

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

DAVID A. SILVIA, :
Plaintiff, :
 :
v. : C.A. No. 20-203JJM
 :
RIPTA RIDE/FLEX PROGRAM, :
Defendant. :

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

On June 29, 2020, this Court adopted my June 18, 2020, report and recommendation, and held that Plaintiff’s complaint fails to state a claim under the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* (“ADA”), because Plaintiff did not provide facts establishing a denial of access to public transportation by reason of his disability. See ECF No. 5; Text Order of June 29, 2020. Plaintiff was afforded an opportunity to amend with the caution that if the amended pleading did not cure the deficiencies in the original complaint, it would be summarily dismissed. ECF No. 5 at 7. On July 20, 2020, Plaintiff filed a motion to amend that sets out his proposed amended complaint (ECF No. 8),¹ which has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(A). While I have granted his motion to amend by Text Order (procedurally, Plaintiff did not need leave of Court to amend at this early phase, Fed. R. Civ. P. 15(a)(1)), I now recommend that the case be summarily dismissed for failure to state a claim.

The amended pleading provides many more details regarding the single incident in issue – the January 9, 2020, failure of RIPTA’s FLEX bus to show up at “correct location” where

¹ “[S]olicitous of the obstacles that *pro se* litigants face,” Silvia v. Raimondo, C.A. No. 17-310-JJM-LDA, 2017 WL 11477124, at *1 (D.R.I. Sept. 29, 2017), I have employed a liberal construction of Plaintiff’s latest filing. See Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam); Instituto de Educacion Universal Corp. v. U.S. Dep’t of Educ., 209 F.3d 18, 23 (1st Cir. 2000).

Plaintiff was waiting. ECF No. 8 at 1. Plaintiff contends that the driver should have known that he would not be at the YMCA's front door because he uses a scooter and there are several steps leading up to the front door; he contends that the driver should have called to get instructions before leaving what the driver thought (wrongly) was the pickup location. ECF No. 8 at 2. Noting that the FLEX bus "transport both handicap persons and non Handicap person," and that waiting in cold or hot weather might adversely impact a handicapped person differently from a non-handicapped person, Plaintiff alleges that "handicap persons are being treated differently when left abandon, we can not get back to our location." ECF No. 8 at 2. However, this conclusory allegation does not explain how RIPTA's botching a single pick-up of a disabled person amounts to discrimination by reason of disability.

To support the amended complaint, Plaintiff attaches extensive correspondence that he exchanged with responsible state officials (RIPTA's Ride Director, Brooks Almonte, and RIPTA Quality Assurance Manager, Christopher McKenna) regarding the January 9, 2020, incident. ECF No. 8 at 4-10. These letters establish that RIPTA carefully considered Plaintiff's suggestion that the FLEX bus driver should be required to place a phone call to track down a disabled passenger who is not at the appointed stop, but found such a requirement would be a "fundamental alteration to the fixed-route program," as well as that, "[l]ike all of our fixed-route operators, our drivers are not permitted or required to call passengers." ECF No. 8 at 5, 9. While declining to adopt Plaintiff's suggestion, Mr. McKenna's letter to Plaintiff describes the procedures RIPTA has implemented to facilitate good communication of the need for accommodation, including how to avoid a miscommunication about the pick-up location when making a FLEX bus reservation. ECF No. 8 at 9. Thus, far from permitting the inference of discriminatory treatment, the amended pleading permits the inference that, in this instance,

RIPTA complied appropriately with its regulatory obligation to designate a person to receive requests for accommodation pursuant to 49 C.F.R. § 37.17. <https://www.ripta.com/ada/> (last visited July 27, 2020). Importantly, the amended pleading lacks any facts permitting the inference that Plaintiff's experience of January 9, 2020, represents a pervasive practice of leaving disabled riders stranded because of their disability. See U.S. Department of Transportation Federal Transit Administration (Circular FTA C 4710.1) Americans with Disabilities Act (ADA): Guidance § 12.7.3, at 299 (November 4, 2015) (pattern or practice of significantly late pickups of disabled riders or drivers refusing to stop for riders in wheelchairs may result in regulatory response but occasional pick-up issue will not).

In sum, taking his factual allegations as true, I find that Plaintiff's amended complaint still fails to establish or give rise to the inference that RIPTA and its FLEX bus program have excluded him from participation in or denied him the benefit of some public service, program, or activity, and that such exclusion, denial of benefits, or other discrimination was "by reason of [his] disability." Iverson v. City of Bos., 452 F.3d 94, 102-03 (1st Cir. 2006); Parker v. Universidad de P.R., 225 F.3d 1, 5 (1st Cir. 2000). Accordingly, I find that Plaintiff's amended complaint still fails to state a plausible ADA claim and recommend that this case now be summarily dismissed.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
July 27, 2020