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

REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

PAGE

ARGUMENT

I. THE "BARRIER REMOVAL" PROVISIONS OF THE ADA APPLY TO EXISTING CRUISE SHIPS 1

II. CRUISE SHIPS ARE PUBLIC ACCOMMODATIONS AND SPECIFIED PUBLIC TRANSPORTATION PROVIDED BY A PRIVATE ENTITY 5

III. REGULATING CRUISE SHIPS THAT ENTER UNITED STATES PORTS IS NOT EXTRATERRITORIAL 7

IV. APPLYING THE ADA TO PREMIER WOULD NOT VIOLATE INTERNATIONAL LAW 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES:

Armement Deppe, S.A. v. United States, 399 F.2d 794 (5th Cir. 1968), cert. denied, 393 U.S. 1094 (1969) 9

Auer v. Robbins, 519 U.S. 452 (1997) 1

Cruz v. Chesapeake Shipping Co., 932 F.2d 218 (3d Cir. 1991) 7

Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923) 7, 8, 9

CASES (continued): **PAGE**

Deck v. American Haw. Cruises, Inc., No. 98-00092 (D. Haw. Jan. 15, 1999) (order denying motion for summary judgment) 5

EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109 (M.D. Fla. 1990) 8

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 11

In re Club Assocs., 956 F.2d 1065 (11th Cir. 1992) 10

Innovative Health Sys. v. City of White Plains, 117 F.3d 37 (2d Cir. 1997) 6

International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970) 9

Johnson v. City of Saline, 151 F.3d 564 (6th Cir. 1998) 6

Lauritzen v. Larsen, 345 U.S. 571 (1953) 8, 12

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 9

Menkowitz v. Pottstown Memorial Med. Ctr., 154 F.3d 113 (3d Cir. 1998) 6

Morton v. Mancari, 417 U.S. 535 (1974) 12

NLRB v. Dredge Operators, Inc., 19 F.3d 206 (5th Cir. 1994) 8, 12

Posadas v. National City Bank, 296 U.S. 497 (1936) 12

CASES (continued): **PAGE**

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 1

United States v. Flores, 289 U.S. 137 (1933) 8

United States v. Hayes, 653 F.2d 8 (1st Cir. 1981) 8

United States v. Louisiana, 394 U.S. 11 (1969) 11

United States v. Louisiana, 470 U.S. 93 (1985) 12

United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358 (S.D. Fla. 1998) 9

STATUTES:

Americans with Disabilities Act (ADA),

42 U.S.C. 12206(a)(1) 6

42 U.S.C. 12206(c)(3) 6

Title III:

42 U.S.C. 12181(9) 3, 4

42 U.S.C. 12182(a)(2)(A)(iv) 2, 4

42 U.S.C. 12183 3

42 U.S.C. 12183(a)(1) 3

42 U.S.C. 12184 5

42 U.S.C. 12184(b)(2)(C) 2, 4

42 U.S.C. 12188(2) 3

National Labor Relations Act (NLRA),

29 U.S.C. 151 et seq. 9

REGULATIONS: **PAGE**

28 C.F.R. 36.201-36.310 1

28 C.F.R. 36.304 2

28 C.F.R. 36.304(b) 3, 4

28 C.F.R. Pt. 36, App. A 3

28 C.F.R. Pt. 36, App. B. 1-2

49 C.F.R. 37.5(f) 2, 6

49 C.F.R. Pt. 37, App. D § 37.3 6

49 C.F.R. Pt. 37, App. D § 37.5 6

49 C.F.R. Pt. 37, App. D § 37.21 6

49 C.F.R. Pt. 37, App. D § 37.109 . . . . 2, 6

55 Fed. Reg. 50,237 (1990) 6

56 Fed. Reg. 45,584 (1991) 2, 5, 6

56 Fed. Reg. 35,544 (1991) 1

LEGISLATIVE HISTORY:

H.R. Rep. No. 485, Pt. 2, 101st Cong.,
    2d Sess. (1990) 4

S. Rep. No. 116, 101st Cong., 1st Sess.
    (1989) 4

MISCELLANEOUS: **PAGE**

ADA Title III Technical Assistance Manual:

Section III-1.2000(D) (1994 Supp.) 2, 5

Craig Allen, Federalism in the Era of International Standards (Part II), 29 J. Mar. L. & Com. 565 (1998) 10, 11

Convention on the High Seas, April 29, 1958, art. 10, T.I.A.S. No. 5200, 450 U.N.T.S. 82 12

President's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983) 11

President's Transmittal of the United States Convention on the Law of the Sea, Oct. 7, 1994, 34 I.L.M. 1393 11-12

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (1982):

Article 11 11

Article 18 11

Article 21(2) 11

Article 25(2) 11

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I
THE "BARRIER REMOVAL" PROVISIONS OF THE ADA APPLY TO EXISTING CRUISE SHIPS

Premier asserts (PC Br. 19-21)[1/] that there are "no present guidelines in effect" for cruise ships to implement. Premier is wrong. In the preamble to its Title III regulations, the Department of Justice stated that cruise ships are places of public accommodation and that sub-parts B and C of its regulations (28 C.F.R. 36.201-36.310) apply to cruise ships.[2/] 56 Fed. Reg. 35,544, 35,550 (1991) (codified at 28 C.F.R. Pt. 36,

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[1/] Citations to "PC Br. __" refer to pages in appellee's brief in this appeal. Citations to "US Br. __" refer to pages in the United States' Brief as Amicus Curiae in this appeal. Citations to "R. __" refer to the record on appeal.

[2/] An agency's interpretation of its own regulations is controlling unless it is plainly erroneous or inconsistent with the regulations. See Auer v. Robbins, 519 U.S. 452, 461 (1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

App. B at 585). Similarly, the preamble to the final rule issued by DOT stated that "the ADA does cover passenger vessels, including ferries, excursion vessels, sightseeing vessels, floating restaurants, <u>cruise ships</u>, and others." 56 Fed. Reg. 45,584, 45,600 (1991) (emphasis added). In its interpretive guidance, DOT explained that "ferries and other passenger vessels operated by private entities are subject to the requirements of [49 C.F.R. 37.5] and applicable requirements of 28 C.F.R. Pt. 36, the DOJ rule under title III of the ADA." 56 Fed. Reg. 45,584, 45,744 (1991) (codified at 49 C.F.R. Pt. 37, App. D § 37.109 at 488).

Contrary to Premier's assertions, the above regulations establish accessibility requirements for cruise ships. The regulations applicable to cruise ships require covered entities to comply with the "barrier removal" provisions set forth in 42 U.S.C. 12182(b)(2)(A)(iv) for public accommodations and in 42 U.S.C. 12184(b)(2)(C) for entities primarily engaged in transportation. 28 C.F.R. 36.304; 49 C.F.R. 37.5(f) (adopting standard established in Department of Justice regulation); Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (stating that barrier removal provisions apply to cruise ships). The barrier removal provisions require covered entities to "remove architectural barriers, and communication barriers that are structural in nature, in existing facilities * * * where such removal is readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv). Barrier removal is considered "readily achievable" if it is

"easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9). The regulations give 21 examples of steps facilities can take to remove barriers, including, inter alia, installing ramps, installing offset hinges to widen doorways, installing accessible door hardware, installing grab bars in bathrooms, and rearranging furniture. 28 C.F.R. 36.304(b).

Premier asserts (PC Br. 26, 32, 34) that the Department of Justice is attempting to "force foreign cruise ships to undertake a wholesale physical redesign" "regardless of cost." Premier ignores the distinction Congress made between the standards for the design and construction of new facilities (42 U.S.C. 12183; 28 C.F.R. Pt. 36, App. A) and the barrier removal requirements for existing facilities, such as Premier's ships.

Section 303 of the ADA requires that new facilities be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1). A facility that is designed and constructed in violation of those standards must be altered to conform to those standards. 42 U.S.C. 12188(a)(2). As the United States explained in its initial brief (U.S. Br. 13), the ADA's design and construction provisions do not currently apply to cruise ships, because the federal government has not yet issued standards for the construction of new cruise ships.

Stevens, however, is seeking relief under Section 302. Section 302 does not require complete remodeling of existing

structures. It requires only accessibility that is "readily achievable." 42 U.S.C. 12181(9); 42 U.S.C. 12182(a)(2)(A)(iv); see also 42 U.S.C. 12184(b)(2)(C). The readily achievable standard "focuses on the business operator and addresses the degree of ease or difficulty of the business operator in removing a barrier; if barrier-removal cannot be accomplished readily, then it is not required." S. Rep. No. 116, 101st Cong., 1st Sess. 65-66 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 109-110 (1990).

If plaintiff prevails, therefore, Premier will only have to make modifications that are readily achievable within the meaning of the ADA. Stevens' complaint states a claim for such relief. Stevens' complaint alleges, inter alia, that Premier's cruise ship: (1) lacks accessible ramps; (2) lacks cabins with sufficient maneuvering space for persons with disabilities; (3) lacks accessible buttons on its elevators; (4) does not have doors with accessible hardware; (5) has doorways that are too narrow; (6) lacks signs noting accessible routes; (7) does not have bathrooms with grab bars around toilets, raised toilet seats, insulation around lavatory pipes to prevent burns, full length mirrors, or accessible paper towel dispensers; and (8) does not have accessible water fountains (see R. 1 at 5-8, 12). The barrier removal regulations list measures that can be taken to correct each of these deficiencies. See 28 C.F.R. 36.304(b).

Of course, Premier may be able to demonstrate that the barrier removal sought by plaintiff is not "readily achievable."

For example, if Premier demonstrates that a proposed modification would violate an applicable safety standard mandated by federal law, such as the International Convention for the Safety of Life at Sea (SOLAS), then that modification would not be readily achievable. See Title III Technical Assistance Manual III-1.2000(D) (1994 Supp.) (cruise ships must comply with the ADA "unless there are specific treaty prohibitions that preclude enforcement"); see also 56 Fed. Reg. 45,584, 45,600. However, Premier has not even alleged, much less demonstrated, that it cannot correct any of the deficiencies alleged by plaintiff without violating applicable federal or international safety laws.

II
CRUISE SHIPS ARE PUBLIC ACCOMMODATIONS AND SPECIFIED PUBLIC TRANSPORTATION PROVIDED BY A PRIVATE ENTITY

Premier argues (PC Br. 18-21) that the Department of Justice has no authority to issue regulations for cruise ships because cruise ships are transportation and, as such, they are covered solely under the transportation provisions of 42 U.S.C. 12184. Cruise ships, however, are both "public accommodations" and "specified public transportation" provided by a private entity. See Deck v. American Haw. Cruises, Inc., No. 98-00092 (D. Haw. Jan. 15, 1999) (order denying motion for summary judgment) at 5-6; 56 Fed. Reg. 45,584, 45,600 (1991).

Nothing in the plain language of the ADA or its implementing regulations prohibits the Department of Justice from issuing guidance concerning cruise ships merely because cruise ships are

also subject to regulation by DOT. The Department of Justice and DOT have recognized that the transportation and public accommodation provisions of the ADA may overlap and have coordinated their rules accordingly. See 49 C.F.R. Pt. 37, App. D § 37.5 at 470, § 37.21 at 474. Because cruise ships are public accommodations, the Department of Justice has authority to address the application of the ADA to cruise ships in its interpretive guidance and technical assistance manual.[3/] See 42 U.S.C. 12206(c)(3).

There is no conflict between DOT's interpretation and that of the Department of Justice. DOT has endorsed the Department of Justice's interpretation that cruise ships are covered as public accommodations. See 56 Fed. Reg. 45,584, 45,599-45,600; 49 C.F.R. Pt. 37, App. D § 37.3 at 469. It has also incorporated the Department of Justice regulations that govern cruise ships -- including those requiring barrier removal -- into its regulations. See 49 C.F.R. Pt. 37, App. D § 37.109 at 488; 49 C.F.R. 37.5(f).

[3/] The Department of Justice's technical assistance manual is entitled to deference. See, e.g., Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 45 n.8 (2d Cir. 1997); Menkowitz v. Pottstown Memorial Med. Ctr., 154 F.3d 113, 123 (3d Cir. 1998); Johnson v. City of Saline, 151 F.3d 564, 570 (6th Cir. 1998). Premier's assertion (PC Br. 20-21) that the Attorney General did not comply with 42 U.S.C. 12206(a)(1), which required her to issue a plan for technical assistance in consultation with other federal agencies, is meritless. The Attorney General issued a proposed plan and issued the technical assistance manual in accordance with its provisions. See 55 Fed. Reg. 50,237, 50,243 (1990).

III
REGULATING CRUISE SHIPS THAT ENTER UNITED STATES PORTS IS NOT EXTRATERRITORIAL

Premier argues (PC Br. 27) that a foreign flag ship is always an "extraterritorial legal entity," even when it enters a United States port. The Supreme Court rejected that argument in Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923):

> [T]he statement [is] sometimes made that a merchant ship is a part of the territory of the country whose flag she flies. But this, as has been aptly observed, is a figure of speech, a metaphor. * * * It is chiefly applicable to ships on the high seas, where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign.

Id., 262 U.S. at 123-124 (citations omitted); accord Cruz v. Chesapeake Shipping Co., 932 F.2d 218, 227-228 (3d Cir. 1991). Premier wrongly contends (PC Br. 32) that the result in Cunard was based on language in the Volstead Act stating that the legislation would apply to "foreign-flagged" ships. The statute at issue in Cunard prohibited the importation of alcoholic beverages into the "United States and all territory subject to the jurisdiction thereof." Cunard, 262 U.S. at 121 (quoting 40 Stat. 1050, 1941). The Act did not specify whether it would apply to foreign-flag ships. See ibid. The Cunard Court held that the statute did not apply extraterritorially, but that applying the statute to a foreign-flag ship in a United States

port was not an extraterritorial application of the statute.[4/] See id. at 123-124.

In an effort to bolster its position, Premier selectively quotes dicta from Lauritzen v. Larsen, 345 U.S. 571, 584-585 (1953), concerning the law of the flag (PC Br. 28). The point of the passage relied on by Premier, however, was that the flag state could sometimes retain "concurrent jurisdiction" over a crime that occurred on the ship while it was in the territorial waters of another country. Lauritzen, 345 U.S. at 585. A flag state may exercise jurisdiction over conduct that occurs on the high seas. See, e.g., United States v. Hayes, 653 F.2d 8, 15 (1st Cir. 1981). It may also exercise concurrent jurisdiction over certain actions that occur on the ship while it is in foreign waters. See, e.g., United States v. Flores, 289 U.S. 137, 157-158 (1933). No court, however, has held that foreign-flag ships that enter United States ports are presumptively exempt from all United States laws merely because of their foreign registry.[5/] In fact, Lauritzen reaffirmed Cunard's holding to the contrary. Lauritzen, 345 U.S. at 584.

[4/] Furthermore, the court in EEOC v. Bermuda Star Line, Inc., 744 F. Supp. 1109 (M.D. Fla. 1990), did not, as Premier contends (PC Br. 32), reject the presumption against extraterritorial application of United States law. It held that the conduct at issue in that case was not extraterritorial. Id. at 1110-1111.

[5/] NLRB v. Dredge Operators, Inc., 19 F.3d 206, 212 (5th Cir. 1994), relied on by Premier (PC Br. 28), held that the NLRB had jurisdiction to regulate the employment practices of an American flagged ship employing United States citizens while the ship operated in Hong Kong waters. The court did not address the question at issue here, the authority of a state to prescribe requirements for foreign-flag ships visiting its ports.

Contrary to Premier's assertions (PC Br. 25), the decision in McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963), did not hold that the presumption against extraterritorial application of United States law applied to any regulation of a foreign-flag ship. The issue in that case was not, as Premier contends (PC Br. 25), whether the NLRA applied at all to foreign flag ships. The issue was "whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen." McCulloch, 372 U.S. at 19 (portion omitted by Premier emphasized). The Court emphasized that applying the Act to foreign seamen employed on a foreign-flag ship would not advance the Act's purpose of protecting United States workers. Id. at 18. That rationale does not apply to this case, which involves protecting passengers who are United States citizens and who are embarking and disembarking in United States ports. Premier also fails to explain the numerous instances in which courts have upheld the application of United States law to foreign flag ships in the absence of any explicit statutory provision stating that such ships are covered by the applicable statute. See, e.g., International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970); Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923); Armement Deppe, S.A. v. United States, 399 F.2d 794 (5th Cir. 1968), cert. denied, 393 U.S. 1094 (1969); United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358 (S.D. Fla. 1998); authorities cited at PC Br. 29.

IV
APPLYING THE ADA TO PREMIER WOULD NOT VIOLATE INTERNATIONAL LAW

Premier contends, for the first time in its appellate brief (PC Br. 33-34), that applying the ADA to Premier would violate the International Convention for the Safety of Life at Sea (SOLAS) and the Convention on the High Seas.[6/] Premier did not raise this defense below (see R. 5) and it was not addressed by the district court (see R. 11). Issues concerning the application of these treaties are not properly before this Court and should first be addressed by the district court. See In re Club Assocs., 956 F.2d 1065, 1069 (11th Cir. 1992).

In any event, Premier has failed to demonstrate that there is any conflict between the ADA and these treaties. Article 10 of the Convention on the High Seas requires states to take steps to ensure that ships that fly their flag are constructed in a manner that ensures safety at sea. Convention on the High Seas, Apr. 29, 1958, art. 10, T.I.A.S. No. 5200, 450 U.N.T.S. 82. SOLAS establishes minimum safety standards for the construction, equipment, and operation of ships. See Craig Allen, Federalism in the Era of International Standards (Part II), 29 J. Mar. L. & Com. 565, 578 (1998). Nothing in the plain language of the Convention on the High Seas or SOLAS prevents states from imposing accessibility requirements on ships that enter their

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[6/] Premier's argument is limited to Steven's claim that Premier comply with the ADA's barrier removal provisions. Premier does not argue that enjoining Premier from charging a discriminatory fare to persons with disabilities would violate any applicable treaty obligation.

ports. Nor has Premier shown how applying the ADA to its ships would conflict with any international safety standard established in SOLAS or in any other international convention to which the United States is a party.[7]

Furthermore, customary international law does not prevent states from imposing accessibility requirements on ships that enter their ports. Customary international law gives states broad authority to regulate ships that enter their ports. See Allen, supra, 29 J. Mar. L. & Com. at 570 (1998). For example, the United Nations Convention on the Law of the Sea[8] precludes states from imposing design and construction requirements that do not give effect to generally accepted international standards on ships that are in innocent passage in their waters. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 21(2), 21 I.L.M. 1261, 1274. This restriction does not apply, however, when the ship enters the ports or other internal waters of a foreign state.[9] See United Nations Convention, supra, art. 11, 18, 25(2), 21 I.L.M. at 1273-1275; President's Transmittal of

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[7] Premier does not claim, for example, that complying with the ADA would cause them to violate an applicable international safety standard or that compliance with both the ADA and applicable international safety standards is otherwise not possible. Cf. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993).

[8] The United States has not yet ratified the Convention, but, pursuant to the President's Ocean Policy Statement, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983), it is recognized to reflect customary international law to which the United States adheres.

[9] Ports are part of a nation's internal waters. See United States v. Louisiana, 394 U.S. 11, 40 (1969).

the United Nations Convention on the Law of the Sea, Oct. 7, 1994, 34 I.L.M. 1393, 1406.

Absent a treaty obligation to the contrary, customary international law authorizes nations to regulate all matters concerning commercial ships that enter their ports save those internal matters that affect "only the vessel or those belonging to her, and d[o] not involve the peace or dignity of the country, or the tranquility of the port." See Lauritzen v. Larsen, 345 U.S. 571, 585-586 (1953); cf. United States v. Louisiana, 470 U.S. 93, 98 (1985) (nation has same "complete sovereignty" over internal waters as over land territory). Accessibility of a cruise ship that calls at a United States port to pick up and drop off passengers is not a matter that is internal to the ship. It directly protects the interests of American citizens and residents (see U.S. Br. 25).

As explained at pp. 4-5, supra, a proposed modification that violates an applicable international safety standard would not be "readily achievable" and, therefore, should not be ordered by the court. This approach is consistent with the general principle that when two applicable laws overlap, courts should give effect to both laws to the extent possible. See, e.g., Morton v. Mancari, 417 U.S. 535, 551 (1974); Posadas v. National City Bank, 296 U.S. 497, 503 (1936). At this stage, however, any such conflict is purely speculative (see p. 5, supra) and cannot be used as a basis for dismissing Stevens' complaint. See NLRB v. Dredge Operators, Inc., 19 F.3d 206, 213-214 (5th Cir. 1984)

(holding that claims of potential conflict with Hong Kong law were not ripe where no conflict had yet occurred).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 3,244 words.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 1999, two copies of the attached REPLY 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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