IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELBERTA BERNICE LIEBERMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-523 GMS
	)	
THE STATE OF DELAWARE, and	)	
THE FAMILY COURT OF THE	)	
STATE OF DELAWARE,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

On May 17, 2001, the plaintiff, Elberta Bernice Lieberman ("Lieberman") filed an amended complaint alleging that the defendants, the Family Court of the State of Delaware and the State of Delaware (collectively, "the defendants") failed to make reasonable accommodations for her disabilities[1] in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. (1994), and the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994). Lieberman also claims that she has been retaliated against for requesting these reasonable accommodations. Specifically, Lieberman claims that she has been reprimanded on numerous occasions and suspended at least once. For these purported wrongs, Lieberman seeks declaratory and monetary relief.

Presently before the court is the defendants' motion to dismiss Lieberman's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Upon

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[1] Specifically, Lieberman claims that she suffers from several mental and physical illnesses. These mental illnesses include: attention disorder, dysthymia, and dissasociative identity disorder. D.I. 42, ¶17. Lieberman's physical illnesses include: osteoarthritis, chronic venous insufficiency, numerous gastrointestinal disorders and a sleep disorder. *Id.* at ¶19-21.

consideration of the parties' arguments and the applicable principles of law, the court will grant the defendants' motion as to Lieberman's claims under the ADA, but will deny the defendants' motion as to Lieberman's claims under the Rehabilitation Act. The reasons for the court's decision are set forth in detail below.

Rule 12(b)(1) Standard

A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court to address the merits of the plaintiff's complaint. A motion to dismiss under Rule 12(b)(1) may present either a facial or a factual challenge to subject matter jurisdiction. *Mortensen v. First Federal Savings and Loan*, 549 F.2d 884, 891 (3d Cir.1977). In this case, the defendants are making a facial challenge to the plaintiff's complaint because they do not dispute the existence of any of the jurisdictional facts alleged in the complaint that support the court's subject matter jurisdiction. A motion which makes a facial challenge to a complaint requires that the court consider the allegations of the complaint as true and make all reasonable inferences in plaintiff's favor. *Id.* Moreover, the plaintiff bears the burden of persuading the court that it has jurisdiction. *Id.*

Discussion

The defendants assert that because they are immune from suit pursuant to Eleventh Amendment, the court lacks jurisdiction over Lieberman's claims under the ADA and the Rehabilitation Act.[2] Generally,

[2]The defendants also argue that suits against a state must be heard by the United Supreme Court and therefore, the court lacks jurisdiction to hear this suit. By virtue of 28 U.S.C. § 1331, this court is vested with original jurisdiction over all suits arising under the Constitution, laws or treaties of the United States. See 28 U.S.C. § 1331. Moreover, it has long been established that Congress can give lower federal courts concurrent jurisdiction over matters where the Supreme Court has original jurisdiction. *See Ames v. Kansas*, 111 U.S. 449 (1884). Therefore, under § 1331, the court has jurisdiction over

pursuant to the Eleventh Amendment, states are immune from suit by private parties in the federal courts. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although this case involves a suit brought by a citizen against her own state, the Eleventh Amendment has long been interpreted to prohibit such suits as well. *See Board of Trustees of University of Alabama v. Garrett*, 121 S.Ct. 955, 962 (2001).

A state will not be entitled to Eleventh Amendment immunity, however, if 1) it has waived its immunity, or 2) Congress has abrogated a state's immunity pursuant to a valid exercise of its power. *See Lavia v. Comm. of Pennsylvania*, 224 F.3d 190, 195 (3d Cir. 2000). In this case, Lieberman claims that as to the ADA, Congress has abrogated the state's Eleventh Amendment immunity, and that as to Section 504 of the Rehabilitation Act, the state has waived its immunity. The court will address these issues in turn.

A. Whether Lieberman's ADA claims are barred by the Eleventh Amendment

1. Claims under Title I of the ADA

At the outset, the court notes that it is undisputed that the Supreme Court's recent decision in *Board of Trustees of University of Alabama v. Garrett*, 121 S.Ct. 955 (2001) forecloses any debate as to whether the Eleventh Amendment bars suits for money damages brought by individuals against a state

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all suits arising under the laws of the United States and presumes that this grant of jurisdiction over all actions includes actions against the States. *See United States v. California*, 328 f.2d 729, 738-39 (9th Cir. 1964).

under Title I of the ADA.[3] In *Garrett*, the Supreme Court held that suits for damages brought by state employees against the State alleging failure to comply with Title I of the ADA are barred by the Eleventh Amendment. *See id.* at 960. Specifically, the court emphasized that Congress' authority to abrogate Eleventh Amendment immunity under Section 5 of the Fourteenth Amendment is exercised properly only in response to state transgressions which demonstrate a patten of unconstitutional discrimination by the states. *See id.* at 964. However, the court concluded that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." *Id.* at 965. Because "[s]ection 5 does not so broadly enlarge congressional authority," the Supreme Court concluded that individual lawsuits for money damages against a state for failure to comply with Title I of the ADA are barred by the Eleventh Amendment. *See id.* at 968.

Concerning Title II of the ADA,[4] the Supreme Court explicitly declined to decide this issue in *Garrett*, but noted that there are differences between the remedial provisions of Title I and Title II. *See id*. at 960 n.1 ("We are not disposed to decide the constitutional issue whether Title II, which has

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[3]Title I of the ADA concerns employment discrimination and reads in relevant part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

See 42 U.S.C.A § 12112.

[4]Title II reads in relevant part:

> Subject to the provisions of this subchapter, no 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.

See 42 U.S.C.A. § 12132.

somewhat different remedial provisions from Title I, is appropriate legislation under [Section 5] of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question."); *see also Lavia v. Comm. of Pennsylvania*, 224 F.3d 190, 195 n.2 (3d Cir. 2000) (declining to address whether Congress had validly abrogated the immunity of the States with regard to Title II). Thus, the court must determine whether Lieberman's claims for money damages against the state for failure to comply with Title II of the ADA are barred by the Eleventh Amendment.

2. Claims under Title II of the ADA

Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and "act[s] pursuant to a valid grant of constitutional authority." *Garrett*, 121 S.Ct. at 962. Congress may subject non-consenting States to suit in federal court when it does so pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. *Id*. Section 5 of the Fourteenth amendment grants Congress the power to enforce the substantive guarantees contained in Section 1 of the Fourteenth Amendment[5] by enacting appropriate legislation. *See id.* (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)). Congress' power under Section 5 to enforce the Amendment includes the authority both to remedy and deter violation of rights guaranteed by the Amendment. *See id*.

There is a "simple but stringent test" to determine whether Congress has abrogated state immunity under the Eleventh Amendment. *Lavia v. Comm. of Pennsylvania*, 224 F.3d at 196 (citing *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)). In this two-part test, a court must first consider "whether Congress

[5]Section 1 of the Fourteenth Amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. 14 §1.

has 'unequivocally expresse[d] its intent to abrogate the immunity;' and second, whether Congress has acted 'pursuant to a valid exercise of power'" in abrogating state immunity. *Id.*

a. Whether Congress has expressed a clear intent to abrogate?

With regard to the first prong, a legitimate abrogation requires that Congress make "its intention unmistakably clear in the language of the statute." *Id.* (quotations omitted). Section 12202 of the ADA provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202 (1994). The Third Circuit has recognized that Congress has "unequivocally fulfilled the first requirement by expressly stating its intent to abrogate the states' Eleventh Amendment immunity." *Lavia*, 224 F.3d at 196; *see also Doe v. Division of Youth and Family Servs.*, 148 F. Supp. 2d 462, 486 (D.N.J. 2001) (noting that Congress expressed an intent to abrogate the states' immunity as to Title II of the ADA). The Defendants do not dispute that Congress has clearly expressed its intent to abrogate the States' sovereign immunity, but do contest whether in attempting to abrogate the States' immunity, Congress acted pursuant to a valid exercise of power.

b. Whether Congress acted pursuant to a valid exercise of power?

In this case, the parties dispute whether Congress acted properly under Section 5 of the Fourteenth Amendment.[6] In determining whether Congress has validly exercised its power under Section 5 in abrogating state immunity, the court must first, identify the constitutional right at issue, *see Garrett*, 121 S.

[6]"Although Congress has the authority to enact legislation under its Article I powers, including its power under the Commerce Clause, such authority does not permit Congress to nullify the States' Eleventh Amendment immunity." *Lavia*, 225 F.3d at 196; *see also Garrett*, 121 S. Ct. at 962 (explaining same).

Ct. at 963. Next, the court must decide whether Congress identified a history and pattern of unconstitutional discrimination against the disabled *by the states* that transgresses the Fourteenth Amendment's substantive provisions, and whether it has proposed a legislative scheme tailored to remedy such conduct. *See id.* at 964 (emphasis added).

With regard to identifying the relevant constitutional right, the court finds guidance in the Supreme Court's discussion of the issue in *Garrett*. Specifically, the Court looked to its decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), to explain that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. . . . If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 964. In light of the limited protections afforded the disabled under the rational basis standard of the Fourteenth Amendment clause, the court concludes that Congress attempts to impose greater obligations and responsibilities on the States' through Title II of the ADA. *See Lavia*, 224 F.3d at 200 (finding same with regard to Title I of the ADA). Therefore, Title II cannot be seen as enforcing direct violations of the Fourteenth Amendment, but rather, Title II attempts to deter and remedy constitutional violations within the "sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.*

"Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Garrett*, at 963; *see also Lavia*, at 197. Congress can act pursuant to Section 5 to remedy and deter conduct that is not expressly prohibited by

Section 1 of the Fourteenth amendment. In doing so, however, Congress must identify a pattern of discrimination against the disabled by the states and adopt a legislative scheme that is tailored to remedy such conduct. *See Garrett*, at 964; *Lavia*, at 201 (explaining that a valid exercise of Section 5 power requires a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end). In deciding, whether there is a pattern of discrimination by the states and if Title II of the ADA is tailored to remedy such conduct, the court finds guidance from three recent district court decisions that extended *Garrett* and *Lavia* to Title II claims of the ADA. These cases include: *Frederick L. v. Department of Public Welfare*, Civ. A. No. 00-4510, 2001 WL 830480 (E.D. Pa. July 23, 2001), *Doe v. Division of Youth and Family Servs.*, 148 F. Supp. 2d 462 (D.N.J. 2001), and *Moyer v. Conti*, Civ. No. 99-744, 2000 WL 1478791, (E.D.Pa. Oct.5, 2000).

In *Frederick L. v. Department of Public Welfare*, Civ. A. No. 00-4510, 2001 WL 830480 (E.D. Pa. July 23, 2001), the court held that Congress did not validly abrogate the States' sovereign immunity with respect to Title II of the ADA. *See id.* at *17. Specifically, in addressing the second prong of the "simple but stringent test" for determining if abrogation is valid, the court found that it could not "against the backdrop of *Kimel* and *Garrett*, find that Congress sufficiently identified a "history and pattern" of unconstitutional discrimination by the States." *Id.* at *18.

In *Doe v. Division of Youth and Family Servs.*, 148 F. Supp. 2d 462 (D.N.J. 2001), the court rejected the plaintiffs' argument that their Title II claims under the ADA survive Eleventh Amendment scrutiny in light of *Garrett*. *See id.* at 484. In finding that Congress did not effectively abrogate the States' sovereign immunity with respect to Title II of the ADA, the court also applied the "simple but stringent test."*See Lavia*, 224 F.3d at 196. The court also adopted the reasoning of *Garrett* and found that

Congress did not have constitutional authority under Section 5 of the Fourteenth Amendment because Congress had failed to identify a pattern of discrimination against the disabled by the States. The court concluded that the remedy imposed by Congress was not congruent and proportional to the targeted violation. *See Doe*, 148 F. Supp. 2d at 486.

Finally, in *Moyer v. Conti*, Civ. No. 99-744, 2000 WL 1478791, (E.D.Pa. Oct.5, 2000), the court found that the reasoning of the Third Circuit's *Lavia* decision with respect to Title I applies to Title II as well. Thus, the court held that Congress did not validly abrogate state sovereign immunity under Title II of the ADA. *See id.* at *6 (also relying on the Supreme Court's decision in *Kimel*). Specifically, the court stated that, "the state of the legislative record, alone, cannot suffice to bring Title II within the ambit of Congress's Section 5 powers if Title II is not 'adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against.'" (agreeing with *Alsobrook v. City of Maumelle*, 184 F.3d 999, 1008. (8th Cir. 1999), *cert. granted sub nom., Alsobrook v. Arkansas*, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000) (holding that claim brought under Title II of the ADA against the State was barred under the Eleventh Amendment)).

One recent Eastern District of Pennsylvania district court case, *Jones v. Pennsylvania*, Civ. No. 99-4212, 2000 WL 15073 (E.D.Pa. Jan.5, 2000), denied a state defendants' motion to dismiss the plaintiff's claims under Title II if the ADA on Eleventh Amendment grounds. *Id*. at *1. However, *Jones* was decided before the Third Circuit's decision in *Lavia* and the Supreme Court's decision in *Garrett*. In allowing the plaintiff's Title II claims to proceed, the court relied upon such cases as: *Muller v. Costello*, 187 F.3d 298, 307-10 (2d Cir.1999); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir.1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 432-38 (5th Cir.1998); and *Crawford v.*

Indiana Dep't Corrections, 115 F.3d 481, 487 (7th Cir.1997). The court notes that in *Lavia*, the Third Circuit questioned the validity of all of these cases, stating that they "have now been called into question by the Supreme Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000)."[7] *Id.* 224 F.3d at 194 n.1.

In light of the Supreme Court's decision in *Garrett* and the Third Circuit's decision in *Lavia*,[8] the court holds that Congress has not validly abrogated the States' Eleventh Amendment immunity concerning Title II claims under the ADA. Thus, the court will grant the defendants' motion as to all of Lieberman's claims under the ADA.

B. Whether Lieberman's Rehabilitation Act claims are barred by the Eleventh Amendment?

Next, the court turns to the defendants' contention that the they are entitled to Eleventh Amendment immunity from suits by private individuals in federal courts for claims arising under § 504 of the Rehabilitation Act. Section 504 states in part:

> 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 or under any program or activity conducted by any Executive agency or by the United States Postal

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[7]In *Kimel* the Supreme Court held that Congress failed to effectively abrogate the States' Eleventh Amendment immunity to suit by private individuals in enacting the ADEA, 29 U.S.C. S 621 et seq. 528 U.S. at 82-83.

[8]Other recent Supreme Court decisions have held that Congress has exceeded its authority under Section 5. *See e.g., Kimel v. Bd. Of Regents of Florida*, 526 U.S. 62 (holding that Congress acted beyond the scope of its Section 5 powers in enacting the ADEA, and thus did not abrogate the States' Eleventh Amendment Immunity)*; United States v. Morrison*, 529 U.S. 598 (2000) (holding the same with regard to the civil remedy provision of the Violence Against Women Act); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (holding the same with regard to the Patent Remedy Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997)(holding the same with regard to the Religious Freedom Restoration Act).

Service.

29 U.S.C. § 794(a) (1994). In this case, Lieberman argues that the State has waived its sovereign immunity. The Court agrees.[9]

The Rehabilitation Act requires that States that accept federal funds waive their Eleventh Amendment Immunity to suits brought in federal court for violations of Section 504. 42 U.S.C. § 2000d-7. Pursuant to its Spending Clause authority, Congress can legitimately invite the States to consent to suit in exchange for federal funds. *See Frederick L.*, 2001 WL 830480, at *6. Specifically, Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly. *See Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (citing *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686 (1999)).

In this case, Lieberman has established that as a Family Court mediator and arbitration officer, she worked in an activity or program which received and benefitted from federal financial assistance. D.I. 42, at ¶8. Thus, the court concludes that the defendants have waived their Eleventh Amendment immunity, and thus, will deny the defendants motion to dismiss Lieberman's claims under Section 504 of the Rehabilitation

[9]The parties also dispute whether Section 504 was enacted pursuant to Congress' authority under Section 5 of the Fourteenth Amendment. The court need not address this argument, however, because it finds that the State has waived its sovereign immunity. The court does note that there is "some ambiguity regarding the authority pursuant to which Congress enacted section 504." *Frederick L.*, 2001 WL 830480, at *7 (citing *Armstrong v. Wilson*, 942 F. Supp. 1252, 1262 (N.D. Cal.1996) ("the Rehabilitation Act is silent as to the constitutional authority under which it was enacted").

Act, 29 U.S.C. S 794. *See Frederick L*, 2001 WL 830480, at *12 (denying defendants' motion to dismiss plaintiff's Rehabilitation Act claims because Pennsylvania had waived it sovereign immunity); *Maull v. Division of State Police*, 141 F. Supp. 2d, 472 (D. Del. 2001). *See also Jim C. v. United States*, 235 U.S. F.3d at 1082 (holding that Arkansas waived its sovereign immunity with respect to Section 504 when it chose to participate in the federal spending program created by the section).

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. The defendants' Motion to Dismiss for Lack of Jurisdiction is GRANTED as to Lieberman's claims under both Title I and Title II of the ADA;

2. The defendants' Motion to Dismiss for Lack of Jurisdiction is DENIED as to Lieberman's claims under Section 504 of the Rehabilitation Act.

Date: August 30, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE