, Chief of Police of the KCMOPD; and several past and present members of the KCMOPD's Board of Commissioners.

The United States intervened in this action pursuant to 28 U.S.C. § 2403(a), after defendants filed a motion to dismiss the plaintiff's title II claims on the ground that the statute is unconstitutionally vague. In response to this Court's order of October 10, 1995, the government also filed two briefs as amicus

curiae, arguing that title II applies to arrests and all related activities, including the transportation of arrestees.

On January 24, 1996, this Court issued an order denying defendants' motion to dismiss plaintiff's title II claims. Since that time, three separate motions for summary judgment have been filed -- one on behalf of Officer Becker, a second on behalf of Steven Bishop, and a third on behalf of the named past and present members of the KCMOPD's Board of Commissioners. All defendants assert the defense of "qualified immunity" against both the title II and section 504 claims, and further maintain that they are not "public entities" within the meaning of title II.

We argue below that because the Rehabilitation Act and the ADA expressly abrogate state sovereign immunity, the plaintiff may seek all of his requested relief against the State, the City of Kasnas City, and the KCMOPD. We do not take a position on the question of whether and under what circumstances title II and section 504 may permit suits against public officials in their individual capacities. Consequently, we do not address the defense of qualified immunity, which applies only in suits against individuals.

II. ARGUMENT

IT IS UNNECESSARY FOR THIS COURT TO CONSIDER THE APPLICABILITY OF THE DOCTRINE OF QUALIFIED IMMUNITY.

The doctrine of "qualified immunity" applies to public officials acting in their individual capacities only. Brandon v.

Holt, 469 U.S. 464, 472-73 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). It is available in suits brought against public officials of the state under 42 U.S.C. § 1983,[1] or against federal officials pursuant to the principles first set forth in Bivens v. Six Unknown Named Agents of Fed Bureau of Narcotics, 403 U.S. 388 (1971).[2] It is well-settled that the doctrine of "sovereign immunity" prevents suits in federal court against the state itself under section 1983, see Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989); Quern v. Jordan, 440 U.S. 332, 341 (1979), and against the federal government in Bivens constitutional tort actions. See FDIC V. Meyer, 114 S.Ct 996, 1001, 1002, 1005 (1994); Schutterle v. United States, 74 F.3d

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[1] Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[2] Bivens, supra, has been characterized as the analog to the 42 U.S.C. § 1983 with respect to federal officials. The Eight Circuit has characterized the case as standing for the position that "under some circumstances, . . . a person whose clearly established constitutional rights are violated by federal officials may sue them directly even though no legislation by Congress exists specifically authorizing such a remedy." Arcoren v. Peters, 811 F.2d 392, 393 (8th Cir. 1987) (citing Bivens, 403 U.S. at 396-97).

846, 848 (8th Cir. 1996); Phelps v. U.S. Fed. Gov't, 15 F.3d 735, 739 (8th Cir. 1994), cert. denied, 114 S.Ct. 2118 (1994); Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983). Section 1983 and Bivens plaintiffs must, therefore, look to persons acting in their individual capacities under color of either state or federal law for civil damages.

The same is not true of section 504 and title II of the ADA. Both statutes abrogate state sovereign immunity from suits for damages using the kind of "unmistakably clear" language the Supreme Court required in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). In response to Scanlon, which had held that the language of the Rehabilitation Act in existence in 1985 was not sufficient to abrogate or waive state sovereign immunity, Congress adopted the following provision,[3] applicable to the Rehabilitation Act and all other federal statutes prohibiting discrimination by recipients of federal financial assistance:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

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[3] See Statement of President Ronald Reagan Upon Signing H.R. 4021 (October 21, 1986), reprinted in, 1986 U.S.C.C.A.N. 3554; 132 Cong. Rec. S1500-01 (October 3, 1986) (remarks of Senator Cranston); 132 Cong. Rec. S12089 (September 8, 1986) (remarks of Senator Weicker).

> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

Pub. L. 99-506, Title X, § 1003, October 21, 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7 (citations omitted). Virtually identical language appears in section 502 of the ADA. See 42 U.S.C. § 12202.[4]

Defendants do not appear to dispute that the plaintiff's complaint states claims against all of them in their official as well as their individual capacities. Claims against public officials in their official capacities are tantamount to suits against the state and its political subdivisions. See, e.g., Will, supra, 491 U.S. at 75; Kentucky v. Graham, 473 U.S. 159, 165-167 & n.12 (1985); Brandon v. Holt, 469 U.S. 464, 472-73 (1985). The relevant public entities themselves -- the state,

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[4] That section reads as follows:

> 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 of competent jurisdiction, for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in any action against any public or private entity other than a State.

42 U.S.C. § 12202.

the City of Kansas City, and/or the KCMOPD -- can, therefore, be required to provide the relief the plaintiff has requested, assuming he prevails on the merits. The defense of qualified immunity is not available to plaintiff's claims against the defendants in their official capacities.[5]

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[5] We are mindful of those cases, including two in the Eighth Circuit, in which courts have considered the defense of qualified immunity to claims under section 504. These cases assumed, without analysis, that section 504 allows suits against public officials in their individual capacities. See Lloyd v. Housing Authority of the City of Kirksville, 58 F.3d 398 (8th Cir. 1995); Lue v. Moore, 43 F.3d 1203 (8th Cir. 1994). See also W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995); McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850, 862, 863 n. 20 (5th Cir.1993); Doe v. Attorney General, 941 F.2d 780, 797-99 (9th Cir.1991); Lussier v. Dugger, 904 F.2d 661, 663-64, 670 n. 10 (11th Cir.1990); P.C. v. McLaughlin, 913 F.2d 1033, 1041-42 (2d Cir.1990). The only case of which we are aware, however, that contains any analysis of this issue is Chaplin v. Consolidated Edison Company of New York, 587 F. Supp. 519, 520-21 (S.D.N.Y. 1984).

Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), upon which defendants chiefly rely for their qualified immunity argument, applied qualified immunity to plaintiff's claims under both section 504 and title II. We disagree with the Torcasio court, because we think that at the time the plaintiff was allegedly subjected to discrimination, it was clearly established that the ADA and section 504 applied to prisons, just as we believe that the applicability of title II and section 504 to arrests and all related activities was clearly established as of May 31, 1992. However, in light of the case law under section 504, and because of the relationship between that statute and title II, it is possible that suits against public officials in their individual capacities may be permissible under both statutes in some circumstances, though we take no position on that issue here. See 42 U.S.C. § 12132 (making the same remedies, procedures, and rights that are available under section 504 also available for violations of title II).

III. CONCLUSION

To the extent defendants' three separate motions request summary judgment on behalf of defendants in their official capacities, the motions should be denied.

Respectfully submitted,

STEPHEN L. HILL, JR.
United States Attorney
For the Western District
of Missouri

DEVAL L. PATRICK
Assistant Attorney General
Civil Rights Division

ALLEEN S. VANBEBBER
Deputy United States
Attorney for the Western
District of Missouri
Missouri Bar #41460
Suite 2300
1201 Walnut Street
Kansas City, MO 64106
Tel: (816) 426-3130

By: _____
JOHN L. WODATCH
L. IRENE BOWEN
CHRISTOPHER J. KUCZYNSKI,
Attorneys
Disability Rights Section
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
Tel: (202) 307-1060