IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-2490-AJ

COLORADO CROSS DISABILITY COALITION and KEVIN WILLIAMS,

Plaintiffs,

v.

HERMANSON FAMILY LIMITED PARTNERSHIP I,

Defendants.

Civil Action No. 96-WY-2491-AJ

COLORADO CROSS DISABILITY COALITION and KEVIN WILLIAMS, for himself and all others similarly situated,

Plaintiffs,

v.

HERMANSON FAMILY LIMITED PARTNERSHIP I,

Defendants.

Civil Action No. 96-WY-2492-AJ

COLORADO CROSS DISABILITY COALITION and KEVIN WILLIAMS, for himself and all others similarly situated,

Plaintiffs,

v.

NINE WEST GROUP, INC. and HERMANSON FAMILY LIMITED PARTNERSHIP I,

Defendants.

Civil Action No. 96-WY-2493-AJ

COLORADO CROSS DISABILITY COALITION and KEVIN WILLIAMS,

Plaintiffs,

v.

HERMANSON FAMILY LIMITED PARTNERSHIP I,

Defendants.

ORDER DENYING MOTIONS TO DISMISS

The motions to dismiss filed by the defendants in the above captioned matters, and plaintiff's responses to those motions, came before the Court for consideration. The Court, having reviewed the motions, the plaintiff's responses to the motions, the submissions of the parties in support of their respective positions, all pleadings of record, and being fully advised in the premises, FINDS and ORDERS as follows:

Background

In these consolidated cases, plaintiff asserts claims for violations of the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) and certain provisions the Colorado Anti-Discrimination Act (C.R.S. § 24-34-601 et seq.) Plaintiff complains that defendants have failed to assure that their public accommodations are accessible to those in wheelchairs, by failing to remove barriers, although removal of barriers or provision of alternative methods of accommodation is readily achievable. The buildings at issue in these cases are located in Larimer Square in downtown Denver, Colorado. Plaintiff Kevin Williams is a tetraplegic who uses a motorized wheelchair for mobility. He, with a friend, was unable to gain access into certain buildings in Larimer Square because there were steps that had to be ascended in order to get into the stores. He claims that no ramp or other

alternative means of gaining access into the shops was available to him. His friend went into the stores to ask about other access and learned there were no other entrances into the stores that were accessible to wheelchairs. The businesses made no other alternative provisions for gaining access into the shops by those using wheelchairs, such as portable ramps or other forms of assistance.

Case No. 96-WY-2490-AJ involves the building located at 1425 Larimer in which Chatelaine Lingerie is located. There are two steps and no ramp at this location. Case No. 96-WY-2491-AJ involves the AnnTaylor store at 1421 Larimer, which has two steps and no ramp. Case No. 96-WY-2492-AJ involves 1429 Larimer, the Nine West shop, which has two steps and no ramp. Case No. 96-WY-2493-AJ is the Sussex Building at 1430 Larimer, which has one step and no ramp. All of the buildings at issue are owned by the Hermanson Family Limited Partnership. The stores are operated by other entities, some of whom are also defendants in these cases.

There are two basic issues that have been raised by the motions to dismiss filed in these four consolidated cases. The first addresses whether the plaintiff's claims for relief under Title III of the Americans with Disabilities Act ("ADA") should be dismissed because plaintiff has failed to exhaust administrative remedies. The second concerns whether plaintiff has stated a cause of action under the Colorado statutes set out at §§ 24-34-601 et seq. Defendant argues that these sections, although they prohibit discrimination in the provision of public accommodations, do not

impose any affirmative obligations to remove access barriers to those with disabilities, unlike the federal Americans with Disabilities Act.

Plaintiff has opposed the motions.

Standard of review Fed.R.Civ.P. 12(b)(6)

The Tenth Circuit, in Pitts v. Turner and Boisseau Chartered, 850 F.2d 650, 652 (10th Cir. 1988), cert. denied in 488 U.S. 1030 (1989) (quoting Shaw v. Valdez, 819 F.2d 965, 968 (10th Cir.), set forth the standard of review for dismissals pursuant to Fed.R.Civ.P. 12(b)(6):

> In reviewing a dismissal for failure to state a claim, we must accept as true the plaintiff's well-pleaded factual allegations and all reasonable inferences must be indulged in favor of the plaintiff. Dismissal is appropriate only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' (Citations omitted.)

In considering a motion to dismiss, a court must take the allegations of the complaint at face value and must construe them most favorably to the plaintiff. The allegations in the plaintiff's complaint are presumed true. Miller v. Glanz, 948 F.2d 1563, 1565 (10th Cir. 1991). A court should not grant a motion to dismiss unless it appears beyond doubt that the plaintiff could prove no set of facts supporting the claim which would entitle plaintiff to relief. Huxall v. First State Bank, 842 F.2d 249, 250-51 (10th Cir. 1988). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint

alone is legally sufficient to state a claim for which relief may be granted." Miller v. Glanz, 948 F.2d at 1565.

Discussion

A. Exhaustion.

The Court agrees with plaintiff that the Americans with Disabilities Act ("ADA") does not require exhaustion of administrative remedies. The defendant has relied primarily on two cases, one of which is out of the U.S. District Court in Colorado. The Court does not find the analyses in these cases to provide particularly persuasive authority that should control disposition of the instant cases.

Title III is the portion of the ADA that governs public accommodations and services provided by private entities. The complaint seeks redress under Title III, and specifically seeks injunctive relief designed to eliminate barriers to access by wheelchairs in the buildings that are the subject of this lawsuit.

Defendant argues that plaintiff is required to first pursue administrative remedies before filing these lawsuits. Although there are some courts that have imposed such a requirement, the Court believes these opinions mis-read the applicable statutory language.

42 U.S.C. § 12188(a) provides, in part:

(a) In general

(1) Availability of remedies and procedures

The remedies and procedures set forth in

> **section 2000a-3(a)** of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.
>
> (2) Injunctive relief
>
> In the case of violations of sections 12182(b)(2)(A)(iv) and section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.
>
> (b) Enforcement by Attorney General
>
> * * * *

Clearly, this section adopts only portions of 2000a-3(a), rather than all of 42 U.S.C. § 2000a-3. This section adopts portions of the federal civil rights statutes that are to be considered in applying the ADA. Specifically, 42 U.S.C. § 2000a-3, entitled civil actions for injunctive relief, provides:

> **(a) Persons aggrieved; intervention by Attorney General; legal representation; commencement of action without payment of fees, costs, or security**
>
> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive

relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) Attorney's fees; liability of United States for costs

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) State or local enforcement proceedings; notification of State or local authority; stay of Federal proceedings

In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this section before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) References to Community Relations Service to obtain voluntary compliance; duration of reference; extension of period

In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under section (a) of this section: *Provided,* That the court may refer the matter to the Community Relations Service established by subchapter VIII of this

> chapter for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days; *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

The issue before the Court arises because some of the courts that have construed these sections have determined that the reference in 42 U.S.C. 12188 is to all of 42 U.S.C. § 2000a-3, rather than just 42 U.S.C. § 2000a-3(a). This is contrary to the express language in § 12188, which only adopts the remedies and procedures set out in 2000a-3(a).

The defendant has relied on several cases, which this Court does not find provide meaningful guidance. These cases include, Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148, 1150 (D.Colo. 1996), in which the court states:

> Where, as here, the alleged act or practice of which an individual complains is prohibited by state or local law, "no civil action may be brought ... before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person." 42 U.S.C. § 2000a-3(c). By making § 2000a-3 applicable to enforcement actions under 42 U.S.C. § 12188, Congress has imposed a state law exhaustion requirement on disabled individuals seeking to enforce their rights under Subchapter III of the ADA.

Howard, 935 F. Supp. at 1150. This mis-cites the applicable statutory language. Howard stands for the proposition that Subchapter III of the ADA does not provide a private cause of action for damages. Defendants also rely on a unpublished case out of the Eastern District of Pennsylvania, Bechtel v. East Penn School Dist. of Lehigh County, Pa., reported at 1994 U.S.Dist.

Lexis 1327 at 4 (E.D.Penn. 1994). The court there determined that there was no exhaustion requirement for claims under Title II of the ADA and generally, that claims under the Rehabilitation Act have no exhaustion requirement. The court only mentions the exhaustion requirement with respect to claims under Title III of the ADA in dicta stating:

> Defendants are correct that Section 12188 makes enforcement procedures of the Civil Rights Act of 1964, which provide for exhaustion of administrative remedies, applicable to actions brought under Title III of the ADA.

Again, this language mis-states the actual language of 42 U.S.C. § 12188.

Contrary authority, relied on by plaintiff, while not entirely on point, finds there is no exhaustion requirement under these provisions of the ADA. See e.g., Devlin v. Arizona Youth Soccer Assoc., 1996 WL at 118445, at *2 (D.Ariz. Feb. 8, 1996), in which the court stated:

> . . . the legislative history of the ADA indicates that Congress precluded a waiver of judicial remedies of an ADA violation and that exhaustion of administrative remedies is not required. Grubbs v. Medical Facilities of America, Inc., 6 NDLR Para. 105 at 372 (W.D.Va. Sept. 23, 1994). Secondly, the regulations implementing Title II of the ADA omit an exhaustion requirement. See 28 C.F.R. §§ 36.501-.504 (1995). Finally, the ADA's provision of the relationship of the ADA to other laws further demonstrates that Plaintiff's ADA claim is not subject to the exhaustion/arbitration requirements of the Amateur Sports Act. That provision states in relevant part:
>
> > Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or Jurisdiction that provides greater or equal protection for the rights of individuals with equal protection for the rights of individuals

> with disabilities than are afforded by this Act.
>
> 42 U.S.C. § 12201(b)(Supp. V 1993) (emphasis added). The aforementioned provision implies that the ADA does preempt federal and state laws that provide less protection than the ADA and by precluding a judicial remedy, the Amateur Sports Act provides less protection for the rights of individuals with disabilities than does the ADA.
>
> The Court finds that Plaintiff's ADA claims are not subject to arbitration and/or exhaustion of administrative remedies requirements.

Plaintiff also cites Grubbs v. Medical Facilities of America, Inc., 1994 WL 791708, at *3, 7 A.D.D. 570, 6 NDLR P 105 (W.D.Va. 1994), in which the court determined there was no exhaustion requirement for the plaintiff's Title III ADA claim, citing to the legislative history of the ADA, citing J.L. v. Social Security Admin., 971 F.2d 260, 9-64 n.4 (9th Cir. 1992), which quotes H. Rep. No. 101-485, 101st Cong., 2d Sess. 98 (1990).

Soignier v. American Board of Plastic Surgery, 92 F.3d 547, 553 (7th Cir. 1996), dealing mainly with statute of limitations issues, is a case in which the court stated, as to the ADA:

> Because there is no first obligation to pursue administrative remedies, Soignier had to file suit within two years of the accrual date even if he had not exhausted all possible internal remedies. His internal appeal was only an added forum -- an opportunity to get two bites at the apple.

The United States has filed an amicus brief in 96-WY-2492-AJ, supporting the plaintiff's arguments in this case, arguing that the Department of Justice, the agency charged with significant enforcement responsibilities under the ADA in certain circumstances, has taken the position that Subchapter III of the

ADA does not have an exhaustion requirement.

The Court concludes that the ADA does not, by its express terms, incorporate the portions of the Civil Rights Act of 1964 that require exhaustion of administrative remedies.

B. State law Anti-Discrimination Act ("CADA") Issues.

The other issue that is raised in the motions to dismiss asks whether the plaintiff has stated a cause of action under state law. Plaintiff's claims for relief include asserted violations of C.R.S. § 24-34-601. This section prohibits direct and indirect discrimination in places of public accommodations on the basis of disability. Defendant argues that these statutes do not impose any affirmative obligations on the defendant to remove barriers to access, unlike the ADA, and that it simply prohibits discrimination on the basis of disability. Defendants also argue that the court should decline to exercise supplemental jurisdiction over the state law claims, because the federal claims fail and because plaintiffs have failed to exhaust state administrative remedies. Insofar as this Court has already determined that plaintiff's federal claims shall survive the defendants' motions to dismiss, this second aspect of the defendants' argument is without merit.

The Colorado Act parallels on the federal Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96. Colorado Civil Rights Commission v. North Washington Fire Protection Dist., 772 P.2d 70, 77 (Colo. 1989) (discussing part 4 of the Colorado Act dealing with discriminatory employment practices). The federal Act is a broad

act designed to remedy conduct and eliminate barriers that have a disparate impact upon those with disabilities. Similar to Title VII, a plaintiff need not provide direct proof of discrimination on the basis of disability in order to sustain a cause of action under the federal Rehabilitation Act. See e.g., Williams v. Widnall, 79 F.3d 1003, 1005 (10th Cir. 1996), citing Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1386-87 (10th Cir. 1981). Plaintiff must first establish a prima facie case before the burden shifts to the defendant to show a nondiscriminatory reason for its actions. Williams v. Widnall, 79 F.3d at 1005 (also noting that same model has been adopted for cases under the ADA). The Court rejects the defendants' arguments that CADA requires direct proof of discrimination on the basis of handicap and does not authorize a court to require a defendant to take action specifically designed to remediate discrimination, direct or indirect, on the basis of disability.

Colorado law does not make actions brought pursuant to the CADA in these circumstances an exclusive remedy. In the statutory language, C.R.S. § 24-34-601 does not preclude the filing of a suit in federal court under the ADA nor does it expressly state that exhaustion of remedies is required. See e.g., Galieti v. State Farm Mut. Automobile Ins. Co., 840 F. Supp. 104, 105 (D.Colo. 1993) (involves claims brought under 24-34-402.5, which provides that it is an unfair or discriminatory employment practice to terminate employment due to employee's engaging in lawful activities off the premises of the employer during nonworking hours).

C.R.S. § 24-34-601 et seq. prohibits discrimination in places of public accommodation. Section 24-34-602, addressing penalty and civil liability, provides:

> Any person who violates any of the provisions of section 24-34-601 by denying to any citizen, except for reasons applicable alike to all citizens of every disability, race, creed, color, sex, marital status, national origin, or ancestry, and regardless of disability, race, creed, color, sex, marital status, national origin, or ancestry, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated or by aiding or inciting such denial, for every such offense, shall forfeit and pay a sum of not less than fifty dollars nor more than five hundred dollars to the person aggrieved thereby to be recovered in any court of competent jurisdiction in the county where said offense was committed; and also for every such offense such person is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than three hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. A judgment in favor of the party aggrieved or punishment upon an indictment or information shall be a bar to either prosecution, respectively; **but the relief provided by this section shall be an alternative to that authorized by section 24-34-306(e), and a person who seeks redress under this section shall not be permitted to seek relief from the commission.**

C.R.S. § 24-34-602 (emphasis supplied).

Section 24-34-306(9) provides for a hearing before the Colorado Civil Rights Commission (CRCC) for charges of discriminatory practices. The remedy available under § 24-34-602 is an alternative remedy to that provided for in § 24-34-306(9), a hearing before the commission. The statute expressly precludes seeking relief from the commission when the § 24-34-602 type of remedy is sought instead.

Exhaustion of administrative remedies and procedures is

discussed in C.R.S. § 24-34-306(14). That section provides that:

> No person may file a civil action in a district court in this state based on an alleged discriminatory or unfair practice prohibited by parts 4 to 7 of this article without first exhausting the proceedings and remedies available to him **under this part 3** unless he shows, in an action filed, in the appropriate district court, by clear and convincing evidence, his ill health which is of such a nature that pursuing administrative remedies would not provide timely and reasonable relief and would cause irreparable harm.

(emphasis supplied).

In electing to bring suit under § 24-34-602, plaintiff has foregone remedies that would be available to him by way of a hearing before the Colorado Civil Rights Commission pursuant to C.R.S. 24-34-306. However, if he had elected the relief available under § 24-34-306, then exhaustion of administrative remedies would be required. Further, even if administrative relief had been the remedy of choice, the plaintiff could have requested a right to sue letter, and upon receipt of a notice of right to sue the exhaustion of administrative remedies requirement would have been satisfied so as to permit a civil action to proceed. See C.R.S. § 24-34-306(15).

The Court was unable to discover much helpful Colorado case law on these issues, nor did the parties provide citations to clearly persuasive authority. Defendants cite to Brooke v. Restaurant Services, Inc., 881 P.2d 409, reversed in 906 P.2d 66 (Colo. 1995). In that case, the Colorado Supreme Court held that the Colorado Anti-Discrimination Act (C.R.S. § 24-34-301 et seq.) is not the exclusive remedy for employment-related sex discrimination and that the act does not require plaintiff to

exhaust administrative remedies before filing her claim in state district court. That court noted that "as a general rule, federal and state remedies for civil rights violations are cumulative, not exclusive." Brooke, 906 P.2d at 68. The Colorado Court also noted that remedies under the Colorado Act for individuals subjected to sex discrimination on the job are "only incidental to the Act's primary purpose of eradicating discriminatory practices by employers." Id. Further, "the duties of the CCRC, in addition to enforcing the compulsory provisions of the Act, are geared toward eliminating discriminatory practices on a broad scale rather than addressing the harm such practices cause on a case-by-case basis." Id.[1]

The Colorado Court of Appeals has held that the provisions of C.R.S. § 24-34-306 permitting the filing of a claim with the CRCC is an alternative to seeking relief through the courts. It stated therefore that the principle requiring exhaustion of administrative

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[1]The language used in C.R.S. § 24-34-306 is not mandatory, i.e., "any person claiming to be aggrieved by a discriminatory or unfair practice as defined by parts 4 to 7 of this article **may,** by himself or his attorney-at-law, make, sign, and file with the commission" written charges regarding discriminatory or unfair practices. Part 4 of the act deals with employment practices; part 5 deals with housing practices; part 6 deals with discrimination in places of public accommodation and prohibits discriminatory practices (direct or indirect) that withhold, refuse, or deny an individual or group because of handicap, full and equal enjoyment of facilities or accommodations of a place of public accommodation. C.R.S. § 24-34-605 of part 6 authorizes, in addition to relief provided for in C.R.S. § 24-34-306(9), the commission to order a respondent who is found to engage in a discriminatory practice to rehire, reinstate, and provide back pay, to make reports of compliance to the commission, and to take other affirmative action, including the posting of notices setting forth the substantive rights of the public under part 6.

remedies was not applicable. Wing v. JMB Property Management Corp., 714 P.2d 916, 914 (Colo. App. 1985).

This entire statutory scheme, as it relates to exclusivity and exhaustion of administrative remedies for claims on the basis of disability, is somewhat cloudy. Therefore, the Court finds that the motions to dismiss should be denied, also finding that exhaustion of remedies under the state scheme is not required in this case. The Court will to permit both the federal and state causes of action to go forward, as both types of claims require proof of similar or identical elements. Additionally, the Court notes that factual issues exist. It is not clear on the state of the existing record before the Court that plaintiff could prove no set of facts which would entitle him to the relief he now seeks in these cases. Accordingly, and for the foregoing reasons, it is therefore

ORDERED that all motions to dismiss the plaintiff's amended complaints filed by the defendants in the above captioned proceedings shall be, and are, **DENIED.**

Dated this 3rd day of March 1997.

Lewis T. Babcock
UNITED STATES DISTRICT JUDGE
BY DESIGNATION