THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD FRAME, WENDELL DECKER, SCOTT UPDIKE, JUAN NUNEZ, a minor, by his next friend and mother, GABRIELA CASTRO, MARK HAMMAN, and JOEY SALAS	§	
Plaintiffs,	§	CIVIL ACTION NO. 4:05-CV-470-Y
V.	§	
THE CITY OF ARLINGTON, TEXAS,	§	
Defendant.	§	

ORDER GRANTING THIRD RENEWED MOTION TO DISMISS

Pending before the Court is defendant The City of Arlington's Third Renewed Motion to Dismiss [doc. # 86], filed April 30, 2007. After consideration, the Court GRANTS the motion.

I. BACKGROUND

On July 22, 2005, Plaintiffs, who are all Arlington residents with disabilities, filed suit against Arlington for discrimination under the Americans with Disabilities Act ("the ADA") and

the Rehabilitation Act.[1] They also complain of Arlington's failure to implement a transition plan as provided by the regulations governing the ADA. Specifically, Plaintiffs asserted that "Arlington's system of streets, sidewalks and intersections in . . . crucial areas . . . lack curb ramps or lack accessible curb ramps and contain sidewalks that drop or rise sharply, stop abruptly, or are impassable because of major obstructions embedded in them." (Pls.' Resp. at 2.) Arlington moved to dismiss Plaintiffs' complaint under Rule 12.[2] This Court agreed that Arlington's limitations arguments seemed to be fatal to Plaintiffs' claims. However, this Court declined to dismiss Plaintiffs' complaint and instead ordered Plaintiffs to amend their complaint to "adequately allege construction and/or alteration dates or timelines for the locations alleged to be noncompliant . . . with the ADA and the Rehabilitation Act." (July 31, 2006, Order at 2.) Plaintiffs filed an amended complaint, and Arlington has again moved to dismiss it on the basis of limitations and lack of standing, among other arguments.[3]

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[1]This is not plaintiff Richard Frame's first time to file suit under the ADA. In the past five years, Frame has filed 14 lawsuits in this Court against several businesses in Tarrant County for "accommodation discrimination" under Title III of the ADA. Twelve of the suits were voluntarily dismissed. *See Frame v. Lowe's Home Ctrs., Inc.*, No. 4:03-CV-315-A; *Frame v. Outback Steakhouse of Fla., Inc.*, No. 4:03-CV-870-A; *Frame v. Columbia Regency Tex. 1, L.P.*, No. 4:03-CV-1349-Y; *Frame v. WRI Overton Plaza, L.P.*, No. 4:04-CV-028-A; *Frame v. Fry's Elecs., Inc.*, No. 4:04-CV-414-Y; *Frame v. N. Tex. Dist. Council Assemblies of God*, No. 4:04-CV-563-Y; *Frame v. 9 SC Assocs. Ltd.*, No. 4:04-CV-721-Y; *Frame v. Armin & Anna Mandel Trust*, No. 4:06-CV-230-A; *Frame v. Courtside Plaza Shopping Ctr., L.C.*, No. 4:06-CV-451-Y; *Frame v. Boston Market Corp.*, 4:06-CV-721-Y; *Frame v. Chick-Fil-A, Inc.*, No. 4:07-CV-308-Y; *Frame v. RPI Overland Ltd.*, 4:07-CV-503-A. One case, along with the instant case, remains pending. *Frame v. Cheddar's Casual Café, Inc.*, No. 4:07-CV-744-A. Needless to say, the Court is growing weary of Frame's ADA grievances.

[2]This motion was Arlington's second motion to dismiss. This Court denied as moot Arlington's first motion to dismiss when Plaintiffs amended their complaint after the motion was filed.

[3]After Arlington filed its third motion to dismiss, Plaintiffs filed another amended complaint which only added more plaintiffs. Because no new claims were added, this Court did not moot Arlington's motion to dismiss and is now construing the motion as addressing Plaintiffs' fourth amended complaint.

II. APPLICABLE LAW

A. RULE 12(B)(6)

Arlington moves to dismiss Plaintiffs' complaint because it fails to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12(b)(6). Rule 12 must be interpreted in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim for relief in federal court and calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding Rule 8(a)'s simplified pleading standard applies to most civil actions).

"A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). The Court must accept as true all well pleaded, nonconclusory allegations in the complaint, and must liberally construe the complaint in favor of the plaintiff. *See id.* The plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace,* 954 F.2d 278, 281 (5th Cir. 1992). In other words, he must plead "enough facts to state a claim to relief that is plausible on its face" and his "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1974 (2007).

A statute of limitations may support dismissal under Rule 12(b)(6) where the complaint establishes that the action is barred and the pleadings fail to raise a basis to toll the statute. *See Jones v. ALCOA, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003). Likewise, a lack of standing will support a Rule 12 dismissal. *See Hosein v. Gonzalez*, 452 F.3d 401, 403 (5th Cir. 2006) (holding

Rule 12(b)(1) dismissal, which is decided under Rule-12(b)(6) standard, appropriate if plaintiff lacks standing because court lacks subject-matter jurisdiction).

B. THE ADA AND THE REHABILITATION ACT

1. The Acts Themselves

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1) (West 2005). Title II of the ADA prohibits discrimination in the provision of public services: "[N]o 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." *Id.* § 12132 (West 2005). The Rehabilitation Act was enacted "to ensure that handicapped individuals are not denied jobs or other benefits because of prejudiced attitudes or ignorance of others." *Brennan v. Stewart*, 834 F.2d 1248, 1259 (5th Cir. 1988); *see also* 29 U.S.C.A. § 794 (West 1999 & Supp. 2007). Because the ADA expressly provides that rights and remedies available under the Rehabilitation Act are also available under the ADA, the law interpreting either statute is applicable to both. *See* 42 U.S.C.A. § 12133 (West 2005); *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000).

The ADA authorizes the Attorney General to promulgate regulations implementing its provisions. *See* 42 U.S.C.A. § 12134(a) (West 2005). One such regulation addresses a public entity's responsibilities regarding "existing facilities," a phrase that includes "all or any portion of [its] buildings, structures, sites, complexes, . . . roads, walks, passageways, [and] parking lots" that were in existence at the time of the ADA's enactment—July 26, 1990. 28 C.F.R. § 35.104

(2006). With respect to newly constructed or altered streets and sidewalks, the regulations require the installation of curb cuts or comparable means of ingress and egress for disabled persons. *See id.* § 35.151(e) (2006). Consistent with Title II's emphasis on program accessibility, the regulatory scheme generally does not require public entities to retrofit their existing facilities. *See Tennessee v. Lane*, 541 U.S. 509, 532 (2004); *see also* 28 C.F.R. § 35.150(a)(1) (2006).

If structural changes to existing facilities are to be undertaken to accomplish program accessibility, a transition-plan regulation directs a public entity to "develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes." 28 C.F.R. § 35.150(d)(1) (2006). Public entities with responsibility over streets, roads, or walkways bear an additional burden: the regulation requires those entities to craft, in their transition plan, "a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving . . . State and local government offices and facilities, transportation, places of public accommodation, and employers." *Id.* § 35.150(d)(2). Finally, the transition-plan regulation mandates that any structural changes to existing facilities "be made within three years of January 26, 1992, but in any event as expeditiously as possible." *Id.* § 35.150(c).

2. Statutes of Limitation

Because Title II adopts the remedies and rights set forth in the Rehabilitation Act, the same limitations statute would apply to both claims. *See Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1409 (11th Cir. 1998). The determination of a limitations period under the Rehabilitation Act is governed by a three-step inquiry: (1) follow federal law if federal law provides a limitations period; or (2) apply the common law, as modified by Texas law, if no limitations period is provided by federal law; but (3) apply state law only if it is consistent with the Constitution and federal law. *See* 42 U.S.C.A. § 1988(a) (West 2003); *Holmes v. Tex. A&M Univ.*, 145 F.3d 681, 684 (5th Cir. 1998). The ADA, like many federal civil rights statutes, does not contain a specific statute of limitations. *See* 42 U.S.C.A. § 12132; *Holmes*, 145 F.3d at 683. The general federal statute of limitations does not apply to the ADA or the Rehabilitation Act because it only applies to statutes enacted after December 1, 1990, and both the ADA and the Rehabilitation Act were enacted before that date. *See* 28 U.S.C.A. § 1658 (West 2006). Thus, this Court must apply the Texas statute of limitations governing the state cause of action most analogous to Plaintiffs' ADA and Rehabilitation-Act claims. *See Goodman v. Likens Steel Co.*, 482 U.S. 656, 660 (1987); *Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980, 982 (5th Cir. 1992). As Arlington asserts, claims that allege discrimination are essentially claims for personal injury, which are subject to a two-year limitations period in Texas. *See* TEX. CIV. PAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2007); *Hickey*, 976 F.2d at 983; *accord Deck v. City of Toledo*, 56 F. Supp. 2d 886, 890-91 (N.D. Ohio 1999) (holding ADA claims similar to personal-injury or discrimination claim and applying Ohio's two-year limitation period).

While state law determines the applicable limitations period, federal law governs the accrual of a cause of action. *See Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983). A cause

of action accrues when "the plaintiff knows or has reason to know of the injury . . . and who has inflicted the injury." *Id.*

III. DISCUSSION

Plaintiffs filed their complaint on July 22, 2005. Thus under the two-year limitation period, any violation of the ADA or the Rehabilitation Act must have occurred after July 21, 2003. Indeed, this Court implicitly recognized the limitations problem in this case by ordering Plaintiffs to replead their case and allege specific dates of the City's alteration or construction efforts. Unfortunately, Plaintiffs' amended complaint does not remedy this problem. Plaintiffs allege that all of the actions taken by Arlington on the complained-of streets and sidewalks occurred anywhere from three to ten years ago. (Pls.' 4th Am. Comp. at ¶¶ 34, 36, 37, 43, 45, 46, 47, 48, 50, 53, 54, 55, 56.) Although Plaintiffs allege that they have attempted to use these roadways and sidewalks during the limitations period, their discrimination cause of action accrued when the improvements took place. *See Deck*, 56 F. Supp. 2d at 892 (holding limitations began to run on ADA claim regarding insufficient curb ramps at the time the discriminatory act occurred and not in response to the continuing effects of those acts).

Plaintiffs' argument that Arlington is committing a continuing violation of the ADA and the Rehabilitation Act does save them from the effects of limitations. The continuing-violation theory is an exception to a limitations period because such a violation alleviates the staleness concerns that statutes of limitation address. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). But even under this theory, at least one of the discriminatory acts must have occurred within the limitations period. *See id.* By Plaintiffs' own account, the most recent

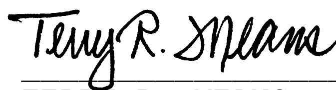
alteration by Arlington was three years before the complaint was filed. Further, Arlington convincingly rebuts Plaintiffs' remaining arguments in opposition to the application of limitations. (Def.'s Br. in Supp. at 4-8; Def.'s Reply at 3-4.)

Plaintiffs' transition-plan claims are also subject to dismissal. Under some circumstances, Title II creates a private right of action against noncompliant public entities. *See* 42 U.S.C. § 12133 (West 2005); *see also Lane*, 541 U.S. at 517. Plaintiffs, however, are raising violations of, and rights to enforce, the transition-plan regulation. An implementing regulation sometimes may be enforced through a private right of action available under the statute it implements. *See Alexander v. Sandoval*, 532 U.S. 275, 284-85 (2001). But a private plaintiff may not, merely by referencing the underlying statute, enforce an implementing regulation that prohibits broader conduct than the underlying statute itself prohibits. *See generally id.* at 286 (stating power to create private right of action lies exclusively with Congress). Thus, a private right of action may be conceived only by a statute that clearly evinces Congressional intent to bestow such a right. *See id.* at 286-87. In other words, an implementing regulation, on its own, cannot create a private right of action. *See id.* at 291. The transition-plan regulation imposes obligations on public entities different than and beyond those imposed by the ADA itself. As such, the transition-plan regulation is not enforceable through a private right of action under Title II. *See, e.g., Iverson v. City of Boston*, 452 F.3d 94, 99-100 (1st Cir. 2006); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 913-15 (6th Cir. 2004); *Cherry v. City College of San Francisco*, No. C04-04981 WHA, 2005 WL 2620560, at *2 (N.D. Cal. 2005). *But see Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 856-60 (10th Cir. 2003) (holding transition-plan regulation enforceable through private suit).

IV. CONCLUSION

Because Plaintiffs' discrimination claim solely focuses on alterations to roadways and sidewalks that occurred at least three years before Plaintiffs filed suit, it is barred by the statute of limitations. Further, Plaintiffs do not have standing to enforce, through a private right of action, the transition-plan regulation.

SIGNED March 31, 2008.



TERRY R. MEANS
UNITED STATES DISTRICT JUDGE