No. 98-5913

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TAMMY STEVENS,

Plaintiff-Appellant

v.

PREMIER CRUISES, INC.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Pursuant to this Court's Order dated November 19, 1999, the United States submits this brief, as amicus curiae, concerning plaintiff's standing to pursue injunctive relief.

STATEMENT OF THE CASE

Plaintiff Tammy Stevens alleges that she was discriminated against on the basis of her disability in connection with a cruise she took on defendant's vessel in May 1998. On November 30, 1998, the district court held that plaintiff lacked standing to seek injunctive relief because she "[had] not alleged that she [would] be a passenger in the future" (R. 11 at 2).[1/] Stevens filed a motion for reconsideration in which she tendered a proposed amended complaint that cured the defect identified by the district court. Stevens' amended complaint alleges that

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[1/] "R.__" refers to the district court docket number of the record on appeal. "PC Br.__" refers to Premier's brief as appellee.

Stevens "would go on another cruise on the Big Red Boat, if not for the Defendant's lack of accommodation for her disability" (R. 13, Exh. B at 2). Stevens also submitted a sworn affidavit that stated that she "would like to take another cruise in the near future" (R. 13, Exh. A). The district court refused to permit Stevens to amend her complaint, holding that even assuming she had standing to seek injunctive relief, her complaint did not state a claim under the ADA (R. 15 at 1-2).

ARGUMENT

STEVENS HAS STANDING TO SEEK INJUNCTIVE RELIEF UNDER THE ADA

A. Stevens' Amended Complaint Sufficiently Alleges Her Standing To Pursue Injunctive Relief

In order to establish standing, a plaintiff must satisfy three elements. First, there must be an "injury in fact," i.e., the invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Second, there must be a causal connection between the injury and the conduct complained of — the injury must be fairly traceable to the challenged action of the defendant and not the result of some independent action of a third party not before the court. Ibid. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id. at 561.

Premier has only questioned whether Stevens can establish the second part of the first element, i.e., whether her injury is either "actual" or sufficiently "imminent" to confer on her

standing to seek prospective relief.[2/] Because Stevens can obtain only injunctive relief through the ADA, she must establish that there is a "real or immediate threat that [she] will be wronged again." City of L.A. v. Lyons, 461 U.S. 95, 102, 111 (1983).

In Defenders of Wildlife (Defenders), the Supreme Court examined the requirement that an injury be "actual or imminent" for purposes of seeking injunctive relief. There, a coalition of environmental groups sought to enjoin the Secretary of Interior to promulgate regulations applying the Endangered Species Act to federally assisted projects in foreign countries. See Defenders, 504 U.S. at 558-559. In opposition to the government's motion for summary judgment, the plaintiffs identified only two organization members who would allegedly be injured in the future by the Secretary's failure to apply the Act abroad. One member testified by affidavit that she intended to go to Egypt to observe the habitat of the endangered Nile crocodile, and that the habitat was threatened as a "result of the [United States'] role in overseeing the rehabilitation of the Aswan High Dam." Id. at 563. However, she did not specify when she intended to go to Egypt, and she had not visited the affected area since 1986.

[2/] It is not disputed that Stevens has alleged all of the other necessary elements to obtain standing. Her allegation that Premier charges persons with disabilities more for an "accessible" cabin and that The Big Red Boat is not accessible to persons with disabilities in a variety of ways establishes the requisite "injury in fact." The injury is caused by Premier, not by any third party. And an injunction requiring Premier to correct the violations will redress the alleged injury.

See ibid. The other member testified that she intended to return to Sri Lanka to observe the habitat of two endangered species whose habitat was threatened by a federally funded project there. See ibid. She had not been to the affected area since 1981, however, and when pressed in a deposition, she was not able to estimate when she might return because of a civil war in the country. See id. at 563-564. She could only say that she would return "[i]n the future." Id. at 564.

Under these circumstances, the Court concluded, the members' mere profession of an "intent" to return to the affected area "in the future" was not sufficient to withstand the government's motion for summary judgment on standing.

> Such "some day" intentions — without any description of concrete plans, or indeed even any specification of when the some day will be — do not support a finding of the "actual or imminent" injury that our cases require.

Ibid.[3/] As explained in more detail below, Defenders does not require dismissal of this action.

1. Stevens Is Not Required To Specify In Her Complaint When She Is Likely To Take A Cruise

At oral argument, Judge Edmondson suggested that Stevens' amended complaint might be defective in light of Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992), because Stevens

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[3/] Justices Kennedy and Souter, whose votes were necessary to form the six member majority on this point, concurred separately. They noted that while it might seem unfair to require the organization members to provide more detail as to when they would return to the affected areas, such a requirement was justified in this case because (1) it was not reasonable to assume that the members would be visiting the sites on a regular basis; and (2) the members had not visited the sites since the projects commenced. See id. at 579 (Kennedy, J., concurring in part).

merely alleged that she intended to take another cruise with Premier. Her amended complaint does not specify when she intends to take such a cruise.

Putting aside the question of how specific plaintiffs must be about future plans to use an ADA-covered facility for purposes of withstanding a motion for summary judgment,[4/] the cited language in Defenders is not applicable on a motion to dismiss. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012 n.3 (1992). In Defenders, the government had moved for summary judgment, and therefore the plaintiffs could no longer rest on "mere allegations" of future injury. See Defenders, 504 U.S. at 561. At the summary judgment stage, standing requires the nonmoving party to put forward "specific facts," see ibid., from which a reasonable trier of fact can conclude that the injury is "certainly impending," see id. at 567 n.3. Despite an ample opportunity to develop the factual record, the plaintiffs in Defenders had failed to give any specific indication of when they intended to return to geographic locations several thousand miles

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[4/] In our view, where, as here, the facility is a commercial enterprise that regularly provides cruises and markets them to members of the general public, a plaintiff need not be as specific about their future plans as the Court suggested was necessary for the more unusual voyage contemplated by the plaintiffs in Defenders. For example, a plaintiff who shops in a mall or retail store, or who attends sporting events in an arena, should generally not be required to detail concrete plans as to when they intend to next use the facility. See, e.g., Amy F. Robertson, Standing to Sue Under Title III Of the ADA, 27 Colo. Law. 51, 54 (1998); Colorado Cross-Disability Coalition v. Hermanson Family Ltd. Partnership I, No. 96-2490 (D. Colo. Aug. 5, 1997) (reproduced in addendum); Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1176 (S.D. Fla. 1997). That issue is not yet presented in this case, however.

away other than to say that they would do so "in the future." Under those circumstances, the Court found, a reasonable trier of fact could not find that it was likely, as opposed to merely "conjectural or hypothetical," that the threatened injury would occur.

At the pleading stage, however, a plaintiff is not required to set forth specific facts concerning when the threatened injury is likely to occur. See Lucas, 505 U.S. at 1012 n.3. On a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct" are sufficient, for the court must "'presum[e] that [the] general allegations embrace those specific facts that are necessary to support the claim.'" Defenders, 504 U.S. at 561 (quoting Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990)).

Lucas illustrates this principle. In Lucas, a developer challenged a South Carolina statute that prohibited him from building permanent habitable structures on his beachfront property. See Lucas, 505 U.S. at 1007. The developer alleged that he intended to build single family units on the property, but his complaint "made no allegations that he had any definite plans" to do so. Id. at 1043 n.5 (Blackmun, J., dissenting). Nevertheless, the Court held that Lucas' complaint adequately alleged injury in fact. See id. at 1012 n.3. In dissent, Justice Blackmun argued that in light of the Defenders decision, issued just two weeks before, Lucas lacked standing because he did not have any concrete plans to build on the property or to

sell it. See id. at 1043 n.5. The Court acknowledged that the factual situations in the two cases were analogous. See id. at 1012 n.3. It held, however, that the Defenders language on which Justice Blackmun relied only applied on summary judgment, not at the pleading stage.

> Lujan, since it involved the establishment of injury in fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful.

Ibid. (second emphasis added).

Similarly, the Supreme Court's decisions in Pennell v. City of San Jose, 485 U.S. 1 (1988), and Chandler v. Miller, 520 U.S. 305 (1997), make clear that, at least at the pleading stage, a plaintiff need only make a generalized allegation of future injury in order to proceed with a claim for injunctive relief. In Pennell, the Court held that plaintiffs had standing to challenge a rent control ordinance that permitted the city to disallow rent increases that exceeded eight percent based, among other things, on the economic hardship to the tenants. The complaint did not specify when or whether the owners intended to raise the rents more than eight percent, nor did the complaint set forth any facts that would suggest whether it was likely that a tenant would object to an increase or that an increase would be disallowed. See Pennell, 485 U.S. at 6. Nevertheless, the Court held that the plaintiffs' allegation that their properties were "subject to the terms of" the ordinance coupled with their representations at oral argument that the property owners had

many tenants who could claim economic hardship from an increase were sufficient to withstand a motion to dismiss for lack of standing. See id. at 7-8. The Court found that assuming these allegations were true, it was not merely "unadorned speculation" that the Ordinance would be enforced against the plaintiffs. Id. at 8. Similarly, in Chandler, the Court held that a plaintiff's action to enjoin a Georgia law requiring candidates to submit to a drug test was justiciable based on the plaintiff's representation that he intended to seek elective office again, even though the candidate did not specify when he intended to run.[5/] See Chandler, 520 U.S. at 313 n.2; Chandler v. Miller, No. 96-126, 1997 WL 19002, at *3-*4 (Jan. 14, 1997) (transcript of oral argument).

Furthermore, the lower courts that have considered plaintiffs' standing to enforce Title III of the ADA have held that a complaint is sufficient to withstand a motion to dismiss if it merely alleges that the plaintiffs intend to use the facilities again. Courts have not required the plaintiffs to specify the time frame in which they intend to use the

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[5/] Although in Chandler the issue was framed in terms of mootness rather than standing, the pertinent inquiry in that case — whether the injury was sufficiently likely to recur that the claim for injunctive relief was justiciable — is indistinguishable from the issue presented here. See Church v. City of Huntsville, 30 F.3d 1332, 1338 n.2 (11th Cir. 1994) ("[M]ootness is merely 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'") (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980)); accord Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997).

facilities. See, e.g., Aikins v. St. Helena Hosp., No. 93-3933, 1994 WL 794759, at *3 (N.D. Cal. Apr. 4, 1994); Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1176-1177 (S.D. Fla. 1997). See also Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 707 n.4 (D. Or. 1997).

Under the standards established in the cases cited above, Stevens' allegation that she will take another cruise with Premier if the necessary modifications are made certainly establishes that she has a "personal stake in the outcome" of this lawsuit, City of L.A. v. Lyons, 461 U.S. 95, 101 (1983), and is more than sufficient to withstand a motion to dismiss. In addition, Stevens' allegation does not require this Court to engage in "unadorned speculation", see Pennell, 485 U.S. at 8, concerning whether Stevens is realistically threatened by Premier's conduct. The cruise Stevens alleges she will take is a modest trip of a few hundred miles of a type that millions of Americans take every year. See Douglas Frantz, Getting Sick On the High Seas: A Question of Accountability, N.Y. Times, Oct. 31, 1999, at A1. Moreover, Stevens took such a cruise last year.

Under these circumstances, requiring Stevens to allege more detail would be inconsistent with the principle that the complaint must be construed liberally in favor of the complaining party, see Pennell, 485 U.S. at 7, and would impose a heightened pleading requirement in contravention of Rule 8(a) of the Federal Rules of Civil Procedure. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

Furthermore, Stevens cannot reasonably be expected to purchase tickets or make concrete plans to take another cruise with Premier at this point because she does not yet know when or whether Premier will cease its allegedly discriminatory practices and make its vessels accessible to persons with disabilities.[6/]

None of the cases cited in this Court's Order of November 19, 1999, compels a different result. The decision in Mausolf v. Babbitt, 85 F.3d 1295, 1297, 1301-1302 (8th Cir. 1996), and the divided opinion in Animal Legal Defense Fund, Inc., v. Espy, 23 F.3d 496, 498, 499-501 (D.C. Cir. 1994), both concerned the showing required at the summary judgment stage, after plaintiffs had had an opportunity to submit affidavits. Neither case addressed what allegations must be made in a complaint.[7/] In San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121, 1127-1128 (9th Cir. 1996), the court found insufficient plaintiff's mere allegation that they intended to violate a provision of a challenged federal gun control law where there was no indication of what conduct the plaintiffs intended to engage in or when, and

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[6/] Indeed, requiring Stevens to take such steps would require Stevens to subject herself to the very injury that the ADA was intended to prevent. Section 308(a)(1) of the ADA makes clear that a person with a disability need not "engage in [the] futile gesture" of using a facility that he or she knows does not comply with the ADA as a precondition to seeking injunctive relief. 42 U.S.C. 12188(a)(1). See also Jankey v. Twentieth Century Fox Film Corp., 14 F. Supp. 2d 1174, 1180 (C.D. Cal. 1998); 136 Cong. Rec. E1913 (June 13, 1990) (statement of Rep. Hoyer).

[7/] In addition, in Animal Legal Defense Fund, the plaintiff had voluntarily abandoned research six years previously, 23 F.3d at 500-501, a fact that rendered her claim that she would resume research later more speculative.

there had been no previous prosecutions under the Act. In this case, by contrast, Stevens has specified her future conduct, taking a cruise, and Premier does not contest that, absent judicial intervention, Stevens would be subjected to the same allegedly discriminatory conditions on her future cruise.

2. Alternatively, Stevens' Affidavit, Stating That She Would Take A Cruise "In The Near Future," Sufficiently Alleges That Her Injury Is Imminent

Alternatively, Stevens' amended complaint, when read in conjunction with her affidavit proffered at the same time, sufficiently alleges that her threatened injury is "imminent." Although future harm must be "imminent," imminence "is * * * a somewhat elastic concept * * * ." Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992). It must be applied in light of its purpose, "which is to ensure that the alleged injury is not too speculative" to erode the case or controversy requirement of Article III. Ibid.

Even for purposes of withstanding summary judgment or prevailing on the merits, a plaintiff is not required to show that the harm will occur immediately. See R.C. v. Nachman, 969 F. Supp. 682, 698 (M.D. Ala. 1997), aff'd, 145 F.3d 363 (11th Cir. 1998) (Table). In Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995), for example, the Court held that the plaintiff only needed to establish that the injury was likely to occur "sometime in the relatively near future." The Court found that the plaintiff had standing to challenge an affirmative action program where it appeared, based on past experience, that

the plaintiff would bid on one of the applicable contracts within the next year. See id. at 212. Similarly, in Lynch v. Baxley, 744 F.2d 1452, 1457 (11th Cir. 1984), this Court found standing to seek injunctive relief where the plaintiff was not currently detained but had been subjected to the involuntary commitment procedures he was challenging twice in the last three years.[8/]

Here, plaintiff's affidavit stating that she would like to take a cruise "in the near future" (R. 13, Exh. A), sufficiently alleges that her injury is imminent for purposes of alleging standing. It is not relevant that this statement does not appear in the amended complaint. Courts may and should permit plaintiffs to expand on the allegations in their complaint at oral argument or in affidavits, when determining whether the plaintiff has sufficiently alleged standing. See Pennell v. City of San Jose, 485 U.S. 1, 7-8 (1988) (finding that plaintiffs adequately alleged standing based in part on representations at oral argument); Warth v. Seldin, 422 U.S. 490, 501 (1975) (stating that the trial court may permit the plaintiff to supply by affidavit additional allegations that support standing).

B. Even If This Court Determines That Plaintiff's Amended Complaint Does Not Sufficiently Allege Standing, Any Defect Can Be Cured Through An Amendment Pursuant To 28 U.S.C. 1653

Alternatively, if this Court were to determine that Stevens' complaint does not sufficiently allege standing because it does not say when she will go on another cruise, that defect can be

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[8/] The above precedent thus requires rejection of Premier's argument that Stevens does not have standing because she "is not presently on a [cruise] ship" (PC Br. 13).

cured through an amendment to the complaint. 28 U.S.C. 1653 provides that: "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." This statute "allows appellate courts to remedy inadequate jurisdictional allegations." Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832 (1989). Amendments pursuant to this provision should be allowed freely "so as to effectuate Congress' intent in enacting [Section] 1653 — to avoid dismissals on technical grounds." Miller v. Davis, 507 F.2d 308, 311 (6th Cir. 1974); accord Goble v. Marsh, 684 F.2d 12, 17 (D.C. Cir. 1982). An amendment may be tendered pursuant to 28 U.S.C. 1653 after oral argument. See, e.g., Hemenway v. Peabody Coal Co., 159 F.3d 255, 257 (7th Cir. 1998).

Relying on 28 U.S.C. 1653, courts have permitted plaintiffs to amend their complaints on appeal in cases where the plaintiff initially did not sufficiently allege the facts necessary to support standing. See, e.g., DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev., 810 F.2d 1236, 1239 (D.C. Cir. 1987); cf. Gillis v. United States Dep't of Health & Human Servs., 759 F.2d 565, 571 n.9 (6th Cir. 1985). In DKT Memorial Fund, for example, the court permitted counsel for appellants to amend the complaint to add an affirmative allegation that there was a causal connection between their claimed injury and the policy they were seeking to enjoin. See DKT Mem'l Fund, 810 F.2d at 1239. Similarly, in Chandler v. Miller, 520 U.S. 305, 313 n.2 (1997), the Court invoked 28 U.S.C. 1653 in finding that the plaintiff's suit was

justiciable based on his representation, during oral argument, that he intended to seek elective office in the future. And in Pennell v. City of San Jose, 485 U.S. 1, 7 (1988), the Court found that plaintiffs had standing based in part on factual representations their counsel had made at oral argument.

The above cases make clear that courts should freely permit counsel to cure defects in the allegations of standing. If this Court believes that an amendment to the complaint is necessary, it should permit Stevens to cure the defect on appeal, rather than frustrate Section 1653's goal of avoiding dismissals on purely technical grounds. It appears that Stevens has at all times acted in good faith. When the district court determined that her complaint was defective because it did not allege that Stevens intended to take another cruise, she promptly submitted an amended complaint that cured the defect. Neither the district court nor Premier, however, suggested that Stevens was required to specify when she intended to take another cruise. As we have demonstrated, pp. 4-11, supra, Stevens could have reasonably assumed, based on the applicable case law, that including such detail in her amended complaint was not necessary. Any error by Stevens was clearly inadvertent and she should not be precluded from correcting it now. See DKT Mem'l Fund, 810 F.2d at 1239.

We understand that Stevens has tendered a proposed amended complaint alleging that she will take a cruise with Premier within the next year if Premier brings its vessels and policies into compliance with the ADA. Assuming this Court finds the

amendment to be necessary, such an allegation is plainly sufficient to establish that Stevens will be threatened with injury "in the relatively near future." See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995). Given the advance planning often required to take a vacation, including the time that must be allowed for Stevens to obtain the necessary relief from the court to make Premier's vessels accessible to her, see Honig v. Doe, 484 U.S. 305, 322 (1988), an allegation that Stevens will take a cruise within the next year is more than sufficient to establish that she faces an "imminent" injury sufficient to confer standing to seek injunctive relief.

CONCLUSION

For the reasons stated above and in the United States' previous briefs in this case, the district court's order of dismissal should be reversed and the case remanded with instructions to grant Stevens leave to file an amended complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 1999, two copies of the attached SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE were served by first-class mail, postage prepaid, on the following counsel of record:

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