IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MID-SOUTH CHAPTER OF PARALYZED VETERANS OF AMERICA, KEITH MORRIS, CARL FLEMONS, TOM HAFFORD, and LARRY HALE,	)	
Plaintiffs,	)	
v.	)	**No. 04-2353 Ml/V**
NEW MEMPHIS PUBLIC BUILDING AUTHORITY OF MEMPHIS & SHELBY COUNTY; CITY OF MEMPHIS, TENNESSEE; SHELBY COUNTY, TENNESSEE; and HOOPS, L.P.,	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

Before the Court are Defendants' Motions to Dismiss Plaintiffs' Complaint and Amended Complaint. Defendants New Memphis Public Building Authority of Memphis and Shelby County ("Public Building Authority") and Hoops, L.P. initially filed a Motion to Dismiss on June 7, 2004. Plaintiffs subsequently filed an Amended Complaint on July 9, 2004. On July 12, 2004, Plaintiffs responded in opposition to the original Motion to Dismiss. On July 30, 2004, Defendants Public Building Authority

and Hoops, L.P. filed a Motion to Dismiss the Amended Complaint. Plaintiffs responded to that motion on September 7, 2004.[1]

Defendants move to dismiss Plaintiffs' claims for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), because Plaintiffs purportedly lack standing to sue and their claims are not ripe for adjudication, and for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, Defendants' motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) are DENIED.[2]

---

[1]Defendant City of Memphis filed a Motion to Dismiss on June 7, 2004, and a Motion to Dismiss Amended Complaint on October 12, 2004, both of which incorporate the arguments made in Defendants Public Building Authority and Hoops, L.P.'s motions. Plaintiffs responded in opposition to those motions on October 18, 2004, incorporating the arguments from its previous opposition. Defendant Shelby County filed a Motion to Dismiss on July 6, 2004, and a Motion to Dismiss Amended Complaint on December 17, 2004, both of which also incorporate the arguments made in Defendants Public Building Authority and Hoops, L.P.'s motions. Plaintiffs responded in opposition to those motions on December 20, 2004, also incorporating the arguments from their prior opposition.

[2] The Court has determined that further briefing is required before it can render a decision regarding Defendants' motions to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). Accordingly, the parties are instructed to submit supplemental briefs as noted in the Court's separate Order Requesting Further Briefing Regarding Defendants' Motions to Dismiss For Failure to State a Claim Upon Which Relief May Be Granted Under Federal Rule of Civil Procedure 12(b)(6).

I. Background

This case arises out of Plaintiffs' allegations that the FedEx Forum, a sports and entertainment arena located in Memphis, Tennessee, fails to comply with federal regulations promulgated pursuant to the Americans With Disabilities Act of 1990, 42 U.S.C. § 12181, *et seq*. ("ADA"). Plaintiff Mid-South Paralyzed Veterans of America ("Mid-South PVA") is an advocacy group for disabled individuals. Individual Plaintiffs Keith Morris, Carl Flemons, Tom Hafford, and Larry Hale are all disabled individuals who utilize wheelchairs. The Defendants are public and private entities responsible for the development and operation of the FedEx Forum. Plaintiffs seek a declaratory judgment that Defendants have violated the ADA, a preliminary and permanent injunction to prevent Defendants from operating the FedEx Forum in a manner that violates the ADA, attorney's fees and costs and other such relief as the Court deems appropriate.

II. Standard of Review

"A Rule 12(b)(1) motion can either attack the claim of [subject matter] jurisdiction on its face, in which case all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists." DLX, Inc. v. Kentucky, 381 F.3d 511, 516 (6th Cir. 2004). Here, Defendants

contend that, “even accepting all factual assertions as true, Plaintiffs do not have standing and their claim is not ripe.” (Defs.’s Mot. to Dismiss the Am. Cplt. at 4.) Defendants therefore present a facial challenge to this Court’s subject matter jurisdiction. Accordingly, for the purpose of Defendants’ Rule 12(b)(1) motions to dismiss, the Court will consider all allegations in Plaintiffs’ Complaint as true and construe the Complaint in favor of the Plaintiffs.

III. Relevant Facts

For the purpose of Defendants’ motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court assumes the following facts.

Plaintiff Mid-South PVA is an affiliate chapter of the Paralyzed Veterans of America (“PVA”), a nationwide organization whose members include veterans of the United States Armed Forces who have either spinal cord injuries or disease. Virtually all of Mid-South PVA’s 1,100 members in Tennessee, Mississippi, Arkansas and Alabama are wheelchair users. One of PVA’s purposes is to eliminate discrimination against its members on the basis of their physical disabilities and ensure that its members have equal access to places of public accommodation. Mid-South PVA is currently a season ticket holder for the Memphis Grizzlies, a National Basketball Association franchise located in Memphis, Tennessee that plays its home games at the FedEx Forum.

Plaintiff Keith Morris is the Executive Director of Mid-South PVA and a wheelchair user. Plaintiff Carl Flemons is a member of the Mid-South PVA and a wheelchair user. Plaintiffs Tom Hafford and Larry Hale are also wheelchair users. All Plaintiffs allege that they "will attend ... sports and entertainment events at the FedEx Forum," and that they "will not be able to fully enjoy events [they] may attend at the FedEx forum if the facility is not readily accessible and usable by [them]." (Pls.' Am. Cplt. at 3.)

Defendant Public Building Authority is a public authority created by the City of Memphis and Shelby County for the purpose of constructing, managing and operating the FedEx forum. Defendant Hoops, L.P. is a limited partnership that owns and operates the Memphis Grizzlies. Defendant Hoops, L.P. is party to a lease agreement with the Public Building Authority involving the operation of events at the FedEx Forum. Plaintiffs allege that the Public Building Authority, Defendant City of Memphis, and Defendant Shelby County, Tennessee are joint owners of the FedEx Forum and public entities within the meaning of the ADA. (Pls.' Am. Cplt. at 4-5.) Plaintiffs also allege that Defendant Hoops, L.P. is a lessor and/or operator of a place of public accommodation and is therefore subject to the anti-discrimination provision set forth in 42 U.S.C. § 12182(a). (Id. at 5.)

At the time Plaintiffs filed their Amended Complaint, the FedEx Forum was under construction. Plaintiffs allege in their Amended Complaint that the FedEx Forum will be the venue for various events for entertainment and exhibitions, including Memphis Grizzlies basketball games and popular music concerts. Plaintiffs also allege that Defendants Public Building Authority and/or Hoops, L.P. will operate the arena when completed.

Seating in the FedEx Forum is divided into the following levels: floor level, 100 series seats, 200 series seats, loge boxes, upper suites, and 300 series seats.[3] Plaintiffs allege that the FedEx Forum has virtually no structurally fixed seating for wheelchair users in the 100 series seat level, 200 series, loge boxes and 300 series seats.[4] Instead of structurally fixed wheelchair seating locations, Plaintiffs allege that Defendants intend to use removable and portable platforms, which will extend over three rows of ambulatory (i.e. non-wheelchair accessible) seating.[5] Plaintiffs further allege that, when the platforms are

---

[3] See Appendix A for a description of the arena's available wheelchair seating.

[4] The Mid-South PVA was a member of an ADA advisory group that assisted in planning and designing the FedEx Forum. On March 1, 2002, the ADA advisory group convened its first and only meeting. At this meeting, members were shown preliminary drawings of the new arena. The Mid-South PVA subsequently requested and received a copy of the architectural drawings for review.

[5] In Defendants' architectural plans, the wheelchair locations are referred to as "demountable," "portable," and/or "removable" platforms. The plans indicate that beneath the

not used by wheelchair users, Defendants intend to remove the platforms in order to make more non-accessible, ambulatory seats available to the public. For each wheelchair location on a removable platform, approximately five to six non-accessible, ambulatory seats are located, or can easily be installed, below the platforms. According to Plaintiffs, such a design provides Defendants with a significant economic incentive to remove the wheelchair platforms to increase the attendance and revenue at arena events and a disincentive to market the wheelchair seating locations to the disabled public.

If Defendants remove any of the wheelchair platform seating for basketball or other events and use the seats below the platforms, Plaintiffs allege that the total number of "fixed" wheelchair locations will fall below the minimum standard established by Department of Justice ("DOJ") Regulations for new construction published at 28 C.F.R. Pt. 36, App. A, § 4.1.3(19)(2004). Accordingly, as designed and constructed, Plaintiffs allege that the FedEx Forum fails to provide the minimum number of structurally "fixed" wheelchair locations. Further, Plaintiffs allege that the intended use of "demountable," "portable," and/or "removable" platforms violates 28 C.F.R. Pt. 36, App. A, § 4.33.3 because such a system does not

---

"removable," portable," and "demountable" platforms are ambulatory seats or precast structures that allow for easy installation of ambulatory seats. (Pls.' Am. Cplt., Exs. 1-3.)

comply with the mandatory requirement that the wheelchair locations be an integral part of a fixed seating plan.[6] Plaintiffs also allege that an impermissible alteration of the FedEx Forum will occur whenever Defendants remove any of the "demountable," "removable," and "portable" platforms during an event.[7]

Plaintiffs' Amended Complaint alleges four counts. Counts 1 and 2 allege that: "[t]he FedEx Forum as constructed without integral 'fixed seating accessible wheelchair locations' violates [Title II (Count 1) and Title III (Count 2)] of the ADA and irreparably injures the Plaintiffs." (Pls.' Am. Cplt. at 16-17.) Counts 3 and 4 allege that: "[t]he FedEx Forum as designed and constructed with 'portable,' 'demountable,' and 'removable' platforms will cause an alteration which decreases or has the effect of decreasing accessiblity below the requirements for new

---

[6]Since June, 2003, Plaintiffs allege that they have repeatedly requested assurances from Defendants that the platforms would be permanently fixed and made an integral part of the fixed seating plan so as to assure compliance with the minimal amount of wheelchair seating set forth in DOJ regulations. According to Plaintiffs, Defendants have refused to assure that the platforms will become "fixed seating" or an "integral part" of "fixed seating" or that no impermissible alterations would occur by removing the wheelchair platforms to use the non-accessible, ambulatory seats below the platforms.

[7] 28 C.F.R. Pt. 36, App. A, § 4.1.6 provides that no alteration to an existing building and facility "shall be undertaken which decreases or has the effect of decreasing accessibility or usability below the requirements for new construction at the time of alteration." 28 C.F.R. Pt. 36, App. A, § 4.1.6.

construction in violation of [Title II (Count 3)] and [Title III (Count 4)] of the ADA and cause irreparable harm." (Id. at 17-18.)

As a proximate result of Defendants' failure to design and construct the FedEx Forum with integral "fixed seating accessible wheelchair locations" for individuals with disabilities, Plaintiffs allege that the Mid-South PVA and its members have suffered and will continue to suffer injury, including, but not limited to:

> (a) the frustration of the efforts and programs of the Mid-South PVA to bring about equality of access to persons with mobility impairments and the elimination of discrimination against persons with disabilities in public accommodations in the Memphis, Tennessee and greater Mid South area.
>
> (b) the interference with the interest of the Mid-South PVA and its members in protecting their rights to live and enjoy a community that is free from discrimination on the basis of physical disability in the Memphis, Tennessee and Mid South area.

(Id. at 11.)

As a proximate result of the Defendants' failure to design and construct the FedEx Forum in a manner that is readily accessible to and usable by individuals with disabilities as required by the ADA, Plaintiffs allege that individual Plaintiffs Morris, Flemons, Hafford and Hall "have suffered, and will continue to suffer, injury including, but not limited to, a deprivation of their right to the full and equal enjoyment of the

goods, services, facilities, privileges, advantages, and/or accommodations of the FedEx Forum." (Id..)

The injuries alleged by all Plaintiffs as to all counts are that:

> (a) Persons with disabilities who use wheelchairs will be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and/or accommodations of the FedEx Forum by being denied accessible wheelchair seating locations with lines of sight comparable to those provided to members of the general public;
>
> (b) Persons with disabilities who use wheelchairs will be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and/or accommodations of the FedEx Forum by being denied seating in a setting with the minimum numbers that are an integral part of the FedEx Forum's fixed seating plan; and,
>
> (c) Persons with disabilities who use wheelchairs will be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and/or accommodations of the FedEx Forum by being denied a choice of available wheelchair seating locations.

(Id. at 16-19.)

Plaintiffs seek a declaration that the acts and omissions of the Defendants alleged in their Amended Complaint violate Titles II and III of the ADA; a preliminary and permanent injunction restraining all Defendants from operating the FedEx Forum in a manner which causes or allows the removal of any platform provided for wheelchair seating for any event at the FedEx Forum;

attorney's fees, including costs and litigation expenses, and other such relief as the Court deems appropriate.

IV. The ADA and the Relevant Department of Justice Regulations

The Americans With Disabilities Act prohibits discrimination against individuals with disabilities. Title II of the ADA prohibits discrimination by public entities.[8] Title III of the ADA prohibits discrimination "in the full and equal enjoyment of ... any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Under the ADA, facilities are to be provided to disabled individuals "in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(b)(2)(B). The ADA also prohibits entities from utilizing standards, criteria or methods of administration "that have the effect of discriminating on the basis of disability." 42 U.S.C. § 12182(b)(2)(D).

The FedEx Forum is a "new construction" within the meaning of 42 U.S.C. § 12183(a)(1) and 28 C.F.R. § 35.151. Such

---

[8]42 U.S.C. § 12132, entitled "Discrimination," provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

buildings are required to be "readily accessible to and usable by individuals with disabilities" at the time of their construction. 42 U.S.C. § 12183(a)(1). Regulations promulgated by the DOJ pursuant to 42 U.S.C. §§ 12134 and 12186 and published as Appendix A to 28 C.F.R. Part 36, entitled "Standards for Accessible Design" (the "Standards"), prescribe specific requirements with respect to the quantity, placement and type of wheelchair accessible seating required in a place of assembly such as the FedEx Forum.

In particular, § 4.33.3 of the Standards requires that, in pertinent part:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

28 C.F.R. Pt. 36, App. A, § 4.33.3. That section also requires that "[a]t least one companion, fixed seat shall be provided next to each wheelchair seating area" and provides that "[r]eadily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users." Id. Additionally, § 4.1.3(19) of the Standards requires that wheelchair and companion seating be provided in a fixed ratio to the total seating capacity within each separate assembly area.[9]

---

[9] Specifically, § 4.1.3(19) of the Standards provides, in pertinent part:

> (a) In places of assembly with fixed seating[,]

It is not disputed that the FedEx Forum, as currently designed, provides for enough wheelchair accessible seating to comply with § 4.1.3(19) of the Standards.

The relevant regulations also provide that alterations to ADA compliant buildings must not decrease the "accessibility or usability of a building or facility below the requirements for new construction at the time of alteration," and that altered parts of buildings must comply with the same minimum requirements as new constructions. 28 C.F.R. Pt. 36, App. A, § 3.5. An "alteration" is defined by § 3.5 of the Standards, as follows:

> Alteration is a change to a building or facility made by, or on behalf of, or for the use of a public accommodation or commercial facility, that affects or could affect the usability of the building or facility or part thereof. Alterations include, but are not

---

> accessible wheelchair locations shall comply with 4.33.2, 4.33.4 and shall be provided consistent with the following table:

Capacity of Seating in Assembly Areas	Number of Required Wheelchair Locations
4 to 25	1
26 to 50	2
51 to 300	4
301 to 500	6
over 500	6, plus 1 additional space for each total seating capacity increase to 100

> ....

28 C.F.R. Pt. 36, App. A, § 4.1.3(19).

> limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement of the structural parts or elements, and changes or rearrangements in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.

28 C.F.R. Pt. 36, App. A, § 3.5.

IV. Analysis

Defendants contend that Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction because the Plaintiffs lack standing and their claims are not ripe for adjudication. The Court will analyze each of these contentions in turn, as to the individual Plaintiffs and the organizational Plaintiff, the Mid-South PVA.

A. Standing

The Court will first analyze standing as to the four individual Plaintiffs, and then as to the Mid-South PVA.

1. The Individual Plaintiffs

As a constitutional requirement to establish standing, Plaintiffs must show that: (1) they have suffered an injury-in-fact; (2) there is a causal connection between the injury and the conduct of the defendants; and (3) the injury is capable of redress by a favorable decision. Lujan v. Defenders of Wildlife,

504 U.S. 555, 560-61 (1992).[10]

Defendants contend that Plaintiffs cannot establish that they have suffered an injury-in-fact. Specifically, Defendants assert that Plaintiffs' purported injury is hypothetical because it is speculative whether Defendants will remove the wheelchair platforms in the future, that Plaintiffs' claim is premature because Plaintiffs have never been denied accessible seating at the FedEx Forum, that Plaintiffs have not alleged a sufficiently specific intent to attend events at the FedEx Forum, and that Plaintiffs' fail to state an injury that is personal to them.[11] The Court finds Defendants' contentions unavailing.

---

[10] Standing to sue involves requirements that are both constitutional and prudential. Warth v. Seldin, 422 U.S. 490, 498 (1975). "Prudential" standing requirements provide that: (1) a party generally cannot assert the rights of others before the court; (2) a plaintiff may not sue as a taxpayer who shares a grievance in common with all other taxpayers; and (3) a party must raise a claim within the "zone of interests" protected by the statute in question. Allen v. Wright, 468 U.S. 737, 751 (1984). Defendants do not contend that any prudential requirements apply to bar the individual Plaintiffs from asserting standing.

[11] Defendants also contend that Plaintiffs must have "actual notice" of a violation of the ADA before they may assert a claim. This argument, however, is based upon an incorrect reading of 42 U.S.C. § 12188. Actual notice is not a precursor to filing a claim under the ADA. Rather, under 42 U.S.C. § 12188, a Plaintiff need only have "reasonable grounds" that a violation will occur before bringing suit. 42 U.S.C. § 12188 states that, where a plaintiff has actual notice of a violation, a plaintiff need not make a meaningless gesture in order to assert a claim under the Act. Id. Here, Plaintiffs have established "reasonable grounds" that a violation will occur.

As a preliminary matter, for the purpose of determining whether or not Plaintiffs have standing to bring this suit, the Court must assume that the allegations in Plaintiffs' Complaint state a claim under the ADA. See DLX, 381 F.3d at 516. Based upon that assumption, the Court will analyze whether Plaintiffs have suffered an injury-in-fact due to Defendants' purported violations of the ADA.

An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (citations and internal quotation marks omitted). Particularized means that "the injury must affect the plaintiff in a personal and individual way." Id. at 561, n. 1. Here, Plaintiffs allege that they have suffered and will continue to suffer injuries due to Defendants purported failure to comply with the regulations promulgated pursuant to the ADA.[12]

In the context of plaintiffs asserting standing for

---

[12] "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." Warth, 422 U.S. at 514. Congressional creation of a right does not, however, eliminate the constitutional requirement of standing to assert that right in court. As the Supreme Court has made clear, Congress cannot confer standing on persons who do not meet the requirements of Article III. See, e.g., Lujan, 504 U.S. at 560, 576-78; Warth, 422 U.S. at 500. Therefore, although Congress may expand the definition of what constitutes an injury by expanding the list of rights people enjoy, it may not eliminate the constitutional "case or controversy" requirement.

purported violations of environmental legislation, the Supreme Court has found that plaintiffs "adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 183 (2000)(citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). Further, the Supreme Court has found that a direct effect to a plaintiff's "recreational, aesthetic, and economic" interests is sufficient to establish standing. Id. at 184.

Here, although Plaintiffs do not aver that they currently use the arena, all of the individual Plaintiffs have alleged that they intend to attend events at the FedEx Forum. (Pls.' Am. Cplt. at 3.). In fact, Plaintiff Tom Hafford purchased tickets for the September 18, 2004, Alan Jackson concert and intends to attend Memphis Grizzlies and University of Memphis basketball games at the FedEx Forum. (Pls.' Mem. in Opp. to the Mot. to Dism. Pls.' Am. Cplt. Filed by Def.'s Public Building Authority and Hoops, L.P., Ex. 2 (Aff. of Tom Hafford ¶¶ 3,4).) Additionally, Plaintiff Mid-South PVA is a season ticket holder for the Memphis Grizzlies. These facts distinguish Plaintiffs' claims from the sort of intentions to return to an area "some day" that the Supreme Court has found insufficient to support a finding of injury. Lujan, 504 U.S. at 564. Further, as putative attendees

of events at the FedEx Forum, Defendants' purported failure to comply with relevant DOJ regulations has a direct effect on Plaintiffs' recreational interests.

Moreover, Plaintiffs asserted injuries are concrete, particularized, and imminent.[13] Defendants' purported failure to comply with the relevant DOJ regulations limits Plaintiffs' access to a place of public accommodation. That injury is concrete and personal because Plaintiffs are disabled persons who intend to utilize the FedEx Forum to serve their recreational interests. Further, should the arena not comply with the relevant DOJ regulations, then Plaintiffs will suffer injury upon attendance at the relevant events. That possibility is imminent because Plaintiffs have alleged that they intend to attend upcoming events at the arena. Accordingly, the Court finds that Plaintiffs have established an injury-in-fact.

In order to have standing to sue, Plaintiffs must also establish a causal connection between the injury and the conduct of the defendants and that the injury is capable of redress by a favorable decision. Lujan, 504 U.S. at 560-61. Here, according

---

[13]The individual Plaintiffs have alleged that they will be injured due to Defendants purported violations of the ADA, in that they will be "denied accessible wheelchair seating locations with lines of sight comparable to those provided to members of the general public," "denied seating in a setting with the minimum numbers that are an integral part of the FedEx Forum's fixed seating plan," and "denied a choice of available wheelchair seating locations." (Pls.' Am. Cplt. at 16-19.).

to Plaintiffs' Amended Complaint, Defendants are responsible for the construction and operation of the FedEx Forum. Accordingly, Plaintiffs have established a causal connection between their injury and Defendants' conduct. Moreover, Plaintiffs have requested declaratory and injunctive relief, which, if granted, would adequately redress their purported injuries. Therefore, Plaintiffs have established standing to sue under the ADA.

2. Plaintiff Mid-South PVA

Defendants allege that the Mid-South PVA lacks standing because not all of its members are disabled, its claims are duplicative of the individual Plaintiffs' claims, and because granting the PVA standing would represent an impermissible instance of third-party standing.

Organizational standing, however, is an exception to the prudential rule against third-party standing. An organization seeking injunctive relief for enforcement of legislation has standing if: 1) its members would otherwise have standing to sue in their own right; 2) the interest it seeks to enforce is germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of the individual members of the lawsuit.[14] Hunt v. Washington

[14] Consideration of the test's third prong is not constitutionally required, but may be of importance and should be considered where appropriate. United Food and Commercial Workers Union Local 751 v. Brown Group, 517 U.S. 544, 555 (1996). The Court finds that the third prong need not be considered in this

State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); See also NAACP v. City of Parma, 263 F.3d 513, 524 (6th Cir. 2001). Here, the Court has found that individual Plaintiffs Keith Morris and Carl Flemons, both members of the Mid-South PVA, have standing to sue in their own right. Moreover, the purpose of the Mid-South PVA - to prevent discrimination against its members on account of disability - is germane to the interest it seeks to enforce in this suit. Accordingly, Plaintiff Mid-South PVA has standing to assert its claims.

B. Ripeness

Defendants also contend that Plaintiffs' claims are not ripe for adjudication, for the same reasons that they contend Plaintiffs lack standing (See discussion supra pp. 17-18.) "The ripeness doctrine 'is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" Ammex, Inc. v. Cox, 351 F.3d 697, 706 (6th Cir. 2003)(quoting Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57, n. 18 (1993)). "Although the question of ripeness bears a close affinity to questions of standing, ripeness focuses on the timing of the action rather than on the party that brings the suit." United States Postal Service v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 330 F.3d 747, 751 (6th Cir. 2003)(citation omitted). The ripeness requirement aims to prevent the court

---

case.

from entangling itself in "abstract disagreements." Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 527 (6th Cir. 1998)(citing Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580 (1985)).

The factors to be weighed in deciding whether a claim is ripe for adjudication include: “(1) the likelihood that the harm alleged by the party will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings.” Nat’l Ass’n of Letter Carriers, 330 F.3d at 751 (citation omitted).

Here, Plaintiffs allege that the mere presence of portable wheelchair seating platforms violates the requirement that wheelchair locations be an “integral part” of a “fixed seating plan,” and that Defendants intend to remove those platforms, which will result in an impermissible alteration of the arena. Plaintiffs also claim that, as designed and constructed, the FedEx Forum fails to provide the minimum number of structurally “fixed” wheelchair locations. Assuming the truth of those allegations, the alleged harm has already occurred or is likely to occur soon. Even if the platforms must actually be removed before there could be a violation of the ADA, however, the fact that Plaintiffs have alleged that the platforms are designed to

be removable so as to facilitate their replacement with non-accessible seating makes it likely that the proffered harm will come to pass.

The Court further finds that the factual record is sufficiently developed to produce a fair adjudication and that hardship would result to the parties if judicial relief is denied at this stage in the proceedings. Under Defendants' contentions, Plaintiffs would have to actually attend events at the FedEx Forum and be denied adequate accommodations before their claims would be ripe. However, Plaintiffs allegations center around whether the presence of removable wheelchair platforms in the arena violates the ADA. Further facts are not needed in order for the Court to determine, as a matter of law, whether the presence of such platforms violates the relevant standards.

IV. Conclusion

For the foregoing reasons, Defendants' motions to dismiss for lack of subject matter jurisdiction are DENIED.

So ORDERED this ___th day of February, 2005.

_____

JON P. McCALLA
UNITED STATES DISTRICT JUDGE

Appendix A

Based on the basketball seating plan at the time of Plaintiffs' Complaint, the number of wheelchair seats for basketball games at the FedEx Forum are as follows:

	General Seats	Wheelchair Spaces	Wheelchair Companion Seats	Total
Floor	247	4	4	255
Lower Bowl/Courtside	4,917	54	54	5,033*
Middle Bowl-Fixed	2,569	30	30	2,629
Middle Bowl-Loge Box	324	4	4	332
Upper Bowl	8,529	90	90	8,709
Total	16,586	182	182	16,958*

Based on the end stage concert seating plan at the time of Plaintiffs' Complaint, the number of wheelchair and companion seats available for concerts are as follows:

	General Seats	Wheelchair Spaces	Wheelchair Companion Seats	Total
Floor	1,350	20	20	1,390
Lower Bowl/Courtside	3,622	38	38	3,698
Middle Bowl-Fixed	2,044	40	40	2,124
Middle Bowl-Loge Box	320	4	4	328
Upper Bowl	6,758	69	69	6,896
Total	14,094	171	171	14,436

* These two numbers appear to be incorrect, since 4,917 + 54 +

54 = 5,025, and 16,586 + 182 + 182 = 16,950.