

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RICHARD COREY, :
 :
 Plaintiff :
 :
 v. : No. 3:03CV0763 (DJS)
 :
 WESTERN CONNECTICUT STATE :
 UNIVERSITY, :
 :
 Defendant :

MEMORANDUM OF DECISION

Plaintiff, Richard Corey ("Corey"), brings this action against the Western Connecticut State University ("WCSU"), based upon the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., and the Federal Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. §§ 701 et seq. WCSU filed a motion to dismiss (dkt. # 11) pursuant to Rule 12 of the Federal Rules of Civil Procedure. In its papers, WCSU argues that the court lacks subject matter jurisdiction over Corey's claims because WCSU is immune from suit under the ADA and Rehabilitation Act pursuant to the doctrine of sovereign immunity, or, in the alternative, that Corey fails to state a claim upon which relief may be granted. For the reasons set forth herein, WCSU's motion is **GRANTED in part** and **DENIED in part**.

I. FACTS

The following facts are alleged in the complaint. Corey is twenty-seven years of age and is blind. Corey is also an accomplished musician. WCSU is a higher educational institution

located in Danbury, Connecticut. WCSU is a "public entity" under the ADA, and is an arm of the State of Connecticut.

This lawsuit concerns Corey's tenure as a student at WCSU. Corey received his Bachelor of Music, Jazz, degree from WCSU in May of 2000. On December 10, 2001, WCSU accepted Corey into its Grade K-12 Music Education Certification Program, in which he enrolled in September of 2002. During this semester, Corey alleges that he sought accommodations from WCSU for his disability, and WCSU failed to provide reasonable accommodations. Corey alleges that, as a result of WCSU's failure to provide reasonable accommodations, he was not successful in the WCSU program and decided not to return.

II. DISCUSSION

Corey sets forth two counts in his First Amended Complaint: (1) violation of Title II of the ADA; and (2) violation of Section 504 of the Rehabilitation Act. WCSU seeks dismissal of each count of the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Alternatively, WCSU seeks dismissal of both counts pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A. STANDARD

Two different standards govern the court's analysis. First, Rule 12(b)(1) of the Federal Rules of Civil Procedure is the appropriate device to assert a "lack of jurisdiction over the

subject matter." Fed. R. Civ. P. 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. U.S., 201 F.3d 110, 113 (2d Cir. 2000). Although the court must afford the complaint a "broad[] and liberal[]" construction, "argumentative inferences in favor of the party asserting jurisdiction should not be drawn." Cole v. Aetna Life & Cas., 70 F. Supp. 2d 106, 109 (D. Conn. 1999) (internal quotation marks omitted); see Klein & Vibber, P.C. v. Collard & Roe P.C., 3 F. Supp. 2d 167, 169 (D. Conn. 1998), aff'd, 201 F.3d 431 (2d Cir. 1999). The burden of proving subject matter jurisdiction rests with the plaintiff, see Makarova, 201 F.3d at 113, and the court may look to evidence outside the pleadings when determining if plaintiff has met its burden, see City of New York v. FDIC, 40 F. Supp. 2d 153, 160 (S.D.N.Y. 1999) (citing Kamen v. American Telephone & Telegraph Co., 791 F.2d 1006, 1011 (2d Cir. 1986)).

When considering a Rule 12(b)(6) motion to dismiss, the court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheur v. Rhodes, 416 U.S. 232, 236 (1974); Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear

that no relief can be granted. See Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." United States v. Yale New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232). In its review of a motion to dismiss, the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

B. SOVEREIGN IMMUNITY

In Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 280 F.3d 98 (2d Cir. 2001), the Court of Appeals for the Second Circuit defined the circumstances under which a plaintiff may bring a claim against a state entity under both Title II of the ADA and Section 504 of the Rehabilitation Act. With respect to Title II of the ADA, the Court of Appeals held that "a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability. . . ." Id. at 112. Corey has amended his complaint to adhere to the parameters set forth

in Garcia, so the court has subject matter jurisdiction over his ADA claim.

Regarding claims against a state entity under Section 504 of the Rehabilitation Act, the Court of Appeals noted that Section 504 "applies only to those government agencies or departments that accept federal funds, and only those periods during which the funds are accepted," Garcia, 280 F.3d at 113 n.2, and held that, in order to be liable under Section 504, the court must find that the state entity has waived its sovereign immunity by accepting federal funds. See id. at 113-14. "As is the case with the waiver of any constitutional right, an effective waiver of sovereign immunity requires an 'intentional relinquishment or abandonment of a known right or privilege.'" Id. at 114 (quoting College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999)).

Corey has not met his burden of establishing subject matter jurisdiction over his Section 504 claim. Although he has alleged that WCSU has accepted federal funds during the time period of September through December of 2002, an allegation standing alone is insufficient to meet Corey's burden under Rule 12(b)(1). Corey must present some evidence that WCSU has in fact accepted federal funds during the relevant time period in order to establish that WCSU has waived its sovereign immunity defense. As such, Corey's Section 504 count is **DISMISSED without prejudice**

to Corey seeking to vacate the dismissal within sixty (60) days of the date of this decision. Should Corey seek to set aside the dismissal, he must submit evidence that WCSU waived its defense of sovereign immunity.

C. FAILURE TO STATE A CLAIM

WCSU argues that Corey has failed to state a claim upon which relief may be granted under Title II of the ADA. The court finds that, at this stage of the proceedings, Corey has alleged conduct that, if proven true, would establish "discriminatory animus or ill will due to disability." Garcia, 280 F.3d at 112. Specifically, Corey may be able to establish that WCSU officials failed to provide him with a reasonable accommodation because of their mistaken and irrational belief that Corey would never be able to become a competent music teacher.

III. CONCLUSION

For the reasons set forth herein, WCSU's motion to dismiss (dkt. # 11) is **GRANTED in part** and **DENIED in part**. Count II is **DISMISSED without prejudice** to Corey seeking to vacate the dismissal within sixty (60) days of the date of this decision by way of a properly supported motion. The motion is **DENIED** in all other respects.

So ordered this 10th day of March, 2004. /s/DJS

DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE