IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-K-2077

MARK E. SHEPHERD, SR.,

Plaintiff,

v.

UNITED STATES OLYMPIC COMMITTEE, et al.,

Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY ADJUDICATION

Plaintiff Mark E. Shepherd, Sr., by and through his counsel, hereby submits this memorandum in support of his motion for partial summary adjudication. Plaintiff seeks an adjudication that certain policies of Defendant United States Olympic Committee ("USOC") that discriminate against Paralympic athletes constitute illegal disability discrimination under Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181 - 12189, and section 504 of the Rehabilitation Act ("Section 504"). 29 U.S.C. § 794.

The USOC is a federally-chartered corporation, created by Congress to "exercise exclusive jurisdiction . . . over all . . . matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games." 36 U.S.C. §§ 220502 & 220503(3)(A). The USOC's 2000 Annual Report describes the Paralympic Games as "the equivalent of the Olympic Games for the physically challenged." Despite its explicit congressional mandate, however, the USOC provides services and benefits to Olympic athletes

for which Paralympic athletes are not eligible. This discrimination is prohibited by the ADA and Section 504, both of which bar discrimination on the basis of disability.

BACKGROUND

Congress created the USOC through the Ted Stevens Olympic and Amateur Sports Act ("TSOASA"). 36 U.S.C. §§ 220501 - 220529. Through that statute, Congress gave the USOC jurisdiction over "all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games," and obtaining "the most competent amateur representation possible in each event" in Olympic, Pan-American and Paralympic Games. Id. § 220503(3)(A) & (4). Congress also mandated that one of the USOC's purposes was "to encourage and provide assistance to amateur athletic programs and competition for amateur athletes with disabilities." Id. § 220503(13). The USOC's Constitution states that it has the power to "represent the United States as its . . . National Paralympic Committee in relations with the International Paralympic Committee." (USOC Constitution art III, § 1(B).)[1] Through its Constitution, the USOC has undertaken to "organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games, the Pan American Games and the Paralympic Games" and to "enter competitors who will represent the United States in the Olympic Games, the Pan American Games and the Paralympic Games." (Id., art. III, §§ 1(C) & 5.)

---

[1] Relevant excerpts from the USOC's Constitution, as amended through April 21, 2002, are attached as Exhibit 1 to the Declaration of Amy F. Robertson ("Robertson Decl."). The entire document is available on the USOC's website at http://www.usolympicteam.com/about_us/documents/constituition051502.pdf.

The USOC's 2000 Annual Report explains that "[t]he Paralympics are the equivalent of the Olympic Games for the physically challenged."[2] The USOC administers the United States's representation in the Paralympic Games through U.S. Paralympics, a division of the USOC.[3] U.S. Paralympics states that it was "created to help athletes with physical disabilities reach their dream of Paralympic excellence,"[4] and to "focus efforts on enhancing programs, funding and opportunities for persons with physical disabilities to participate in Paralympic sport."[5] "Participants in the Paralympic Games must meet eligibility standards established through the International Paralympic Committee. Disability groups represented include amputees, blind or visually impaired athletes, athletes with cerebral palsy, athletes with spinal cord injuries and athletes who are affected by a range of other disabilities that do not fall into the aforementioned categories, such as multiple sclerosis or dwarfism."[6]

The USOC provides various benefits and services to Olympic athletes that it does not provide to Paralympic athletes.[7] For example, the USOC provides grants to Olympic athletes -- including Basic Grants, Special Assistance Grants, and Tuition Assistance Grants -- that it does

---

[2] Id. at 18 (DP767). (Robertson Decl., Ex. 2.) This Exhibit consists of relevant excerpts from the annual report. The entire document is available on the USOC's website at http://www.usolympicteam.com/about_us/documents/taxdisclosure.htm.

[3] See http://www.usparalympics.com. (Robertson Decl. Ex. 3.)

[4] Id.

[5] See http://www.usparalympics.com/usparalympics.htm. (Robertson Decl. Ex. 4.)

[6] Id.

[7] See Stipulations ¶ 7 (filed Sept. 18, 2002).

not make available to Paralympic athletes.[8] In addition, the USOC offers Elite Athlete Health Insurance to Olympic athletes but not to Paralympic athletes.[9] The USOC provides incentives to Olympic athletes by giving them cash payments for winning medals. This program is called "Operation Gold." Prior to 2002, the USOC did not provide any awards to Paralympic athletes who won medals. Starting in 2002, the USOC began providing cash payments to Paralympic medalists -- in amounts precisely one-tenth of the amounts provided to Olympic medalists for equivalent medals.[10] The USOC determines usage of its training facilities by prioritizing athletes by class. Olympic athletes are allocated an A (or first) priority level whereas Paralympic athletes are allocated a C (or third) priority level.[11]

Plaintiff Mark E. Shepherd, Sr. is a paraplegic and uses a wheelchair for mobility.[12] He is also an elite Paralympic athlete. He was a member of the United States Paralympic Wheelchair Basketball team in the 1996 Paralympic Games,[13] which won a bronze medal, and was a member of Team USA, the team that represented the United States in the International Wheelchair

---

8 Id. ¶¶ 10, 12 & 13.

9 Id. ¶ 14.

10 Id. ¶ 8.

11 Id. ¶ 9.

12 Stipulations ¶ 1.

13 Id. ¶ 2.

Basketball Federation World Championships in 1994 and 1998.[14] He is currently a member of Team USA, and just returned from Japan where he and his teammates won the gold medal in the 2002 International Wheelchair Basketball Federation World Championships. He is training for the 2004 Paralympics.[15]

Based on his accomplishments and training, Mr. Shepherd is a Paralympic-caliber athlete and an athlete training for the next Paralympic Games in a Paralympic sport in non-Paralympic years. Yet Mr. Shepherd is not eligible for grants, insurance, medal incentives and training priorities that a similarly-situated Olympic athlete would be eligible for. That is, the USOC has stipulated that "Olympic-caliber athletes and/or athletes training for the next Olympic Games in Olympic sports in non-Olympic years" are eligible for the benefits of "Olympic programming" -- including the benefits described above -- while "Paralympic-caliber athletes and/or athletes training for the next Paralympic Games in Paralympic sports in non-Paralympic years" are not.[16]

PROCEDURAL STATUS

Mr. Shepherd brought this lawsuit to challenge discrimination by the USOC against him as an employee with a disability (the "Employment Claims") and as an athlete with a disability (the "Athletic Claims"). With respect to the Athletic Claims, Mr. Shepherd challenges the USOC's discrimination in a number of areas, including those described above and other, more

---

[14] Declaration of Mark E. Shepherd, Sr. ¶¶ 2-3.

[15] Id. ¶¶ 4-5.

[16] Stipulations ¶¶ 3, 7-15.

factually complex, programs. In order to establish the precise contours of the USOC's funding disparities between disabled and non-disabled athletes, Mr. Shepherd propounded a number of discovery requests to which the USOC objected. Mr. Shepherd moved to compel production of the requested documents.[17] Following protracted negotiations -- in which the USOC made Mr. Shepherd aware of the quantity of information at issue -- the parties concluded that it would be of significant assistance in managing the litigation of -- and specifically discovery concerning -- the Athletic Claims to stay discovery on those claims and resolve first the question whether the USOC commits illegal disability discrimination when it discriminates against Paralympic athletes.[18]

In order to accomplish this, the parties negotiated the Stipulations being filed with this Court today and agreed to file cross-motions on the legal question of disability discrimination.[19] The Stipulations address, among other things, a series of discrete programs in which the disparity in treatment between Paralympic and Olympic athletes could be easily ascertained and memorialized. In addition, the USOC has previously stipulated that it receives federal financial assistance[20] and it is Plaintiff's understanding that -- for the purposes of these cross-motions only

---

[17] See Pl.'s Mot. to Compel (filed May 29, 2002).

[18] See generally Joint Mot. for Briefing Schedule and to Extend Disc. (filed Aug. 22, 2002).

[19] Id. ¶ 3.

[20] Stipulation Re: (1) Pl.'s Mot. to Modify Case Mgmt. Order; (2) Def.'s Withdrawal of Affirmative Defense (3) Pl.'s Mot. for Leave to File Am. Compl. at 2 (filed Oct. 5, 2001).

-- the USOC will not contest that Plaintiff has a disability[21] or that the USOC owns, operates, leases and/or leases to a place of public accommodation.

As such, Mr. Shepherd moves pursuant to Rule 56(d) of the Federal Rules of Civil Procedure for summary adjudication of the following question: does the USOC violate Title III of the ADA and/or Section 504 when it explicitly excludes Paralympic athletes from certain programs or provides such athletes with explicitly inferior benefits? Specifically, does it violate Title III of the ADA and/or Section 504 when the USOC:

1. Provides grants to Olympic athletes for which Paralympic athletes are not eligible;
2. Provides Elite Athlete Health Insurance to Olympic athletes for which Paralympic athletes are not eligible;
3. Provides medal incentives to Olympic athletes that it (previously) did not provide to Paralympic athletes or (more recently) provides to Paralympic athletes in amounts one-tenth of the amounts provided Olympic athletes; and
4. Assigns Olympic athletes first priority, and Paralympic athletes third priority, in obtaining access to USOC training facilities?

The matters set forth in the Stipulations are not in controversy and, as Plaintiff demonstrates below, support summary adjudication in Plaintiff's favor of the questions above. There are a number of material facts that would remain "actually and in good faith controverted," see Rule 56(d), following a ruling favorable to Plaintiff on this motion. For example, the

---

[21] The USOC has stipulated that Plaintiff is a paraplegic and uses a wheelchair for mobility. Stipulations ¶ 1.

question whether the USOC owns, operates, leases or leases to a place of public accommodation as well as the question of disability discrimination in more factually complex programs will remain to be resolved in future motions or at trial. Based on the procedural posture and the potential for litigation efficiencies, Plaintiff respectfully requests that this Court address the discrete questions set forth above. For the reasons set forth below, Plaintiff requests that the Court hold that the explicit discrimination against Paralympic athletes described herein violates Title III of the ADA and Section 504.

ARGUMENT

The USOC has admitted that the Paralympics are the equivalent of the Olympics for individuals with disabilities and that there are a number of benefits and services that the USOC makes available to Olympic athletes that it does not make available to Paralympic athletes. These admissions suffice to establish discrimination under the ADA and Section 504.

The USOC's Policies Constitute Illegal Discrimination on the Basis of Disability.

The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1); see also PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (holding that the ADA provides a "broad mandate" to eliminate discrimination against people with disabilities). Title III of the ADA prohibits disability discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Under Section 504, a qualified individual with a

disability may not -- solely by reason of his or her 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). The USOC's policies that provide grants, incentives, insurance and training opportunities to Olympic athletes but deny those benefits or provide explicitly inferior benefits to Paralympic athletes violate these provisions and their implementing regulations.[22]

A. The Elements of a Prima Facie Case under Title III and Section 504.

Plaintiff states a prima facie case under Title III of the ADA if he can show (1) he has a disability; (2) the USOC owns, operates, leases or leases to a place of public accommodation; and (3) he was denied full and equal treatment because of his disability. See Parr v. L & L

---

[22] See 28 C.F.R. pt. 36 (Department of Justice ("DOJ") Title III regulations); 32 C.F.R. pt. 56 (Department of Defense ("DOD") Section 504 Regulations); 28 C.F.R. pt. 41 (DOJ Section 504 Coordination Regulations); see also 45 C.F.R. pt. 84 (Department of Health and Human Services ("HHS") (formerly Department of Health, Education and Welfare ("HEW")) Section 504 Coordination Regulations); 28 C.F.R. pt. 35 (DOJ regulations implementing Title II of the ADA). These regulations and Title III contain many parallel provisions, which will be noted in footnotes below. The DOD regulations are relevant because the USOC has stated that the source of federal financial assistance on which its stipulation was based was the grant of land from the Department of Defense. See Def.'s Resp. in Opp'n to Pl.'s Mots. for Sanctions Pursuant to 28 U.S.C. § 1927 and Rule 11 at 13-16 (filed June 11, 2002). The DOJ's Title III regulations are "entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 626 (1998). The HEW regulations "particularly merit deference" because the responsible congressional committees "and Congress itself endorsed the regulations in their final form." Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984); see also Toyota Motor Mfg. v. Williams, 122 S. Ct. 681, 690 (2002) (holding that "[t]he HEW regulations are of particular significance because at the time they were issued, HEW was the agency responsible for coordinating the implementation and enforcement of § 504" and noting that the HEW regulations "appear without change in the current regulations issued by" HHS). Finally, the DOJ's Title II regulations "have the force of law." Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir.), cert. denied 516 U.S. 813 (1995).

Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1085 (D. Haw. 2000); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001). Under Section 504, Plaintiff is required to show that (1) he has a disability; (2) he is otherwise qualified to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminated against him. See Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir. 1999). As discussed above, the USOC has stipulated that it receives federal financial assistance and will not contest for the purposes of this motion that Plaintiff is disabled and that the USOC owns, operates, leases or leases to a place of public accommodation. The question at issue in this motion -- whether the USOC's provision of benefits to Olympic athletes that it does not provide to Paralympic athletes constitutes discrimination under Title III and/or Section 504 -- is the third element of the Title III prima facie case and the fourth element under Section 504.[23]

Denying benefits to Paralympic athletes that the USOC provides to Olympic athletes constitutes illegal discrimination under Title III and Section 504. Specifically, the USOC's

---

[23] The USOC also disputes whether Plaintiff is "otherwise qualified," apparently on the grounds that only Olympic athletes qualify for the benefits in question. This is circular. If it is discriminatory to exclude Paralympians from these benefits, it cannot be made legal by defining the qualifications for the benefits in explicitly discriminatory terms. See, e.g. Clark v. Va. Bd. of Bar Examiners, 880 F. Supp. 430, 441 (E.D. Va. 1995) (addressing the question whether bar applicants should be required to respond to a question concerning mental health and noting that "[w]hile Defendant argues that [the plaintiff] is not an 'otherwise qualified individual' because she failed to answer [the mental health question], this argument begs the question of whether [the question] must be answered at all."). The USOC has conceded that "Olympic-caliber athletes and/or athletes training for the next Olympic Games in Olympic sports in non-Olympic years" are eligible for benefits that Plaintiff -- as a Paralympic-caliber athlete and an athlete training for the next Paralympic Games in a Paralympic sport in non-Paralympic years -- is not. See Stipulations ¶¶ 3, 7-15. But for the distinction being challenged here, Plaintiff is otherwise qualified.

policies facially discriminate against athletes with disabilities by denying them the opportunity to participate in or benefit from USOC services, facilities, privileges, advantages, and accommodations, in violation of 42 U.S.C. § 12182(b)(1)(A)(i) (the "Denial of Participation" provision),[24] and afford athletes with disabilities services, facilities, privileges, advantages, and accommodations that are not equal to those afforded to non-disabled athletes, in violation of 42 U.S.C. § 12182(b)(1)(A)(ii) (the "Unequal Benefit" provision).[25]

In the alternative, the USOC's policies have a disparate impact on athletes with disabilities in that they impose eligibility criteria that screen out or tend to screen out those athletes from fully and equally enjoying the USOC's goods, services, facilities, privileges, advantages, or accommodations, although such criteria are not necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered, in violation of 42 U.S.C. § 12182(b)(2)(A)(i) (the "Eligibility Criteria" provision).[26]

B. The USOC's Denial of Participation and Provision of Unequal Benefits Constitute Facial Discrimination Against Athletes with Disabilities.

The USOC denies athletes competing in the Paralympic Games -- described by the USOC as the equivalent of the Olympic Games for athletes with disabilities -- the ability to participate in or benefit from Basic Grants, Special Assistance Grants, Tuition Assistance Grants, Elite

---

[24] See also 32 C.F.R. § 56.8(a)(2)(ii); 28 C.F.R. § 41.51(b)(1)(i); 45 C.F.R. § 84.4(b)(1)(i); 28 C.F.R. § 35.130(b)(1)(i).

[25] See also 32 C.F.R. § 56.8(a)(2)(iii); 28 C.F.R. § 41.51(b)(1)(ii); 45 C.F.R. § 84.4(b)(1)(ii); 28 C.F.R. § 35.130(b)(1)(ii).

[26] See also 28 C.F.R. §§ 35.130(b)(8).

Athlete Health Insurance and, prior to 2002, Operation Gold incentives, in violation of the Denial of Participation provision. The USOC provides these athletes unequal benefits in the form of Operation Gold rewards that are currently one-tenth of those offered Olympic athletes and lower priorities for the use of training facilities, in violation of the Unequal Benefits provision. These policies facially discriminate against athletes with disabilities. Plaintiff "makes out a prima facie case of intentional discrimination . . . merely by showing that a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment." Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995). There is no question that the USOC policies that provide benefits to Olympic athletes but deny those benefits to Paralympic athletes subject athletes with disabilities to "explicitly differential -- i.e. discriminatory -- treatment." Plaintiff has thus stated a prima facie case of intentional disability discrimination.

Unlike the employment sections of the ADA, neither the Denial of Participation nor the Unequal Benefit provision contains any defense.[27] Denying benefits to Paralympians and providing them benefits that are explicitly unequal to those of Olympians present per se violations of Title III and Section 504. See Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 735 (9th Cir. 1999) (holding that a facially discriminatory zoning

[27] The only defense that applies to either section is the general "direct threat" defense, which applies to all of Title III. 42 U.S.C. § 12182(b)(3). Pursuant to that provision, a covered entity is not required to "permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." Plaintiff has never heard it suggested, and it is almost impossible to imagine, that provision of benefits to Paralympic athletes could constitute a direct threat to the health or safety of others.

ordinance constituted a per se violation of Title II of the ADA). As the legislative history makes clear, "it is a violation of [Title III] to exclude persons with disabilities. For example, it would be a violation for a grocery store to impose a rule that no blind persons would be allowed in the store, or for a drugstore to refuse to serve deaf people." H. R. Rep. No. 101-485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 388. Likewise, it is a violation of Title III -- and Section 504 -- for the USOC to impose a rule that no Paralympians may receive grants, insurance or medal incentives that Olympic athletes are eligible to receive and that their training opportunities are explicitly inferior to those of Olympians.

Even if one were to take the view that the USOC is discriminating against Paralympians but not technically against athletes with disabilities -- that is, that the occasional disabled athlete who is able to qualify for the Olympics would be eligible for the USOC's benefits -- the exclusion of Paralympians would still constitute facial disability discrimination. By definition, the athletes who are excluded by the USOC's policies are athletes with disabilities. Using such a "proxy" for a protected class constitutes intentional discrimination.

When a criterion used to discriminate is closely aligned with a protected classification, use of the criterion is illegal. For example, in McWright v. Alexander, the Seventh Circuit addressed the question whether a policy requiring advance notice of maternity leave discriminated against infertile women who chose to adopt, a process that generally does not permit of advance notice. 982 F.2d 222, 223-24 (7th Cir. 1992). The court first analyzed whether the challenge was one of disparate treatment -- that is, intentional, facially

discriminatory treatment -- or disparate impact -- that is, a neutral rule that disproportionately impacted infertile women. The court concluded it was the former:

> an employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the "fit" between age and gray hair is sufficiently close that they would form the same basis for invidious classification.

Id. at 228 (citation omitted). With respect to the rule in question, the court stated, that "even if the [employer's] apparent policy disadvantages all adoptive mothers (including reproductively normal ones), the 'fit' may be sufficient" to constitute intentional discrimination. Id. (emphasis in original).

Similarly, it is facial disability discrimination to apply different fire code provisions to "facilities that house four or more unrelated persons 'for the purpose of providing personal care services.'" Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057, 1070 (N.D. Ill. 1996).

> Such a law does not use the word "handicap" or "disability," yet the reach of the law clearly "coincides with the breadth of the definition of 'handicap' under the [Fair Housing Amendments Act]." For this reason, such a law discriminates on its face against the handicapped. That such a law "may incidentally catch within its net some unrelated groups of people without handicaps, such as juveniles or ex-criminal offenders" does not alter this conclusion.

Id. (quoting Horizon House Developmental Servs., Inc. v. Township of Upper Southampton, 804 F.Supp. 683, 694 (E.D. Pa. 1992), aff'd, 995 F.2d 217 (3rd Cir. 1993)). The court held that the classification at issue was a "proxy" for intentional disability discrimination. Alliance for the Mentally Ill, 923 F. Supp. at 1070. Likewise, the court in Horizon House held that an ordinance

requiring 1000 feet between facilities in which "permanent care or professional supervision is present" was facially discriminatory, because "[i]n using the words 'permanent care' or 'professional supervision,' the individuals singled out for disparate treatment are those who are unable to live on their own, who, in the language of the Fair Housing Act, are 'handicapped.'" Id., 804 F. Supp. at 694.

In the present case, "Paralympian" is a close proxy for "disabled athlete." Indeed, the USOC itself commonly equates Paralympians with disabled athletes in its own publications.[28] It is irrelevant that the occasional Olympic athlete with a disability -- for example, an Olympic swimmer with a hearing impairment -- may be entitled to the benefits at issue here. "That a law may not burden all members of the protected class does not remove its facially discriminatory character." Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1496 n.8 (W.D. Wash. 1997) (citing Asbury v. Brougham, 866 F.2d 1276, 1281-82 (10th Cir.1989) for the proposition that evidence of a high percentage of protected-class residents could not by itself dispose of an intentional discrimination claim). The "fit" is sufficiently close between Paralympic athletes and athletes with disabilities to make facial discrimination against the former -- to which the USOC readily admits -- a proxy for facial discrimination against the latter.

In any event, the only elite athletes excluded by the USOC's discrimination against Paralympians are disabled athletes, which is sufficient to render the policy illegal. An argument that the exclusion is legal because the occasional disabled athlete qualifies for the Olympics is

---

[28] See, e.g., Robertson Decl. Exs. 2-4.

the equivalent of the defendants in Alliance for the Mentally Ill or Horizon House defending their facially discriminatory ordinances -- barring group homes for people with disabilities -- on the grounds that they did not prevent a quadriplegic lawyer from living independently in the neighborhood. The USOC's policy excludes athletes with disabilities and is thus illegal on its face.

C. In the Alternative, the USOC's Policies Include Eligibility Criteria That Screen Out or Tend to Screen Out Athletes with Disabilities but Which Are Not Necessary for the Provision of the Benefits in Question.

Title III also prohibits policies that have a disparate impact on individuals with disabilities. It is illegal discrimination to impose or apply

> eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

42 U.S.C. § 12182(b)(2)(A)(i).[29]

There can be no question that a policy denying benefits to Paralympic athletes tends to screen out athletes with disabilities. The Eligibility Criteria provision "makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation." H. R. Rep. No. 101-485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 388; see also Hahn ex rel. Barta v. Linn County, 130 F. Supp. 2d 1036, 1055 (N.D. Iowa 2001) (same); Guckenberger v. Boston Univ., 974 F.

---

[29] See also 28 C.F.R. § 36.301(a); 28 C.F.R. § 35.130(b)(8).

Supp. 106, 134 (D. Mass. 1997) (same). The eligibility criteria at issue here are those that bar (and have in the past barred) Paralympic athletes from receiving certain USOC benefits, such as grants, insurance and medal incentives. Plaintiff has argued above that these constitute a direct bar to athletes with disabilities, and thus facially discriminate against such athletes. Even if this Court should disagree, there can be no question that these criteria screen out or tend to screen out athletes with disabilities, that is, they "diminish such [athletes'] chances of participation." Given that no Paralympic athletes are eligible for these benefits, the chances of most disabled athletes qualifying for these benefits are next to zero.

In order for the USOC's discriminatory eligibility criteria to survive Plaintiff's challenge, the USOC must demonstrate that they are "necessary for the provision" of the benefits in question. 42 U.S.C. § 12182(b)(2)(A)(i).[30] The USOC has the burden of proof on the defense of necessity. See Colorado Cross Disability Coalition v. Hermanson Family Ltd. P'ship I, 264 F.3d 999, 1003 (10th Cir. 2001) (noting that "[s]everal district courts have placed the burden of showing that the eligibility criteria are necessary on the proponent of such criteria" and citing Hahn, 130 F. Supp. 2d at 1055, Bowers v. Nat'l Collegiate Athletic Ass'n, 118 F. Supp. 2d 494, 518 (D.N.J. 2000), and Guckenberger, 974 F. Supp. at 134)).

---

[30] Congress envisioned that the "necessity" defense would address those criteria that are "necessary for the safe operation of [the] business" and provided the example of a height limit for rides at an amusement park. H. R. Rep. No. 101-485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 388. Plaintiff has never heard the suggestion that -- and cannot imagine the circumstances in which -- provision of benefits to Paralympic athletes would threaten the safe operation of the USOC.

In light of the USOC's congressionally-mandated mission, denying benefits to Paralympic athletes is not, as a matter of law, necessary to the provision of the benefits and services in question. The USOC was created by Congress with, among others, the purposes of administering United States participation in the Paralympic Games, "obtain[ing] . . . the most competent amateur representation possible in each event" in the Paralympic Games, and "encourag[ing] and provid[ing] assistance to amateur athletic programs and competition for amateur athletes with disabilities." 36 U.S.C. § 220503(3)(A), (4) & (13). It cannot possibility be necessary to the achievement of these purposes to exclude America's most competent disabled athletes from the benefits at issue here. Thus, as a matter of law, not only are the USOC's discriminatory criteria not necessary, it is necessary to do away with these criteria in order truly to achieve all of the USOC's purposes.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court grant summary adjudication in his favor and find that the USOC is in violation of Title III of the ADA and Section 504 by

1. Providing grants to Olympic athletes for which Paralympic athletes are not eligible;
2. Providing Elite Athlete Health Insurance to Olympic athletes for which Paralympic athletes are not eligible;

3. Providing medal incentives to Olympic athletes that it (previously) did not provide to Paralympic athletes or (more recently) provides to Paralympic athletes in amounts one-tenth of the amounts provided Olympic athletes; and

4. Assigning Olympic athletes first priority, and Paralympic athletes third priority, in obtaining access to USOC training facilities.

Respectfully submitted,

FOX & ROBERTSON, P.C.

Amy F. Robertson
Timothy P. Fox
Fox & Robertson, P.C.
910 - 16th Street, Suite 610
Denver, CO 80202
303.595.9700

Darold Killmer
Killmer & Lane, LLP
1543 Champa Street, Suite 400
The Odd Fellows Hall
Denver, CO 80202
303.571.1000

Dated: September 18, 2002

Attorneys for Plaintiff