

No. 02-10190

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUCINDA G. MILLER; ELAINE KING-MILLER,

Plaintiffs-Appellees

v.

TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

**REPLY TO PETITION FOR REHEARING EN BANC
FOR THE UNITED STATES AS INTERVENOR**

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue - PHB 5010
Washington, DC 20530
(202) 305-4584

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10190

LUCINDA G. MILLER; ELAINE KING-MILLER,

Plaintiffs-Appellees

v.

TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

**REPLY TO PETITION FOR REHEARING EN BANC
FOR THE UNITED STATES AS INTERVENOR**

Pursuant to this Court's order dated July 2, 2003, the United States files this response to Plaintiffs' petition for rehearing en banc. Plaintiffs' petition seeks review of the decision in *Pace v. Bogalusa City School Board*, 325 F.3d 609 (5th Cir. 2003), the holding of which was applied to preclude Plaintiffs' claim in this case. See *Miller v. Texas Tech Univ. Health Sciences Ctr.*, 330 F.3d 691, 692 (5th Cir. 2003). On May 8, 2003, the United States petitioned for rehearing en banc in *Pace*. That petition is currently pending before this Court. In our view, this Court should grant the petition in *Pace* and hold in abeyance Plaintiffs' petition in this case pending the outcome of en banc proceedings in *Pace*.

1. Plaintiff Elaine Miller sued her employer, Texas Tech University Health Sciences Center (University), alleging that it discriminated against her on the basis of her disability in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504). Section 504 provides that “[n]o 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.” 29 U.S.C. 794(a). As part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845, Congress enacted 42 U.S.C. 2000d-7, which provides in pertinent part:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. 2000d-7(a)(1).

2. In the district court, the University moved to dismiss Plaintiffs’ Section 504 claims on Eleventh Amendment grounds. The district court denied the motion and the University filed this interlocutory appeal. While this appeal was under submission, another panel issued its decision in *Pace v. Bogalusa City School Board*, 325 F.3d 609 (5th Cir. 2003), holding that the Eleventh Amendment precluded the plaintiff’s Section 504 claims against the State defendants.

Applying the Circuit’s prior decision in *Pederson v. Louisiana State University*,

213 F.3d 858 (5th Cir. 2000), the panel held that 42 U.S.C. 2000d-7 “clearly, unambiguously, and unequivocally conditions a state’s receipt of federal * * * funds on its waiver of sovereign immunity.” *Pace*, 325 F.3d at 615. Nonetheless, the panel held that the State did not knowingly waive its sovereign immunity by applying for and accepting federal funds. The panel concluded that prior to this Court’s decision in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001) and the Supreme Court’s decision in *University of Alabama v. Garrett*, 531 U.S. 356 (2001), “the State defendants had little reason to doubt the validity of Congress’s asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA.” *Pace*, 325 F.3d at 616. For that reason, the panel held, “the State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds.” *Ibid*.

On May 13, 2003, the panel in this case issued its decision, explaining that “[o]n the basis of *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609 (5th Cir. 2003), which binds us, we reverse and remand with instruction to dismiss the claim.” *Miller*, 330 F.3d at 692 (footnote omitted). In particular, the panel found that Plaintiffs’ claims in this case arose between 1998 and 2000, before the decisions in *Reickenbacker* and *Garrett*, and therefore held that the University had not knowingly waived its sovereign immunity to Plaintiffs’ Section 504 claims from that period. *Id.* at 694-695.

3. For the reasons set forth in our petition for rehearing in *Pace*, the panel in this case erred in holding that the State did not knowingly waive its sovereign immunity to Plaintiffs' Section 504 claims by applying for and receiving federal funds clearly conditioned on such a waiver. Rather than repeat those arguments here, we have attached our petition in *Pace*.

The petition in this case raises the same question of the propriety of the panel decision in *Pace* that is presently under consideration in *Pace* itself. Accordingly, the Court should grant the petition for rehearing in *Pace* and hold the petition in this case in abeyance pending the resolution of any subsequent en banc proceedings in *Pace*.

Respectfully submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Civil Rights Division
Department of Justice
Appellate Section, PHB 5001
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-4142

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Reply to Petition for Rehearing En Banc For the United States as Intervenor were served by overnight mail, postage prepaid, on this 9th day of July, 2003, to the following counsel of record:

Bradley W. Howard
Brown & Fortunato
905 South Fillmore, Suite 400
P.O. Box 9418
Amarillo, Texas 79105

Amy Warr
Office of the Attorney General
for the State of Texas
300 W. 15th St., 10th Floor
William Clements Bld.
Austin, TX 78701

KEVIN RUSSELL
Attorney