

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BILLY WILLIAMS,

Plaintiff,

v.

ERIC HOLDER, THOMAS E. PEREZ,
and UNITED STATES DEPARTMENT
OF JUSTICE,

Defendants.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 3:13-CV-2179-O

DEFENDANTS’ MOTION TO DISMISS

Defendants Eric Holder, Thomas E. Perez,¹ and the United states Department of Justice (collectively, “Defendants”) respectfully move this Court to dismiss Plaintiff Billy Williams’ (“Plaintiff”) Complaint for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).² In support, Defendants state as follows:

¹ Since the filing of the instant suit, Thomas E. Perez has been appointed as the Secretary of Labor. Assistant Attorney General Stuart F. Delery should be substituted in place of Mr. Perez.

² Plaintiff’s Complaint can also be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(4) and (5), as his time to properly effectuate service has lapsed. Although the undersigned counsel has a record of receipt of personal delivery of Plaintiff’s Complaint to the U.S. Attorney’s Office for the Northern District of Texas, she cannot confirm that Plaintiff has met the requirements to serve all three Defendants with a summons and a copy of the complaint. Nor has Plaintiff filed any proof of service as directed by the Court. (Doc. 4.)

I. PLAINTIFF'S COMPLAINT

Plaintiff complains that Defendants have violated the Administrative Procedures Act (APA) by “unlawfully except[ing] smoking and second hand tobacco smoke from the protections of the Americans with Disabilities Act (ADA).” (Doc. 3 at 1.) Essentially, the crux of Plaintiff’s Complaint is that the Department of Justice has violated its technical assistance and enforcement activities under the ADA by interpreting the ADA to permit, but not require, smoking bans. (*See* doc. 3.) The relief Plaintiff demands is: (1) that the Court compel Defendants to enforce the ADA in the manner he sees fit; and (2) that the Court compel Defendants to provide technical assistance (*e.g.*, issue regulations or other directives) that mandates the blanket smoking ban he desires.

II. ARGUMENTS AND AUTHORITIES

A. *Motion to Dismiss Standard*

1. Rule 12(b)(1)

Claims must be dismissed when the federal court does not have the right to exercise its limited jurisdiction because of the subject matter presented in a complaint. Fed. R. Civ. P. 12(b)(1); *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). It is “incumbent on federal courts” to dismiss actions whenever subject matter jurisdiction is lacking; “[t]his is the first principle of federal jurisdiction.” *Stockman v. FEC*, 138 F.3d 144, 151 (5th Cir. 1998) (citations omitted). In reviewing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court may consider the

complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The burden of proof for a Rule 12(b)(1) motion is on the party asserting jurisdiction, thus the plaintiff "constantly bears the burden of proof that the jurisdiction does in fact exist." *Id.*

2. Rule 12(b)(6)

Dismissal is proper when a plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In order to survive a 12(b)(6) motion to dismiss, a complaint "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Claims consisting of "[t]hreadbare recitals of the elements supported by conclusory statements" are simply insufficient. *Id.* Once such "naked assertion[s]" are stripped from the complaint, there must be a factual basis that "raise[s] the right to relief above the speculative level" to a plausible level. *Id.*; *Twombly*, 550 U.S. at 555. This "plausibility standard is not akin to a probability requirement," but asks for something more than a "sheer possibility" that the defendant has acted unlawfully. *Iqbal*, 556 U.S. at 678. The court may draw on its experience and common sense to determine whether a claim is plausible. *Id.* at 679. In sum, a complaint "armed with nothing more than conclusions" fails to meet the plausibility standard and is subject to dismissal under Rule 12(b)(6). *Id.*

B. The Court lacks jurisdiction to review discretionary actions.

The APA does not apply to agency actions that are “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). Under the ADA, Defendants are given discretionary authority for enforcement and for providing technical assistance to covered entities. *See* 42 U.S.C. §§ 12188, 12206.

In exercising its discretionary authority, Defendants properly enforce the ADA requirements and provide technical assistance to assist covered entities in understanding their obligations under the ADA.³

Here, Plaintiff does not allege that Defendants have violated any nondiscretionary duty.⁴ Instead, Plaintiff takes issue with how Defendants have elected to act. Such a decision is unreviewable. *See Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) for the proposition that agency decisions not to institute enforcement proceedings are presumptively unreviewable); *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010) (same); *cf. Ahmadi v. Chertoff*, 522 F. Supp. 2d 816, 818 (N.D. Tex. 2007) (explaining that although the decision to grant or deny an application for adjustment of status is discretionary, there is a nondiscretionary duty to act on the application one way

³ For example, the Department of Justice has a robust outreach and technical assistance program, which includes providing information on the ADA website (www.ada.gov) and through a toll-free hotline.

⁴ Plaintiff fails to allege any “agency action,” much less a “final agency action” which would invoke the APA in the first instance, but the undersigned counsel liberally construes Plaintiff’s Complaint, as he is acting *pro se*.

or another). Accordingly, the Court lacks jurisdiction to review this matter, and Plaintiff's Complaint must be dismissed.

C. Alternatively, Plaintiff fails to state a claim upon which relief can be granted.

The ADA prohibits discrimination on the basis of disability by state and local government entities and places of public accommodation. Covered entities are required to make "reasonable modifications" to their policies, practices, or procedures when such modifications are necessary to enable individuals with disabilities to participate in programs or to receive goods and services provided by the covered entity. These policy modifications are required unless the covered entity can demonstrate that the modifications would fundamentally alter the nature of its program or services. *See* 28 C.F.R. §§ 35.130(7); 36.302(a). With respect to disabled persons affected by smoking, the ADA provides:

Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter. 42 U.S.C. § 12201(b).

This language makes clear that while covered entities are permitted to prohibit smoking in their facilities, they are not required to do so. Instead, it may be a reasonable modification to merely place certain restrictions on smoking. A reasonable modification of policy on behalf of an individual with a disability such as asthma or other condition that affects his or her respiratory functioning may include restrictions on smoking in a

covered facility. But, a ban on smoking is not the only possible modification, and each covered entity is entitled to explore the available alternatives to identify a modification that is reasonable. The ADA requires evaluation of requests for modifications on a case-by-case basis. It does not, however, authorize the Federal government to ban or prohibit smoking – across the board – in all facilities covered by the ADA.

Here, Plaintiff seeks to have the Court enter an order requiring Defendants to promulgate regulations in a *particular manner* to address smoking in public facilities. But no law exists which would require Defendants to do so. Indeed, as Defendants have already made Plaintiff aware, “the ADA . . . does not require entities to enact legislation or adopt policies to ban smoking” and furthermore, “the ADA does not provide the Federal government with authority to create a blanket requirement banning smoking in all facilities.” (Doc. 3 at 13.) Thus, Defendants do not have the authority to render the relief Plaintiff seeks – even if they wanted to – and therefore, Plaintiff fails to state a claim upon which relief can be granted.

III. CONCLUSION

For the reasons set forth herein, Plaintiff’s Complaint should be dismissed with prejudice.

Respectfully submitted,

SARAH R. SALDAÑA
UNITED STATES ATTORNEY

/s/ LSWilson
Assistant United States Attorney
Lynette S. Wilson
Assistant United States Attorney
Texas State Bar No.: 24047126
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214.659.8611
Facsimile: 214.659.8807
Email: lynette.wilson@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on November 18, 2013, I electronically filed the foregoing document with the Clerk of Court for the United States District Court for the Northern District of Texas using the Court's electronic case filing system. A hard copy was sent to the Plaintiff at the address listed below:

Billy Williams
Pro Se Plaintiff
1419 Creekview Drive
Lewisville, TX 75067
Phone: 972.353.8764
bjwtex@aol.com

/s/ LSWilson
LYNETTE S. WILSON
Assistant United States Attorney