IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN COUNCIL OF THE BLIND et.al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 1:02CV00864 JR
PAUL H. O'NEILL Secretary of the Treasury, et.al., Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Jeffrey A. Lovitky
D.C. Bar No. 404834
1735 New York Ave., NW, Ste. 700
Washington, DC 20006
(202) 429-3393
Attorney for Plaintiffs
American Council of the Blind,
et. al.

Dated: August 12, 2003

TABLE OF CONTENTS

I. THE DESIGN OF PAPER CURRENCY IS NOT COMMITTED TO THE SOLE DISCRETION OF THE DEFENDANT……...1

II. PLAINTIFF'S LACK OF MEANINGFUL ACCESS TO PAPER CURRENCY TRANSACTIONS CONSTITUTES DISCRIMINATION UNDER THE REHABILITATION ACT.....4

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED……6

A. No Requirement Exists For Exhaustion of Administrative Remedies under Section 504…….……6

B. The Administrative Remedy Is Inadequate, Even If Exhaustion Is Otherwise Required…….7

IV. DEFENDANT MAY REDESIGN THE $1.00 BILL……..8

V. REDESIGN IS NOT SOLELY WITHIN THE DISCRETION OF THE SECRETARY…….10

CONCLUSION……..11

Pursuant to the schedule established by the Court, Plaintiff submits this memorandum in opposition to the Defendant's Motion to Dismiss. For the reasons stated below, Plaintiff asserts that Defendant's Motion to Dismiss should be denied.

I. THE DESIGN OF PAPER CURRENCY IS NOT COMMITTED TO THE SOLE DISCRETION OF THE DEFENDANT

Defendant again asserts that the design of paper currency is committed to the sole discretion of the Secretary. Def. Mem. at pp 3-12. This is the identical argument already raised by Defendant in its prior Motion for Summary Judgment dated August 29, 2002, and denied by the Court in its Memorandum Order dated April 1, 2003.

Once again, Defendant relies upon 12 U.S.C §418 in support of the proposition that the Secretary has unfettered discretion with respect to the design of paper currency. However, Section 504 of the Rehabilitation Act by its terms applies to all the operations of each executive agency. Thus, the statute states that

> "No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."
> (b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of-- (1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government;….
> (Emphasis added).
> See 29 U.S.C. § 794.

There can be no doubt that the statute applies to the design of paper currency, and all other operations and activities of the Department of the Treasury. Had Congress intended any exemptions, it would have written them into the statute.

Moreover, the Secretary's regulations implementing the Act, states as follows: *"This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States."* (Emphasis added). See 31 CFR §17.102. If the Secretary truly believed that the form of paper currency was exempt from the strictures of the Rehabilitation Act, this conclusion would presumably have been reflected the regulations. The fact that the regulations do not provide for any exemptions, except with respect to activities performed overseas, is persuasive as to the Secretary's intent to cover all of the functions of the Department.

As such, the position now being taken by the Defendant is inconsistent with the Department's regulations. Such a position on the part of the Defendant is simply untenable. See Alexander v. Choate, 469 U.S. 287, 304, n. 24 (1985) (regulations implementing Section 504 constitute an important source of guidance).

Moreover, the Defendant's argument would essentially preclude any judicial review in connection with the design of paper currency. This argument runs contrary to the general proposition that, absent a clear Congressional mandate, federal courts have authority to conduct judicial review of agency action.

Plaintiff believes that the Supreme Court's decision in Traynor v. Turnage, 485 U.S. 535, 99 L. Ed. 2d 618, 108 S. Ct. 1372 (1988), compels rejection of Defendant's argument. In Traynor, the Supreme Court was asked to rule whether a regulation promulgated by the Department of Veteran's affairs constituted a violation of the Rehabilitation Act. The regulation provided that disability benefits would not be paid for alcoholism. The government's contention was that judicial review was precluded by 38 U.

S. C. § 211(a), which bars judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans."

The Supreme Court noted a "strong presumption that Congress intends judicial review of administrative action," which presumption may be overcome only upon a showing of "clear and convincing evidence of a contrary legislative intent", citing to *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). Id. at 542. The Court held that review of the agency's action was not precluded.

If in Traynor v. Turnage, supra, the Supreme Court held that judicial review was not barred, a fortiori the same result should apply in the instant case. Unlike Traynor, there is no statute in the instant case which goes nearly as far in arguably precluding judicial review. Indeed, the statute upon which the Defendant now relies, 12 U.S.C §418, is silent on the subject of judicial review under Section 504. Based upon the precedent in Traynor v. Turnage, supra, there is simply no basis for holding that judicial review of the Secretary's decisions concerning design of paper currency is precluded.

Defendant's argument that judicial review is precluded by 12 U.S.C §418 relies heavily upon the proposition that "a more specific statute will be given precedence over a more general one…" See Def. Mem. at pp 9-12. Plaintiff does not argue with this proposition as a general matter. However, Plaintiff fails to see the relevance of Defendant's argument to the instant case.

Contrary to Defendant's belief, there is simply no conflict between the requirements of Section 504 and 12 U.S.C §418. Nor are the cases cited by Defendant relevant on this

point. The cases cited by Defendant all involve situations in which the courts have attempted to resolve conflicts between two or more separate statutes. These cases are inapposite because, as noted above, no conflict exists between 12 U.S.C §418 and Section 504.

II. PLAINTIFF'S LACK OF MEANINGFUL ACCESS TO PAPER CURRENCY TRANSACTIONS CONSTITUTES DISCRIMINATION UNDER THE REHABILITATION ACT

As in its Motion for Summary Judgment, Defendant cites to Alexander v. Choate, 469 U.S. 287 (1985), for the proposition that Plaintiff's have the right to only "meaningful access" to currency transactions. See Def. Mem. at pp 14-17. Defendant asserts that Plaintiff's are seeking "optimal access" to paper currency, which they are not entitled to under the ruling in Alexander v. Choate, supra.

However, Defendant's reliance upon Alexander v. Choate is misplaced. This is not a question of Plaintiff seeking optimal access to U.S. currency. Rather, under any construction of the term, Plaintiff's do not even have "meaningful access" to paper currency.

For example, Plaintiff Otis Stephens must rely upon a sighted individual to inform him as to the denomination of a particular banknote. See Complaint, Paragraph 12. Similarly, Plaintiff Patrick Sheehan is able to distinguish between banknotes of varying denominations only in the very best of lighting conditions. See Complaint, Paragraph 13. Under these circumstances, Plaintiff's access to U.S. currency can hardly be said to be meaningful.

Additionally, the fact that Plaintiffs must rely on sighted individuals to advise them of the banknote denomination leads to a very real possibility of fraud. This is not a mere

hypothetical occurrence. Rather, it is experienced regularly by persons with visual disabilities, including the Plaintiffs in this litigation.

Defendant's argument that Plaintiff has meaningful access by folding bills in varying lengths depending upon denomination is without merit. The folding system is only useful after Plaintiff knows the denomination of the banknote. The key point is that Plaintiff must rely upon sighted individuals to advise him as to what the denomination is so that he can then fold the bill in the appropriate manner. Similarly, electronic devices currently on the market are of extremely limited use in assisting Plaintiffs in identifying banknote denomination. See Complaint, at Para. 33.

Finally, Defendant distinguishes between government imposed burdens and government provided benefits in applying the Rehabilitation Act. "Although a government should be able to control the nature and quantity of the benefits that it provides, government-imposed barriers or burdens should, in most circumstances, have an equal effect on the disabled and the non-disabled." See Def. Mem. p.13.

Defendant's view of the significance of the "benefit" versus "burden" distinction is somewhat unclear. On the one hand, the government refuses to assert that production of currency is not a "program or activity" to which the Rehabilitation Act applies.[1] Therefore, the government would apparently agree that the meaningful access requirements spelled out in Alexander v. Choate apply to the production of paper currency, regardless of whether the latter activity is classified as a burden or a benefit.

[1] In its Memorandum order, the Court invited Defendant to address the issue of whether Section 504 applies to the design and production of currency in the first place. However, Defendants have chosen not to seek dismissal on this basis, "given uncertainties regarding the law on that subject and the potential ramifications, in other contexts, of making an argument to the contrary." See Def. Mem, p. 9, Footnote 3.

In any event, Plaintiff is unaware of any cases supporting the novel interpretation that the Rehabilitation Act is applied differently depending upon whether the activity involves a "burden" or a "benefit." The Rehabilitation Act itself makes no distinctions between "burdens" and "benefits." Moreover, the issuance of US currency is neither a "burden" nor a "benefit." It is simply a government program to which the meaningful access must be afforded under the Rehabilitation Act. See Alexander v. Choate, supra.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED

A. No Requirement Exists For Exhaustion Of Administrative Remedies Under Section 504

Plaintiff is suing under Section 504 of the Rehabilitation Act, 29 U.S.C §794. Section 504 specifically incorporates the procedures set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq). See 29 U.S.C §794a. There is no exhaustion requirement under Title VI. Jeremy H. v. Mount Lebanon School Dist., 95 F.3d 272, 281 (3rd Cir. 1996). Applying Title VI procedures, the Courts have consistently held that actions under Section 504 do not require exhaustion of administrative remedies. See Freed v. Consolidated Rail Corporation, 201 F.3d 188 (3rd Cir 2000), and cases cited therein. Indeed, Defendant conceded in its brief that exhaustion is not statutorily required in cases brought under Section 504, unlike Section 501 claims. See Def. Mem. at pp. 15, Fn. 6.

The government asserts that exhaustion should be required for prudential reasons. However, this argument is not meritorious, particularly given that the statute expressly does not require exhaustion with respect to claims brought under Section 504.

Defendant cites to only two district court decisions supporting the notion that exhaustion should be required as a prudential matter. However, both of these decisions incorrectly apply federal appellate court precedent interpreting Section 504.

In Poynter v. United States, 55 F. Supp. 2d 558 (W.D. La. 1999), the district court incorrectly relied upon Prewitt v. United States, 662 F.2d 292 (5th Cir. 1981), in support of its holding that exhaustion should be required. Prewitt was a federal employment case, and as such, exhaustion is required regardless of whether the Plaintiff proceeds under Section 501 or Section 504.[2] Similarly, in Isle Royale Boaters Association v. Norton, 154 F. Supp. 2d 1098, (W.D. Mich 2001), the district court relied upon Mickulicz v. Garthwaite, 2000 U.S. App. Lexis 22248 (6th Cir. August 22, 2000). Again, Mickulicz applied the exhaustion requirement in the employment context, and as such, in not applicable to the instant case.

B. The Administrative Remedy Is Inadequate, Even If Exhaustion Is Otherwise Required.

A generally recognized exception to the exhaustion requirement exists when it would be futile to raise arguments before the agency. See Chadmoore Communs. v. FCC, 113 F.3d 235, 239 (D.C. Cir. 1997). In Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986), the Court extensively analyzed the case law of this Circuit in applying the futility exception. Id. at 104. The court held that this exception applies when denial of the requested relief by the administrative agency is a virtual certainty, citing to *Daedalus Enterprises, Inc. v. Baldrige,* 563 F. Supp. 1345, 1350

[2] Generally, the courts have held that exhaustion is required in employment discrimination cases, regardless of whether these actions are brought under Section 501 or Section 504. See Spence v. Straw 54 F.3d 196, 199 (3rd Cir. 1995).

(D.D.C. 1983) ("When the agency has already made it abundantly obvious that it would not correct the error and would not conform its actions with the strictures of [the applicable statute], it would be meaningless to compel the hapless plaintiff to pursue further administrative remedies simply for form's sake.").

In the present case, denial of the requested relief is not a mere probability, it is an absolute certainty. Defendant states that the changes sought by Plaintiff would result in an additional cost of $245-$300 million, and an increase in annual production cost of $143-$174 million. See Ferguson Declaration, Para 65. According to Defendant, additional "expenditures by the private sector to accommodate these changes would rival — and may even exceed — the expenditures incurred by the government in making the changes." See Def. Mem. in support of Motion for Summary Judgment, p. 10. Defendant further asserts that the redesigns sought by Plaintiff would impose "undue financial and administrative burdens." Id. at p. 5. Based upon the above, "the Bureau of Engraving and Printing has determined not to recommend, to the Secretary of the Treasury, the currency redesign requested by the plaintiffs. " Id. at p. 10.

In any event, Defendant's argument that Plaintiff should exhaust its administrative remedies under the Rehabilitation Act is undermined by its assertion in this case that the form of paper currency is not subject to the Rehabilitation Act. See Def. Mem. in support of Motion to Dismiss, pp. 3-8. Therefore, by the government's own admission, there is no administrative remedy to pursue. The regulations implementing the Rehabilitation Act cannot by their very definition have broader coverage than the Act itself. As such, if as Defendant states the Act does not cover the design of paper currency, than neither can the regulations implementing the Act provide any meaningful administrative remedy.

In sum, the government is trying to force Plaintiff to pursue an administrative remedy which would be an utterly futile exercise with a predetermined result. Such a remedy should not be imposed upon Plaintiff.

IV. DEFENDANT MAY REDESIGN THE $1.00 BILL

Defendant once again argues that Congress has prohibited any re-design of the $1.00 bill. The identical argument was raised previously by Defendant in its Motion for Summary Judgment, and has already been addressed in Plaintiff's Reply dated October 31, 2002.

In fact, Plaintiff contends that the Congressional purpose was exactly the opposite. Conference Report on H.R. 4104, Treasury and General Government Appropriations Act, 1999, states as follows:

> *The conferees remain concerned about the cost associated with producing special anti-counterfeiting properties for the estimated 6 billion circulating $1 Federal Reserve Notes. As a result, the conferees do not believe the Bureau of Engraving and Printing should undertake cost prohibitive anti-counterfeiting changes to the $1 note. However, the conferees do believe it is important to update the currency, such as making minor modifications to assist the visually impaired.*
> *Therefore, the conferees direct the Department of the Treasury and the Bureau of Engraving and Printing not to pursue redesign of the $1 Federal Reserve Note to combat international counterfeiting threats, but to only make minor design enhancements to the $1 note for the visually impaired and elderly population, provided it has no effect on the use of $1 Federal Reserve Notes with existing bill accepting machinery.*

See Conference Report on H.R. 4104, Treasury and General Government Appropriations Act, 1999, 144 Cong. Rec, H 9870, October 7, 1998. (Emphasis added).

The Conference Report evinces a Congressional intent that the $1.00 note not be re-

designed for anti-counterfeiting purposes. However, it is equally clear that Congress expressly desired the Treasury to make changes to the $1.00 note for the purposes of assisting persons with visual disabilities.

The Conference Report language further undermines any notion that the Secretary need not consider the interests of the visually disabled community in designing paper currency. Rather, the Conference Report makes clear that the Secretary is obligated to consider the needs of disabled individuals in the design of U.S. bank notes.

V. REDESIGN IS NOT SOLELY WITHIN THE DISCRETION OF THE SECRETARY

Finally, Defendant argues that the specifics of any currency redesign are within the sole decision of the Secretary. The identical argument was raised previously by Defendant in its Motion for Summary Judgment.

Defendant apparently believes that this Court should have no role in either participating in any redesign decisions, or in ordering the inclusion of any specific design features

Defendant's argument lacks merit. Assuming this Court possesses authority to review the design of currency under the Rehabilitation Act, this Court necessarily also has authority to evaluate the specifics of any redesign in determining whether the Secretary's actions are in compliance with the Act, and to grant such relief as may otherwise be required.

Moreover, Plaintiff does not in this litigation seek the imposition of one fixed design for all paper currency. Rather, Plaintiff seeks declaratory and injunctive relief requiring that the Secretary comply with Section 504 in the redesign process, and that the

Court further review the Secretary's actions to determine whether he has complied with the mandate of the Act. In any event, it is beyond doubt that this Court has jurisdiction to order such appropriate relief as may be required for the purpose of ensuring that there are no further violations of the Rehabilitation Act.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss should be denied

DATED: August 12, 2003

Respectfully submitted,

/s JEFFREY A. LOVITKY
D.C. Bar No. 404834
Law Office of Jeffrey A. Lovitky
1735 New York Ave., NW, Ste. 700
Washington, DC 20006
(202)429-3393
Attorney for Plaintiff