UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
CIVIL RIGHTS

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In Reply Refer to:
EPA File No. 10D-10-R3

John Hanger, Secretary
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101

Re: Dismissal of Title VI Administrative Complaint

Dear Secretary Hanger:

The purpose of this letter is to notify the Pennsylvania Department of Environmental Protection (PDEP) that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is dismissing the administrative complaint ("Complaint") dated April 21, 2010. The administrative complaint was filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964,[1] as amended (Title VI), by [redacted] against PDEP. PDEP was a recipient of EPA funds at the time of the alleged discriminatory acts. The Complaint alleges that PDEP intentionally discriminated against [redacted] by denying him handicapped privileges for a handicap-accessible permit to repair an existing handicap-accessible boat dock and sea wall on his property at Canadohta Lake in Union City, Pennsylvania.[2]

The Complaint met EPA's four jurisdictional requirements as found in 40 C.F.R. Part 7 and was accepted for investigation on August 13, 2010.[3] OCR conducted an investigation from August 2010 to February 2011. Following its investigation, OCR finds insufficient evidence in

[1] 42 U.S.C. §§ 2000d *et seq.*

[2] Letter from Rafael DeLeon, Acting Director, Office of Civil Rights, US EPA, to [redacted], Re: Acceptance of administrative complaint (August 13, 2010).

[3] *Id.*

the record to support the Complainant's allegations of intentional discrimination by PDEP. Therefore, the Complainant's allegations regarding PDEP's intentional discrimination are dismissed.

I. LEGAL FRAMEWORK

A. Statutory Background

Section 504 of the Rehabilitation Act of 1973 (the Act) provides that "No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, 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." EPA's Section 504 implementing regulations incorporate this prohibition of discrimination on the basis of a disability. See 40 C.F.R. Part 7.

B. Regulatory Background - Intentional Discrimination Based on Disability

EPA's regulations are codified at 40 C.F.R. Part 7. Under these regulations, EPA's Office of Civil Rights (OCR) is responsible for investigating complaints alleging discrimination based on handicap in programs or activities receiving financial assistance from EPA.[4]

Subpart C of 40 C.F.R. Part 7 states:

"No qualified handicapped person shall solely on the basis of handicap be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving EPA assistance."[5]

In addition, EPA regulations specifically provide, in part, that recipients shall not "[d]eny a qualified handicapped person any service, aid or other benefit of a federally assisted program or activity;" "[p]rovide different or separate aids, benefits, or services to handicapped persons ..., than is provided to others..." or "[l]imit a qualified handicapped person in any other way in the enjoyment of any rights, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service from the program or activity."[6]

Where direct proof of discriminatory motive is unavailable, it is necessary to evaluate

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[4] 40 C.F.R. § 7.20, 7.45. To be accepted for investigation, a complaint must be in writing, describe an alleged discriminatory act that violates EPA's Title VI regulations, be filed within 180 calendar days of the alleged discriminatory act, and must be against an applicant for, or recipient of, EPA assistance that allegedly committed the act.

[5] 40 C.F.R. §7.50.

[6] 40 C.F.R. § 7.35(a)(3).

whether any circumstantial evidence of discriminatory intent exists. Such evidence may be found in various sources including statements by decision-makers, the historical background of the events at issue, the sequence of events leading to the decision at issue, a departure from standard procedures, the minutes of meetings, a past history of discriminatory conduct, and evidence of a substantial disparate impact on a protected group.[7]

In disparate treatment cases, a similarly situated disabled individual is treated differently because of his disability than less-disabled or non-disabled individuals. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000). When no direct evidence of discrimination is available, the Title VII burden-shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green* is applied. Id. at 142-43; *Norcross v. Sneed*, 755 F. 2d 113, 117 & n. 5(8th Cir. 1985)(holding *McDonnell Douglas* is applicable in disparate treatment cases under the Rehabilitation Act).

To establish a *prima facie* case of disability discrimination, a plaintiff must show: (1) that [he] is disabled under the Act; (2) that he would be "otherwise qualified" to participate in the program; (3) that the person was denied participation in the program ; and (4) that the program discriminated against the complainant.[8]

II. ALLEGATIONS

The allegation that OCR accepted for investigation was that PDEP intentionally discriminated against the Complainant by denying him a handicap-accessible permit to repair an existing handicap-accessible boat dock and sea wall on his property at Canadohta Lake in Union City, Pennsylvania.[9] Complainant alleges that PDEP notified him of an alleged illegal repair and resulting violation for the repair of the sea wall and required him to remove the newly installed materials at his own expense.[10] The Complainant asserts he had a permit by the Army Corps of Engineers to fill in the wetland, but that the PDEP ignored this permit in taking these enforcement actions "and refused my request for access granted to others" in violation of nondiscrimination regulations.[11]

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[7] *Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment).

[8] Courts apply the standards from the American with Disabilities Act in analyzing a Rehabilitation Act claim. *Wilkerson v. Shinseki*, 606 F.3d 1256, 1262 (10th Cir. 2010).

[9] Correspondence from [redacted] to Karen Randolph, Office of Civil Rights, US EPA (June 7, 2010).

[10] *Id.*

[11] Correspondence from [redacted] to Karen Randolph, Office of Civil Rights, US EPA (May 22, 2010).

III. RECIPIENT RESPONSE

In its response to the complaint, PDEP explained that they had a long history of attempting to bring [redacted] into compliance with the Pennsylvania Dam Safety and Encroachments Act.

PDEP stated that on May 27, 2007, they issued [redacted] an Order directing him to restore the wetlands that he had filled in on his property along Canadohta Lake in Crawford County, Pennsylvania.[12] PDEP maintains that in prior years [redacted] filled in these wetlands then restored them in compliance with an earlier Department order; then filled them in again for a second time.[13] PDEP stated that on October 6, 2008, [redacted] submitted to PDEP a proposed site restoration plan which included handicap access to his dock. On November 18, 2008, PDEP approved [redacted]s site restoration plan with modifications leaving his proposed handicap access essentially undisturbed.[14]

The PDEP then states that they approved the site restoration plan and allowed him to leave certain fill onsite for walking or wheelchair access from [redacted]s property to his dock on Canadhota Lake. Regarding his disability, PDEP states that the "Department has no knowledge that [redacted] has a disability. Moreover, aside from casual observation and rumor, no Department personnel had any inference that [redacted] had any type of impairment, physical or otherwise, despite numerous site inspections and interactions with him."[15] In addition, PDEP asserted they never received from [redacted] an application for a handicap-accessible permit to repair a sea wall on his property and that PDEP did not deny [redacted] handicap privileges and/or handicap access for any aspect of his property.[16]

IV. FINDINGS OF FACT

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[12] Email with letter and supporting documents from Patrick H, Bair, Assistant Counsel, PDEP, to Helena Wooden-Aguilar, Office of Civil Rights, US EPA at 1 (September 9, 2010).

[13] *Id.*

[14] *Id. See also*, Letter from John A. Holden, P.E, Regional Manager, Watershed Management, PDEP to [redacted], Re: Administrative Order (November 18, 2008).

[15] E-Mail correspondence from Patrick H, Bair, Assistant Counsel, PDEP, to Helena Wooden-Aguilar, Office of Civil Rights, US EPA (February 7, 2011).

[16] Submitted Statement of Stephanie K. Gallogly, Assistant Counsel, PDEP to Karen Randolph, Office of Civil Rights, US EPA (November 10, 2010).

2) On March 17 2000, PDEP inspected the site and determined that the wetlands at the site had been filled, and a new retaining seawall built off a pre-existing wall into Canadohta lake had been constructed, without a permit from PDEP.[18]

3) In April 2000, PDEP issued Complainant a notice of violation (NOV) and requested that Complainant remove the new sea wall and restore the site.[19] In May 2001, PDEP inspected the site and determined that the wetlands had been restored and the retaining wall removed.[20]

4) In March 2002, Complainant received a permit from the Crawford County Conservation District, registered by the PDEP, for a general permit (*i.e.*, GP-2 permit) to construct a boat dock extending from his property to the lake.[21]

5) In November 2004, PDEP inspected the site and determined that the wetlands at the site had been filled again. They also determined that a water obstruction (sea wall) had been constructed again without a permit from the PDEP, in violation of Section 6a of the Dam Safety and Encroachments Act, 32 P.S. Sec. 693.6a.[22]

6) In December 2004, PDEP issued Complainant another NOV for violating Section 6a of the Dam Safety and Encroachments Act, 32 P.S. §693.6a, and requested that he restore the site.[23] PDEP conducted several inspections between 2005 and 2007 that revealed additional encroachment activity within the wetlands without a permit.[24]

7) In April 2007, PDEP issued Complainant a third NOV, including a suggested restoration plan.[25]

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[18] *Id.*

[19] *Id.*

[20] *Id.* at 3 (Exhibit A).

[21] *Id.*

[22] *Id. See also,* Memorandum Opinion of the Commonwealth Court of Pennsylvania, [redacted] *v. DEP*, No. 456 Consent Decree 2009 (October 16, 2009).

[23] *Id.*

[24] *Id.*

[25] *Id.*

8) On May 22, 2007, PDEP issued Complainant an Order pursuant to Section 20 of the Dam Safety and Encroachments Act, 32 P.S. §693.6a and Section 1917-A of the Administrative Code, 71 P.S. §§510-17. The Order required Complainant "...1) to cease and desist all filling of the wetlands and construction of water obstructions; 2) within 30 days of the Order to submit and implement a Department approved site restoration plan (including vegetation plan); 3) to submit a site restoration report and annual monitoring reports until the site was shown to be successfully re-vegetated."[26]

9) On June 19, 2007, Complainant appealed PDEP's order to the Environmental Hearing Board (EHB).[27] In November 2007, PDEP filed a civil complaint seeking civil penalties for failure to comply with its order, which the EHB consolidated with the failure to comply order.[28] In December 2007, because of Complainant's failure to respond, PDEP filed a motion for default judgment with the EHB. In January 2008, the EHB granted PDEP's motion. On April 29, 2008, the EHB held the hearing. The EHB ruled in favor of PDEP.[29]

10) On October 6, 2008, in compliance with PDEP's Order, Complainant submitted a proposed site restoration plan which included a provision for handicap access to his dock.[30] On November 18, 2008, PDEP approved Complainant's site restoration plan with modifications leaving his proposed handicap access essentially undisturbed.[31]

11) On January 26, 2009, the EHB issued an Order dismissing Complainant's appeal.[32]

12) On March 18, 2009, Complainant filed a petition for review of the EHB's January 26, 2009, Order to the Commonwealth Court of Pennsylvania.[33]

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[26] Commonwealth of Pennsylvania, Department of Environmental Protection, Administrative Order, *In the Matter of* [redacted]. (May 22, 2007).

[27] Letter from Olen E. Seidler faxed to Helena Wooden-Aguilar, Office of Civil Rights, US EPA Re: [redacted] (May 22, 2010).

[28] Email from Patrick H, Bair, Assistant Counsel, PDEP, to Karen Randolph, Office of Civil Rights, US EPA at 2 (November 10, 2010).

[29] *Id.* at 31.

[30] *Id.* at 22.

[31] *Id.*

[32] *Id.* at 52.

[33] *Id.*

13) On January 13, 2010, the Commonwealth Court of Pennsylvania affirmed the EHB's January 26, 2009, Order.[34]

14) On March 2, 2010, PDEP inspected the site and determined that Complainant continued to violate the requirements of PDEP's May 22, 2007, Order.[35]

15) On March 22, 2010, PDEP filed a petition to enforce their 2007 Order in the Crawford County Court of Common Pleas.[36]

16) On June 4, 2010, the court granted PDEP's petition and ordered Complainant to implement PDEP's approved restoration plan, including handicap access to Complainant's dock, by December 1, 2010, re-vegetate the wetlands, and submit a site restoration report by June 4, 2011. As of September 9, 2010, Complainant had not paid the civil penalty or complied with the 2007 Order.[37]

17) At the time of PDEP's enforcement actions against the complainant, PDEP was not aware that Complainant was disabled.[38]

V. METHODOLOGY OF THE INVESTIGATION

EPA OCR conducted an investigation from August 2010 to February 2011. The investigation included gathering and reviewing all information submitted by the Complainants and Recipient relevant to the complaint. This included, among other things, the initial complaint and clarification information filed by [redacted] and rebuttal information submitted by PDEP on September 9, 2010, October 6, 2010, November 10, 2010, and February 7, 2011, and an interview with the Complainant on November 22, 2010.

VI. ANALYSIS

OCR began its analysis by determining whether PDEP intentionally discriminated against [redacted] by denying him handicapped privileges for a handicap-accessible permit to repair an existing handicap-accessible boat dock and sea wall on his property. OCR also analyzed whether PDEP intentionally discriminated against [redacted] in taking various

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 1.

[38] E-Mail correspondence from Patrick H, Bair, Assistant Counsel, PDEP to Helena Wooden-Aguilar, Office of Civil Rights US EPA (February 7, 2011), *supra* note 15.

enforcement actions against him. During the course of the investigation OCR found that [redacted]. [redacted] sought and received a valid permit to construct a boat dock extending from his property into the lake, [redacted] repeatedly, without a permit, constructed a new seawall off of a pre-existing wall. [redacted] was issued a Notice of Violation in April 2000, and he ultimately complied with that directive.[39] However, PDEP became aware that [redacted] rebuilt the seawall and placed fill in the area that was the subject of the earlier restoration.

PDEP inspections [redacted] property revealed that not only has [redacted] failed to restore the site, but he filled in the wetland on his property without a permit. [redacted] never applied for a permit that would allow him to add fill to the wetland on his property. Mr. Sabot never applied for a permit that covers Bank Rehabilitation, Bank Protection & Gravel Bar Removal, otherwise knows as a GP-3 permit. Because he was in violation of state law, PDEP issued a civil order against him requiring [redacted] to restore the site.[40] This site restoration plan allowed for the handicap accessible ramp area for [redacted] to access his dock. The PDEP's Environmental Hearing Board also noted that "[w]alkways and access ramps are not necessarily incompatible with wetlands, and we fail to see why a reasonable accommodation cannot be designed at this Site."[41] To date, [redacted] has not complied with the 2007 Order and had not implemented the PDEP approved restoration plan.[42] The wetlands on his property remains filled in and in violation of the Dam Safety and Encroachments Act.

Intentional Discrimination

In order to prove intentional discrimination the investigation must show that "a challenged action was motivated by the intent to discriminate."[43] The investigation would have to show that the decision maker was not only aware of the complainant's disability, but that the recipient acted, at least in part, because of the complainant's disability.

Analysis

PDEP maintains [redacted] does not suffer a disability, however for purposes of this analysis, OCR will assume that Complainant is a qualified individual with a disability. PDEP has asserted it had no knowledge of [redacted] disability at the time of the alleged discriminatory acts. Specifically, PDEP states that "no Department personnel had any inference

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[39] *See* fn. 25 at 2.

[40] *See* fn. 37 at 2.

[41] *Id.*

[42] *Id.*

[43] *Elston v. Talladega County Bd of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993).

that [redacted] has any type of impairment, physical or otherwise, despite numerous site inspections and interactions with him."[44] PDEP also stated [redacted] never told any PDEP employee that he had impairment, even though there were several meetings regarding the site and its restoration.[45] [redacted] did not indicate he was disabled when he submitted his application for the GP-2 permit in March 2002. According to the interview conducted by OCR with [redacted] in November 2010, [redacted] maintains that PDEP should know that he is disabled because they could see him walk with a cane when he went to court.[46]

In response, PDEP stated, "Our employees first saw [redacted] with a cane in 2008 at a meeting and at the hearing, but did not know why he had a cane. Prior to this, inspectors had seen [redacted] riding in a golf cart at the site, but not using a cane or other type of mobility aid."[47] Even if it were true that PDEP was put on notice [redacted] disability when he was seen with a cane in 2008, the allegedly discriminatory enforcement actions had already taken place. The record shows that PDEP issued the NOVs in 2004 and 2007, and the cease and desist order and civil complaint in 2007.[48] Therefore, OCR concludes that PDEP's actions to initiate the civil action against [redacted] were in response to his non-compliance with the law based on PDEP's 2007 Order, not based on his disability.

Moreover, the record does not establish that the Complainant was denied participation in a PDEP program (denied a permit) or that PDEP provided the benefits only to those outside the Complainant's protected class. There is no evidence in the record that non-disabled individuals are permitted to violate the Dam Safety and Encroachments Act and not face enforcement action.

Thus, OCR finds that a *prima facie* case of intentional discrimination has not been established because there is no evidence that PDEP was aware of [redacted]s disability at the time of the alleged discriminatory acts or that PDEP allowed non-disabled individuals to maintain sea walls that failed to comply with state law. OCR finds that PDEP provided a legitimate, non-discriminatory explanation for the enforcement action taken against [redacted], and there is no evidence in the record that PDEP was motivated by [redacted] disability in taking that enforcement action.

While the *prima facie* elements are not rigid and are merely intended to provide a

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[44] E-Mail from from Patrick H, Bair, Assistant Counsel, PDEP, to Ms. Helena Wooden-Aguilar, Office of Civil Rights, US EPA (February 7, 2011), *supra* note 38 at1.

[45] *Id.*

[46] Telephone Interview with Karen Randolph, Office of Civil Rights, US EPA and [redacted], Sr. (November 22, 2010)

[47] *See* fn. 44.

[48] *See generally*, Findings of Fact #6-9.

framework for establishing discrimination, the investigative record does not reveal other indicia of discriminatory intent. The record does not support that PDEP was motivated by the Complainant's alleged disability in pursuing a civil enforcement action against him for non-compliance with the Dam Safety and Encroachments Act.

VII. CONCLUSION

Based on the facts established during this investigation and the applicable legal standards, OCR concludes that the Complainant's allegations of unlawful intentional discrimination are not supported by the record. Pursuant to 40 C.F.R. § 7.120(g), OCR finds no violation of EPA's regulations, and therefore dismisses this complaint against PDEP.

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at wooden-aguilar.helena@epa.gov or by mail at U.S. EPA, 1200 Pennsylvania Ave., NW, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,

Rafael DeLeon
Director

cc: Certified Mail # 7004-1160-0002-3622-8028
[redacted]

Stephen G. Pressman, Associate General Counsel
Civil Rights & Financial Law Office (MC 2399A)