

Memorandum



Subject Attached "Memorandum for the Solicitor General" re <u>Williams v. United States</u> , C.D. Cal. No. 80-5368 WPG	Date December 31, 1981
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To Chuck Cooper Special Assistant Civil Rights Division	From Carolyn B. Kuhl Special Assistant to the Attorney General <i>CBK</i>
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Regarding the attached, even though the Department of Justice will be promulgating "a regulation for guidance" under Section 504 of the Rehabilitation Act, wouldn't it be desirable to preserve the option of eliminating regulations at some time in the future? On its face, a statute which requires promulgation of "such regulations as may be necessary to carry out the amendments of this section" does not mandate promulgation of regulations if none are necessary.

I do not have the benefit of the Civil Rights Division's memorandum of December 15 on this case. However, I thought you might want to consider whether the position we took in the district court is indeed indefensible and should be abandoned (even though immediate appeal apparently is unnecessary).

cc.: Ken Starr
Bruce Fein
John Roberts

Attachment



JPM:RNF:FLipstein:jp
145-5-5446

Washington, D.C. 20530

22 DEC 1981

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Williams, et al. v. United States and United States Postal Service (No. 80-5368 WPG, C.D. Cal.)

TIME LIMITS

The record must be docketed by February 2, 1982.

RECOMMENDATIONS

The United States Postal Service recommends appeal.

The Civil Rights Division recommends against appeal. 1/

I recommend against appeal.

QUESTIONS PRESENTED

1. Whether the district court's order denying a motion for judgment on the pleadings and concluding that federal agencies, including the Postal Service, are required to promulgate such regulations as they deem necessary to implement the 1978 Amendments to Section 504 of the Rehabilitation Act, is appealable.

2. Whether, if the order is appealable, the court erred in finding (a) that plaintiffs have standing to seek to compel the promulgation of regulations and (b) that the agencies are required to promulgate regulations.

STATUTE INVOLVED

29 U.S.C. 794, as amended provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason

1/ We have not requested the views of the other Executive Agencies since the Civil Rights Division is the coordinating agency, since these agencies are complying with an order to issue regulations in the related case discussed in n. 2 infra, and since the order is of dubious appealability, as we discuss infra.

of his handicap, be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.

STATEMENT

Plaintiffs, disabled and handicapped individuals and associations of handicapped persons, brought this action to compel all federal executive agencies and the Postal Service to promulgate regulations to implement the 1978 amendments to Section 504 of the Rehabilitation Act, 29 U.S.C. 794. ^{2/} We moved for judgment on the pleadings on behalf of all defendants arguing that plaintiffs lack standing and that the act vests discretion in the agencies to determine whether to issue regulations. In the alternative, we moved on behalf of the executive agencies, but not the Postal Service, to stay judicial proceedings pending issuance of guidelines by the Department of

2/ Section 504 originally applied to recipients of federal financial assistance and prohibited those recipients from excluding or discriminating against handicapped individuals or denying them benefits of any federally funded program or activity solely on the basis of their handicap. In 1978, Section 504 was amended to extend the prohibition to "any program or activity conducted by any Executive agency or by the United States Postal Service."

In a companion case, Paralyzed Veterans of America v. Bell, et al., C.D. Cal. No. 79-1979-WFG, most of the same plaintiffs had sought to compel the agencies to issue regulations to implement the original Section 504. The agencies are in the process of complying with that order. This case seeks the same relief with respect to amended Section 504.

Justice, Civil Rights Division, the agency responsible for reviewing and coordinating implementation of Section 504. See Exec. Order 12250, 3 C.F.R. 298 (1980 Comp.). 3/

In an order entered October 19, 1981, the district court concluded that the plaintiffs do have standing and that the agencies, as well as the Postal Service, are required to promulgate regulations to implement the 1978 Amendments to Section 504. The court granted in part the government's alternative motion to stay proceedings until the Department of Justice promulgates a regulation for guidance--the court has ordered a status report to be filed by March 1, 1982 after which the court will decide whether a further hearing is necessary.

DISCUSSION

I recommend against appeal. 4/

1. Technically the order is a denial of a motion for judgment on the pleadings, and is not appealable. It is true that the court, in denying the motion, has decided the legal issues of the plaintiffs' standing and the agencies' obligation to promulgate regulations, 5/ but the court has not actually ordered any agency, including the Postal Service, to issue regulations until the Civil Rights Division has developed guidelines for the agencies. Certainly nothing is required of the Postal Service at least until after the status report to the court in March 1982. There is thus no compelling reason to appeal at this time even if the order were appealable. In addition, since the order's conclusions apply to all the concerned agencies, there may be a Rule 54(b), F.R. Civ. P., problem in permitting the Postal Service to pursue an appeal now while the other agencies are awaiting guidance from the Department of Justice and entry of a final order by the court requiring them to act. Despite the dictum in Coopers & Lybrand v. Livesay, supra,

3/ The Postal Service declined to join the alternative motion because it is technically not an executive agency and thus not subject to the Civil Rights Division's coordination and review under Executive Order 12250 and because it believes its continuing review of existing regulations is sufficient to comply with Section 504.

4/ While the delay in proceedings is a victory for the government on its alternative motion, the Postal Service did not join that motion.

5/ Citing dictum from Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978), the Postal Service argues that these findings have disposed of the case and all that remains is for the court to implement its order. (See Postal Service Recommendation, p. 2.)

that case imposes a strict finality requirement. See also Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 363 (1981). In any event, whether or not the order is appealable now, we recommend against appeal on the merits, as we discuss below.

2. The agencies, including the Postal Service, raised two principal arguments in the district court. First they argued that the plaintiffs have no standing based on their failure to demonstrate injury in fact. It seems clear, however, that these handicapped persons are within the zone of interest Section 504 was designed to protect, see Data Processing Service v. Camp, 397 U.S. 150, 153 (1969); Control Data Corp. v. Baldrige, 655 F. 2d 283 (D.C. Cir. 1981 cert. denied 10/5/81 (50 USLW 3250)), and that they are deprived of the benefits of Section 504 so long as it remains a toothless statement without implementing regulations. That is sufficient injury to confer standing on them to require the agencies to implement the statute by promulgating regulations.

Second, the agencies argued that the amendments vest discretion in each agency to decide whether to issue regulations. This argument rests on the language in the amended Section 504 which provides that the "head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments of this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978." For the reasons thoroughly discussed in the attached memorandum from the Civil Rights Division dated December 15, 1981, we concur with the Civil Rights Division's conclusion that this argument is unsupported by the language and the legislative history, as well as the purpose of Section 504, and thus the Ninth Circuit is unlikely to reverse the decision below.

CONCLUSION

For the foregoing reasons, I recommend against appeal.

J. PAUL McGRATH
Assistant Attorney General
Civil Division

By:
Robert N. Ford
Deputy Assistant Attorney General