UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DICK ANTHONY HELLER, *et al.*, Plaintiffs,	)	Civil Action No. 08-01289 (JEB)
v.	)	
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT

Defendant District of Columbia and Mayor Vincent C. Gray (the "District"),[1] by and through undersigned counsel, hereby submit this Opposition to Plaintiffs' Motion for Leave to File Fourth Amended Complaint (the "Motion").

PRELIMINARY STATEMENT

Plaintiffs seek leave to file a proposed Fourth Amended Complaint (the "PFAC"), *inter alia*, to: (i) join as plaintiffs two individuals—Jermone Parson and Burnell Brown—who purportedly are blind, within the meaning of the District's firearm registration laws (PFAC ¶ 9); and (ii) add a new cause of action against the District for violation of the Americans with Disabilities Act ("ADA") (*id.* ¶¶ 81-94).[2] The District will be prejudiced if Plaintiffs are granted the leave they seek, as the PFAC will expand the scope of the allegations at issue and delay the resolution of the litigation. In addition to Plaintiffs' entirely new claim under the ADA, the

[1] Mayor Gray is sued in his official capacity only. It is well-settled that a suit against a government official in his or her official capacity is, in actuality, a suit against the employing government. Walker v. Washington, 627 F.2d 541, 544 (D.C. Cir. 1980).

[2] The PFAC also removes Mark Snyder as a Plaintiff and makes certain technical corrections to the pleading. The District does not oppose Plaintiffs' motion to the extent it seeks leave to make these amendments.

proposed joinder of Parson and Brown is an apparent attempt to remedy a substantial deficiency with the Third Amended Complaint—namely, that the current Plaintiffs lack standing to challenge the District's requirement that a firearms registrant not be legally blind. *See* D.C. Code § 7-2502.03(a)(11); Motion, at 2 n. 1. Although Plaintiffs admittedly had notice of the facts underlying their PFAC since at least May 2012, when the District's current firearms registration requirements first took effect (s*ee* Motion, at 3 n. 3),[3] they failed to remedy the deficiencies in their claims when they filed their Third Amended Complaint more than two months later, in July 2012. As Plaintiffs fail to offer any explanation for this undue delay, their Motion should be denied.

Moreover, Plaintiffs' Motion should be denied for the additional reason that their proposed cause of action under the ADA is futile, as it does not sufficiently allege facts showing that either Parson or Brown meets the "essential eligibility requirements" to register a firearm in the District.

BACKGROUND

Plaintiffs commenced this lawsuit nearly five years ago, on July 28, 2008. Since that time Plaintiffs have amended their complaint on three separate occasions, principally as a result of changes to the District's firearms registration laws.

The most recent of these changes came in May 2012—approximately ten months ago—when Mayor Vincent C. Gray signed emergency and permanent legislation amending various provisions of the District's firearms registration scheme (collectively, the "2012 Firearms Amendment Act"). Among other things, the 2012 Firearms Amendment Act provided that "[n]o

[3] In fact, Plaintiffs' Second Amended Complaint, filed on March 25, 2009, challenged the District's previous vision requirements for firearms registration as unconstitutional under the Second Amendment. Plaintiffs have not explained why they did not seek to join Parson and Brown at that time.

registration certificate shall be issued to a person . . . unless the Chief determines that such person . . . [i]s not blind, as defined in § 7-1009(1)."[4] D.C. Code § 2502.03(a)(11) (2012).

On July 31, 2012, Plaintiffs filed—with the District's consent—a Third Amended Complaint in this action (the "TAC"). The TAC joined as plaintiffs two individuals, William L. Scott and Asar Mustafa, and alleged, *inter alia*, that the District's requirement that a firearms registrant not be blind is "a novel, not historic, registration requirement" that violates Plaintiffs' Second Amendment Rights. TAC ¶¶ 30, 78.c. The District answered the TAC on August 17, 2012, and, pursuant to the Court's Scheduling Order (Doc. No. 46), discovery commenced on September 24, 2012.

On October 24, 2012, Plaintiffs served their responses to the District's First Request for Admissions, in which they admitted that none of the current Plaintiffs are "blind," as defined in D.C. Code § 7-1009(1). *See* Motion, at 2 n. 1. Since that time, the District has not taken or sought to take any additional discovery, including expert discovery, with respect to Plaintiffs' claim that D.C. Code § 2502.03(a)(11) is unconstitutional.

On February 12, 2013—less than two weeks before the parties' deadline to exchange expert disclosures[5]—counsel for Plaintiffs advised counsel for the District of Plaintiffs' intent to seek leave to file the PFAC.

[4] D.C. Code § 7-1009(1) provides that the term "blind" refers to "a person who is totally blind, has impaired vision of not more than 20/200 visual acuity in the better eye and for whom vision cannot be improved to better than 20/200, or who has loss of vision due wholly or in part to impairment of field vision or to other factors which affect the usefulness of vision to a like degree."

[5] The District, with Plaintiffs' consent, has since filed, and the Court has granted, a motion to extend the remaining discovery deadlines in this matter by 30 days. (*See* Feb. 21, 2012 Minute Order.) Accordingly, the parties' expert disclosures currently are due to be exchanged on March 25, 2013.

LEGAL STANDARDS

In deciding whether to grant leave to file an amended complaint, courts may consider factors such as "undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [and] futility of amendment." *Virtue v. Int'l Brotherhood of Teamsters Retirement & Family Protection Plan*, No. 12-516 (JEB), 2012 WL 4458423, at *1 (D.D.C. Sept. 27, 2012) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Allowing a plaintiff to amend his complaint may unduly prejudice a defendant if amendment would delay the litigation or "expand[] the allegations beyond the scope of the initial complaint." *Lover v. District of Columbia*, 248 F.R.D. 319, 322 (D.D.C. 2008) (citing *Parish v. Frazier*, 195 F.3d 761, 763 (5th Cir. 1999)).

Further, it is well-established that amendment should not be permitted if it would be futile—*i.e.*, if the amended pleading would not survive a motion to dismiss. *See In re Interbank Funding Corp. Secs. Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010) ("[A] district court may properly deny a motion to amend if the amended pleading would not survive a motion to dismiss."). To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint may not merely state "a formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, and a court should not accept the truth of conclusory assertions or legal conclusions that are not "supported by factual allegations," *Iqbal*, 129 S. Ct. at 1950.

ARGUMENT

I. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE IT WILL PREJUDICE THE DISTRICT AND DELAY THE LITIGATION

The District will be prejudiced if Plaintiffs are granted the leave they seek, as the PFAC clearly "expand[s] the allegations" at issue in this matter beyond the scope of the TAC and will delay the resolution of the litigation. *See Lover*, 248 F.R.D. at 322. Plaintiffs seek, for the first time since this lawsuit began in 2008, to pursue a cause of action against the District under the ADA. If permitted, this new claim would not only expand the scope of the issues before the Court, but also require the District to expend additional resources to defend the case, including retaining an expert witness to establish the affirmative defense of "fundamental alteration"—a defense that is not at issue under the TAC.

Further, if Plaintiffs' Motion is granted, the District will also have to incur the cost of retaining an expert to render an opinion with respect to the District's requirement that a firearms registrant not be blind. The District, to date, has not retained an expert to provide such testimony, as Plaintiffs' discovery responses made clear that they lack standing to challenge this requirement. *See* Motion, at 2 n. 1. At a minimum, Plaintiffs' proposed amendments, if permitted, will necessitate a considerable extension of discovery beyond those previously granted by the Court in order to provide the District the opportunity to explore the new parties and claims. Such an extension will certainly delay the resolution of the litigation.

Moreover, Plaintiffs have not adequately explained why they have waited until now—ten months after the challenged requirement became effective—to seek to amend their pleading in the manner that they have proposed. As discussed above, Plaintiffs were on notice of the facts underlying the proposed amendments in the PFAC at least as of the time they filed their TAC on July 31, 2012 (and, in fact, more than two months prior). Plaintiffs assert in their Motion that

their desire to join Parson and Brown is the result of their belief that the District intends to "contest the standing of the existing plaintiffs to challenge the requirement that a person must not be 'blind' to register a firearm." Motion, at 2 n. 1. Plaintiffs, however, fail to explain why they were not able to join any plaintiffs with standing to challenge this requirement at the time they filed their TAC. They further fail to explain why they did not raise the ADA claim they now seek to assert in their TAC. Indeed, Plaintiffs admit in their moving papers that the District's prohibition against issuing a firearms registration certificate to a person who is "blind" has been in effect since May 11, 2012 (Motion, at 3 n. 3)—more than two months *before* Plaintiffs filed the TAC.

As Plaintiffs' PFAC will prejudice the District by expanding the claims at issue and delaying the resolution of this action, and because Plaintiffs failed to cure this deficiency in amendments previously allowed, the Court should deny Plaintiffs' Motion.

II. PLAINTIFFS' PFAC DOES NOT STATE AN ACTIONABLE CLAIM UNDER THE ADA AND SHOULD BE DENIED AS FUTILE

Plaintiffs' Motion should be denied for the additional reason that their proposed ADA claim is futile because the PFAC does not contain sufficient factual allegations to show that Parson and Brown are "qualified individuals with a disability." Title II of the ADA provides that: "no qualified individual with a disability shall, by reasons 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. A "qualified individual with a disability" is defined as "an individual who, with or without reasonable modifications to rules, policies, or practices . . . meets the ***essential eligibility requirements*** for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2)(emphasis added).

The U.S. Department of Justice ("DOJ")—the agency charged with promulgating regulations to implement Title II of the ADA[6]—has recognized that "[t]he phrase 'essential eligibility requirements' is particularly important in the context of State licensing requirements" which often "require applicants to demonstrate specific skills, knowledge, and abilities." DOJ's Title II Technical Assistance Manual 3.7200 (1993) (available at http://www.ada.gov/taman2.html). Further, federal regulations recognize that a licensed activity may trigger safety questions, which, in turn, will affect eligibility requirements. *See* 28 C.F.R. pt 35, App. A (2011) (available online at http://www.ada.gov/reg2.html); *see also Briggs v. Walker*, 88 F. Supp. 2d 1196, 1202 (D. Kan 2000).

For example, in *Briggs v. Walker*, the plaintiff—a wheelchair bound individual—brought a Title II ADA claim against the defendant alleging that she had been improperly denied the opportunity to obtain an instruction driver's permit because of her disability. Plaintiff alleged that she was "qualified" to obtain the permit because she met the State eligibility requirements of being at least fourteen years of age and passing a written and visual examination—which were the requirements set forth in the permitting statute. *Id.* at 1200. The Court, however, concluded that "the ability to safely control a motor vehicle [is] an essential eligibility requirement for the privilege of driving or as an essential function of a driver." *Id.* at 1203. Accordingly, the Court found that the plaintiff's allegations of being over fourteen and able to pass a written and visual examination were insufficient to establish that she was "qualified" for purposes of the ADA. The Court, therefore, dismissed plaintiff's Title II ADA claim on the grounds that she did "not plead facts showing she is qualified to operate a motor vehicle on public roadways with an instruction permit." *Id.* at 1203.

[6] 42 U.S.C. § 12134(a).

Here, as in *Briggs*, the requirement that a registrant be able to safely operate a firearm is an essential part of the District's firearm registration program. In adopting the Firearms Control Regulations Act of 1975, the D.C. Council found that "in order to promote the health, safety, and welfare of the people of the District of Columbia it is necessary to . . . [a]ssure that only qualified persons are allowed to possess firearms." Firearms Control Regulations Act of 1975, D.C. Law 1-85, § 2 (codified at D.C. Code § 7-2501.01 *et seq.*). Further, the D.C. Council has found "an obvious correlation between not being blind and being able to handle a firearm safely, especially for self-defense in the home." Committee on the Judiciary, "Report on Bill 19-614, Firearms Amendment Act of 2012," at 17 (Feb. 29, 2012) (available at http://dcclims1.dccouncil.us/images/00001/20120430145205.pdf).[7]

The PFAC does not contain any factual allegations demonstrating that Parson and Brown are capable of safely handling and operating a firearm, notwithstanding the fact that they are blind. Rather, the PFAC merely alleges conclusorily that Parson and Brown "are 'qualified individuals with a disability' as defined in 42 U.S.C. § 12131(2)." PFAC ¶ 84. The PFAC also fails to contain any allegations at all that would support the notion that sight is not an essential eligibility requirement to handle a firearm safely. As a result, like in *Briggs*, the PFAC fails to allege that Parson and Brown meet the "essential eligibility requirements" of a firearms registration certificate, and therefore fails to set forth an actionable cause of action under the ADA. *Iqbal*, 129 S. Ct. at 1950 ("A court should not accept the truth of conclusory assertions or

[7] The Court may take judicial notice of findings in the Committee Report under Federal Rule of Evidence 201(b)(2). *United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W. D. Mich. 2003) (collecting cases for the proposition that government documents are generally subject to judicial notice, "includ[ing] public records and government documents available from reliable sources on the Internet").

legal conclusions that are not "supported by factual allegations."). Consequently, Plaintiffs' Motion should also be denied as futile.

DATE: March 11, 2013

Respectfully submitted,

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ORDER

Upon consideration of Plaintiffs' Motion for Leave to File Fourth Amended Complaint, the Opposition filed by the District of Columbia, and any reply thereto, and in consideration of the entire record herein, it is hereby **ORDERED** that Plaintiffs' Motion be **DENIED.**

SO ORDERED.

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JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel for Parties via ECF