No. 02-1694

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LAW SCHOOL ADMISSION COUNCIL,

Defendant-Appellee

THOMAS E. SCHERER,

Applicant in Intervention-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the underlying case pursuant to 42 U.S.C. 12188(b)(1)(B), 28 U.S.C. 1331, and 28 U.S.C. 1345. For the reasons stated herein, this Court does not have jurisdiction to hear this appeal.

STATEMENT OF RELATED CASES

A related appeal is currently pending before this Court. Appeal number 01-3203 arises from the district court's denial of the Appellant's motion to intervene. On April 10, 2002, this Court consolidated the instant appeal with number 01-3203.

ISSUE PRESENTED

Whether Appellant, who is not a party to the underlying lawsuit, can appeal from the district court's order dismissing the suit.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On December 6, 1999, the Department of Justice filed the underlying action against the Law School Admission Council (LSAC). The amended complaint alleges that LSAC has engaged in a pattern or practice of discrimination against certain named individuals who have physical disabilities and other similarly aggrieved individuals by failing to grant to them reasonable testing accommodations during the administration of the Law School Admission Test (LSAT) in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, and the implementing regulations, 28 C.F.R. Part 36 (R. 3, Amended Complaint).[1] Most law school applicants are required to take the LSAT in order to be eligible for admission (R. 3 at 2). Entities that offer "examinations * * * related to applications * * * for secondary or post-secondary education" are subject to the requirements of the ADA, 42 U.S.C. 12189, and the implementing regulation promulgated by the Department of Justice, 28 C.F.R. 36.309.

On February 20, 2001, Thomas E. Scherer filed an action pro se against the University of Missouri-Kansas City (UMKC) School of Law and against LSAC. See *Scherer* v. *UMKC Sch. of Law & Law Sch. Admission Council, Inc.*, No. 01-

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[1] References to "R. _" are to the docket number of documents filed in the district court. References to "Br. _" are to pages in the Appellant's opening brief.

2085-JWL (D. Kan.). Scherer's complaint in that action challenges the decision of UMKC not to admit him to the law school and asserts that UMKC violated "Mr. Scherer's civil rights as guaranteed by the Civil Rights Act, the Americans with Disabilities Act, the Rehabilitation Act and the state statutes of Missouri referred to as the Sunshine Laws" (UMKC Complaint at 5, attached to R. 24, Request to Intervene). Scherer's complaint in that action also claims that LSAC denied his request for a reasonable accommodation in taking the LSAT, denied his request for a waiver of fees, improperly transmitted his medical information to one or more law schools, denied his request for an extension of time within which to provide medical documentation, and generally violated "Mr. Scherer's rights to privacy, [and] his right to a reasonable accommodation as guaranteed by the Americans with Disabilities Act, the Civil Rights Act and the Rehabilitation Act" (UMKC Complaint at 6-7, attached to R. 24).

On July 16, 2001, Scherer filed a request to intervene in the district court in this case (R. 24). Along with his request, Scherer included a copy of the complaint that he filed against UMKC and LSAC in the district court in Kansas (R. 24). The district court in this case construed this document as the "pleading setting forth the claim or defense for which intervention is sought" that the Rules require an applicant-in-intervention to file along with a motion to intervene. Fed. R. Civ. P. 24(c); see R. 29, Memorandum and Order Denying Request to Intervene, at 1-2. Scherer identified four grounds supporting his request to intervene:

1. Both cases involve the same defendant the LSAC.

> 2. The cause of action in both cases is regarding LSAC documentation prior to granting reasonable accommodation on the law school exam.
> 3. The United States of America Department of Justice as the plaintiff has the right to intervene.
> 4. The parties seeking relief are all disabled individuals who have requested reasonable accommodation.

(R. 24, Request to Intervene, at 1-2). Both the United States and LSAC opposed Scherer's request to intervene (R. 27, R. 26). Although Scherer did not specify whether he sought intervention as of right under Federal Rule of Civil Procedure 24(a) or permissive intervention under Rule 24(b), the parties and the district court addressed both.

On August 7, 2001, the district court denied Scherer's request for intervention as of right, finding that the application was untimely because "the claim filed in Kansas raises issues unrelated to the case at bar and would broaden the scope of litigation to the prejudice of the parties" (R. 29, Order, at 3). The district court also found that Scherer had "failed to demonstrate a sufficient interest in the litigation at bar, or the threat of impairment of such an interest by disposition here," and had "failed to overcome the presumption that a government entity charged by law with representing a national policy is presumed adequate for the task" (R. 29 at 4-5). In addition, the district court denied Scherer's request for permissive intervention on the ground that "[Mr.] Scherer's intervention would so unduly delay resolution of this matter as to make intervention unfair" (R. 29 at 5). Scherer filed a timely notice of appeal on August 10, 2001, and the parties briefed the appeal during October and November, 2001.

On February 26, 2002, the United States and LSAC entered into a settlement agreement and jointly moved the district court to dismiss the underlying lawsuit (R. 40). On the same date, the district court dismissed the action with prejudice, specifically incorporating the settlement agreement between the United States and LSAC in its dismissal order (R. 41). On March 11, 2002, Scherer filed a notice of appeal from the district court's order dismissing the case (R. 44), and this appeal followed.

SUMMARY OF ARGUMENT

Scherer is not a party in this case and, therefore, does not have the right to appeal the district court's disposition. This Court and the Supreme Court have long held that a party who was appropriately denied intervention in a case is not entitled to appeal any merits determinations in that case. Because the district court was correct in denying Scherer's motion to intervene, and because the disposition of the underlying case will not in any way affect any legally protectable interests of Scherer, this Court should dismiss this appeal.

STANDARD OF REVIEW

Because the Appellant does not have the right to bring this appeal, this Court should summarily dismiss this appeal without reviewing the district court's order.

ARGUMENT

THIS COURT SHOULD DISMISS THIS APPEAL

A. *Scherer Cannot Take This Appeal Because He Is Not A Party To This Case*

In bringing this appeal, Scherer seeks to challenge the district court's acceptance of the settlement agreement and dismissal of the case. However, because Scherer was not a party to the suit, and because the district court properly denied his motion to intervene, he is not a "party" within the meaning of Federal Rule of Appellate Procedure 3(c)(1)(A) ("[t]he notice of appeal must * * * specify the party or parties taking the appeal"), and is therefore not entitled to appeal the district court's disposition of the case.

It is well-settled by decisions of the Supreme Court and this Court that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988); see also *Pennsylvania* v. *Rizzo*, 530 F.2d 501, 507 (3d Cir.), cert. denied, 426 U.S. 921 (1976). This Court has repeatedly held that, although a putative intervenor may appeal the denial of his motion to intervene, he may not appeal any merits determinations in the underlying suit. *American Lung Ass'n* v. *Kean*, 871 F.2d 319, 326 (3d Cir. 1989); *Harris* v. *Pernsley*, 820 F.2d 592, 603 (3d Cir.), cert. denied, 484 U.S. 947 (1987). As this Court has explained:

> There is a good reason for this rule. When a district judge denies a motion for intervention, the judge is making a determination that the party trying to intervene does not have a sufficient interest in the matter being adjudicated to require joinder and that interests in convenience do not mandate joinder. * * * There is no reason to allow

> a party to challenge on appeal issues which it could not litigate at the trial level because its interest was deemed insufficient.

American Lung Ass'n, 871 F.2d at 326 (internal citations omitted).

For the reasons given in the United States' Brief as Appellee in appeal No. 01-3203, the district court acted appropriately in denying Scherer's motion to intervene. Under Federal Rule of Civil Procedure 24, an individual may intervene as of right in ongoing litigation if he either has a statutory right to do so, Fed. R. Civ. P. 24(a)(1), or satisfies the requirements of Rule 24(a)(2). An individual is entitled to permissive intervention if he satisfies the requirements of Rule 24(b). As we argued in our Brief as Appellant in the related appeal in this case, No. 01-3203, because Scherer has no statutory right to intervene and has not satisfied any of the other requirements of Rule 24, the district court was correct in denying his request to intervene. Thus, Scherer is not entitled to appeal the district court's February 26th dismissal order, and this Court should dismiss this appeal.

B. *Scherer Is Not Entitled To An Exception From The General Rule That Only Parties May Appeal A Merits Determination*

As discussed in the United States' Brief as Appellee in appeal No. 01-3203, at 6-13, the decision in this case will in no way affect any of Scherer's legally protectable interests. This suit was filed by the government on behalf of four named individuals who have physical disabilities and "[a]ny other persons with physical disabilities who have been the victims of LSAC's discriminatory policies" (R. 3 at 11). Because Scherer alleges that he is a person with mental disabilities, he does not fall within the class of persons on whose behalf the United States filed this

lawsuit. Although Scherer claims that mental and physical disabilities should be treated the same, he has no right to have both addressed in the same lawsuit. Moreover, the legal and factual issues raised by persons with mental impairments who are seeking testing accommodations (including issues of documentation) are distinct from those raised by persons with physical disabilities. Thus, the complaints Scherer has raised against LSAC are distinct from those raised by the United States in this lawsuit. Scherer is, therefore, unable to demonstrate that he has a protectable interest in this lawsuit.[2]

For the same reason, Scherer cannot show that this lawsuit and settlement agreement between the United States and LSAC could bind him or in any way affect his interests or his claims against LSAC. Although both the United States and Scherer raise issues about LSAC's documentation requirements, the United States has not raised any issues with respect to persons with mental disabilities and the settlement agreement addresses only physical disabilities. The United States' suit will not pose a tangible threat to Scherer's claims. To the extent that Scherer contends (Br. 13-15) that LSAC has violated and continues to violate his rights under federal law, nothing in the settlement agreement in any way prevents Scherer from seeking redress of those alleged violations. He therefore does not have a

[2] In this appeal, for the first time, Scherer asserts (Br. 16-17) that LSAC discriminates on the basis of race in violation of Title VI of the Civil Rights Act of 1964. Such a claim certainly has no nexus to the claims asserted by the United States against LSAC, and cannot serve as a basis for either intervention as of right or permissive intervention.

stake in the outcome of the litigation sufficient to allow him to appeal from the district court's dismissal of the case below. Because Scherer is not a party and because his rights will not be affected in any way by the settlement and dismissal of the underlying lawsuit, he is not entitled to appeal.

Furthermore, Scherer does not have the right to appeal based on the recent Supreme Court decision in *Devlin* v. *Scardelletti,* 2002 WL 1270617, No. 01-417, at *5-*7 (June 10, 2002), which permitted an appeal in a class action by a nonnamed class member who was bound by the settlement of the action. Although Scherer asserts (Br. 5-7) that he is entitled to intervene under Federal Rule of Civil Procedure 23, which governs class actions, this lawsuit is not a class action. It is a suit by the United States seeking to secure the rights under the ADA of a certain population of persons with disabilities – those with physical disabilities. Even if this had been a class action, therefore, Scherer would not be a member of the class. Unlike the petitioner in *Devlin*, who, as a member of the class represented in the underlying class action, was bound by the settlement agreement, Scherer is not bound by the settlement agreement in the instant case.

Thus, Scherer is not entitled to bring this appeal. For these reasons, Scherer's situation is different from that of nonparties whom this Court has permitted to appeal. See, *e.g.*, *Caplan* v. *Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 836-838 (3d Cir. 1995) (liability insurance carrier permitted to appeal from injunction entered in suit by plaintiff against policy holder defendant); *Binker* v. *Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992) (employees on whose behalf the

EEOC initiated suit allowed to appeal settlement agreement between EEOC and employer); *Johnson* v. *Trueblood*, 629 F.2d 302, 303 (3d Cir. 1980) (nonparty attorney permitted to appeal order denying him *pro hac vice* status because he was "directly bound by the order").

CONCLUSION

This Court should dismiss this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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