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,

Defendant.

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

Plaintiff Mark E. Shepherd, Sr., by and through his counsel, hereby submits this reply memorandum in support of his Motion for Partial Summary Adjudication ("Plaintiff's Motion").

Defendant United States Olympic Committee's ("USOC's") opposition to Plaintiff's Motion proceeds as if the world of sport were divided in two: Olympic athletes; and the rest. It thus treats elite Paralympic athletes as the legal equivalent of a group of guys playing pick-up basketball in a local gym. Because Congress has mandated that the USOC administer both the Olympics and the Paralympics and because the USOC itself describes the Paralympics as the equivalent of the Olympic Games for persons with disabilities, its discrimination against Paralympic athletes violates Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 et seq., and section 504 of the Rehabilitation Act ("Section 504"). 29 U.S.C. § 794.

1. The USOC's Premise that Olympic Athletes Are Superior to Paralympic Athletes Is Wrong and Reflects Their Discriminatory Stereotypes.

The USOC is statutorily charged with "exercis[ing] exclusive jurisdiction . . . over . . . all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games" and "support[ing] amateur athletic activities involving the United States and foreign nations." 36 U.S.C. § 220503(3)(A) & (5). Congress expressly defined "amateur athlete" to include both Olympic and Paralympic athletes. Id. § 220501(b). The USOC itself describes the Paralympics as "the equivalent of the Olympic Games for the physically challenged."[1] Paralympic athletes are highly-skilled elite athletes, equal to Olympic athletes in their talent, athleticism, desire and tenacity -- the values we cherish in our elite athletes.

Despite this express congressional mandate and its own recognition that the Paralympics are equivalent to the Olympics, the theme of the USOC's Response in Opposition to Plaintiff's Motion for Partial Summary Adjudication ("Def. Opp.") is that Olympic athletes are uniquely superior to all other athletes -- including Paralympic athletes -- and thus worthy of the USOC's exclusive support. The USOC asserts that "Olympic programming is denied to all but the most elite athletes," and implies that providing benefits to Paralympic athletes would undermine its "basic nature, character, [and] purpose," and "effectively eliminate selective criteria altogether." (Def. Opp. at 10, 11, 14.) In contrast to Olympic athletes, the USOC argues, Paralympic athletes are the equivalent of "junior athletes, senior athletes, national or university level athletes and

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[1] USOC 2000 Annual Report at 18 (DP767). (Declaration of Amy F. Robertson (filed Sept. 18, 2002) Ex.2.)

countless other athlete categories." (Id. at 9-10.)

These arguments -- far from justifying the USOC's discrimination -- reflect precisely the stereotypes the ADA and Section 504 were enacted to combat. See 42 U.S.C. § 12101(a)(7) ("Congress finds that . . . individuals with disabilities . . . have been faced with restrictions and limitations [and] subjected to a history of purposeful unequal treatment . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society"). The USOC's exclusion of Paralympians is based on the incorrect stereotype that they are not elite athletes of the same caliber as Olympic athletes. This is discrimination, in violation of the letter and spirit of the ADA.

The USOC also attempts to justify its exclusion of Paralympic athletes on the grounds that "the USOC's policies exclude most of the human population, irrespective of disability." (Def. Opp. at 12.) The universe at issue is not the entire human population, however; it is the universe of elite athletes for whom Congress has assigned the USOC responsibility, including both Olympic and Paralympic athletes. Under the USOC's rationale, it could provide benefits only to white Olympic athletes and argue that this did not discriminate against African-American Olympic athletes because most of the white population of the world would not qualify either.[2]

The USOC asserts that "Olympic programming is universally denied to all athletes

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[2] This is also the flaw in Defendant's proxy argument. It argues that the "classification at issue" is "Olympic caliber athlete" and not "Paralympian." (Def. Opp. at 12 n.6.) Within the relevant universe of elite athletes, however, whether one focuses on the included class -- Olympic athletes -- or the excluded class -- Paralympic athletes -- the discrimination is equally evident. "Olympic caliber athlete" is a proxy for elite non-disabled athlete and "Paralympic athlete" is a proxy for elite disabled athlete. Providing benefits to the former but not the latter is facial disability discrimination.

(disabled or otherwise) who are not of Olympic caliber," and specifically notes that Pan American athletes receive benefits inferior to those received by Olympic athletes. (Def. Opp. at 8, 10.) These assertions are misleading. The USOC's Resource Allocation Policy states that, "[p]articipation in Athlete Support Programs is available only to athletes who are eligible to represent the United States and who intend to compete, if selected, in the next Olympic or Pan American Games." (Def.'s Mot. for Summ. J., Ex. B at 1 (emphasis added).) The USOC provides Pan American athletes with the same grants and insurance it provides Olympic athletes but denies Paralympic athletes. (Id. at 3.) This is important because the USOC argues that Plaintiff is not seeking equal treatment, but rather "different or separate services."[3] (Def. Opp. at 9.) Yet the USOC provides precisely the same grants and insurance that Plaintiff now seeks to both Olympic and Pan American athletes within the same program. There would be nothing "different" or "separate" about providing those benefits to Paralympic athletes as well. The fact that there are some benefits that Olympic athletes receive but Pan American athletes do not[4] does

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[3] Defendant argues that "the ADA does not require the provision of different or separate goods or services." (Def. Opp. at 9.) This is inaccurate. The ADA explicitly anticipates that separate goods and services may be required to permit individuals with disabilities to enjoy certain benefits. 42 U.S.C. § 12182(b)(1)(A)(iii); see also Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F. Supp. 986, 991 (S.D. Fla. 1994) (citing the Title II regulation equivalent to § 12182(b)(1)(A)(iii) and holding that city could not cut recreation programs for individuals with disabilities, despite the fact that general recreation programs were technically open to all). Although Plaintiff does not believe it is necessary to rely on this provision -- as he is not seeking separate benefits -- even if the USOC were correct that providing the same benefits to Paralympic athletes would constitute a separate program, this provision would provide independent grounds on which to order the USOC to do so.

[4] Pan American athletes receive medal incentives of approximately the same magnitude as Paralympic athletes (compare Resource Allocation Policy at 6 with Stipulations

(continued...)

not excuse Defendant's discrimination: in contrast to Paralympic athletes, Pan American athletes do not belong to a protected class. For example, it does not appear to be the case that Pan American athletes are all Latino and Olympic athletes largely non-Latino. Disparities in treatment among non-protected classes do not violate civil rights laws.

Finally, the USOC suggests that Plaintiff's approach will require the National Football League and the Professional Golfers' Association to provide separate but equal programming for "any athlete who cannot qualify for their current programs." (Def. Opp. at 14.) Again, Plaintiff is not asking for equal programming for "any athlete who cannot qualify" for the Olympics; he is asking for such programming for a specific, congressionally-recognized set of elite athletes that the USOC itself acknowledges are equivalent to Olympic athletes. In any event, because neither the NFL nor the PGA was chartered by Congress and mandated to administer "Parafootball" or "Paragolf," the USOC's analogy fails.

2. The USOC's Attempts to Distinguish Plaintiff's Cases Are Unavailing.

Defendant attempts to avoid the consequences of its facially discriminatory policies by arguing that "with rare exception" Plaintiff relies on cases decided under the Fair Housing Act rather than the ADA or Section 504. (Def. Opp. at 10.) This selective reading overlooks most of Plaintiff's cases. For example, Plaintiff relied on Bay Area Addiction Research and Treatment, Inc. v. City of Antioch for the on-point holding that "facially discriminatory laws present per se violations" of the ADA. 179 F.3d 725, 735 (9th Cir. 1999) (cited in Pl. Mem. in Supp. of his

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[4](...continued)
¶ 8), and the USOC provides Pan American athletes with second priority for training facilities, whereas Olympic athletes get first priority and Paralympic athletes, third. (Def. Opp. at 10.)

Mot. for Partial Summ. Adjudication ("Pl. MPSA") at 12-13). He also provided ADA and Section 504 cases establishing the elements of a prima facie case. See Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir. 1999) (outlining prima facie case under Section 504); Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1085 (D. Haw. 2000)) (outlining prima facie case under Title III of the ADA); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001) (same). Finally, Plaintiff presented legislative history demonstrating that Congress intended to prohibit just the sort of exclusionary practices at issue here: "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. These authorities demonstrate conclusively that the USOC's policies constitute per se disability discrimination.[5]

The holding in Bangerter v. Orem City Corp. that Defendant disputes -- apparently on the grounds that Bangerter concerned the Fair Housing Act, (see Def. Opp. at 10) -- is that 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." 46 F.3d 1491, 1501 (10th Cir. 1995) (quoted in Pl. MPSA at 12). Establishing a prima facie case

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[5] Defendant also ignores the ADA cases Plaintiff cited in support of the proposition that, even if the USOC has not committed facial disability discrimination, its policies "screen out or tend to screen out" elite disabled athletes in violation of 42 U.S.C. § 12182(b)(2)(A)(i). See Hahn ex rel. Barta v. Linn County, 130 F. Supp. 2d 1036, 1055 (N.D. Iowa 2001); Bowers v. Nat'l Collegiate Athletic Ass'n, 118 F. Supp. 2d 494, 518 (D.N.J. 2000); Guckenberger v. Boston Univ., 974 F. Supp. 106, 134 (D. Mass. 1997), cited in Pl. MPSA at 16-17; see also id. at 8 & 9 n.22 (citing cases).

of discrimination by showing explicitly differential treatment of a protected group is hardly a controversial proposition. Bangerter's language closely tracks the statutory language at issue here: the ADA prohibits subjecting individuals with disabilities to a denial of opportunity and affording such individuals an opportunity that is not equal to that afforded others, that is, subjecting such individuals to differential treatment. 42 U.S.C. § 12182(b)(1)(A)(i) & (ii). The USOC has done just this, and is in violation of the ADA.

The USOC also asserts that Plaintiff has failed to show how the USOC's policy "is intended to or does disparately impact disabled athletes to a greater extent than it does non-disabled athletes." (Def. Opp. at 13.) Quite to the contrary, there is no dispute that the USOC intentionally treats Olympic athletes more favorably than Paralympic athletes. Where a policy discriminates on its face, the motive of its author is irrelevant. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).[6] Assuming, arguendo, that the USOC's exclusion of Paralympic athletes is a neutral policy, its effect is clearly to exclude elite disabled athletes. As the USOC concedes, "a wheelchair athlete is unlikely to qualify for the Olympics." (Def. Opp at 12.) Because the USOC has provided no evidence that its exclusionary policy is necessary to the provision of the benefits at issue, it is illegal under 42 U.S.C. § 12182(b)(2)(A)(i).

Finally, the USOC attempts to justify its discrimination on the grounds that many

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[6] The USOC asserts two of Plaintiff's cases are inapposite because they require a demonstration of the defendant's intent. (Def. Opp. at 13.) This is incorrect. Both cases make clear that, with respect to a facially discriminatory ordinance -- or one that discriminates by proxy -- motive and intent are irrelevant. Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057, 1073 (N.D. Ill. 1996); 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).

Paralympic athletes have achieved excellent results. (Def. Opp. at 14-15.) All this truly demonstrates is the exceedingly high level of dedication and sacrifice of those Paralympic athletes, making them perhaps more worthy of the title "elite" than their Olympic brothers and sisters. They achieved excellence while buying their own health insurance and working to provide the funding that Olympic grants provide elite non-disabled athletes, and they won medals with either no monetary incentives or (starting with the most recent Paralympics) incentives one-tenth the size of those offered Olympic athletes. The USOC's argument ignores the many elite disabled athletes screened out by its discrimination, athletes unable to raise their own funds or secure their own training time and thus denied the opportunity to excel. Discrimination occurs when equal opportunity is denied. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995) ("[I]njury in [discrimination] cases . . . is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing'") (quotation omitted). Excellent achievement by certain members of a protected class does not justify discrimination against the entire class.

3. This Court Has the Power to Resolve the Matters Raised in Plaintiff's Motion.

A. Defendant Has Waived Any Procedural Objection to Plaintiff's Motion.

Defendant explicitly agreed to the procedure it now challenges. The parties' cross motions on the issue of discrimination were the agreed-upon resolution of Plaintiff's ongoing efforts to get the USOC to produce documents related to his athletic claims, efforts that commenced with the service of discovery requests on November 16, 2001. The somewhat tedious history of Plaintiffs' efforts and the parties' negotiations is set forth in an accompanying

declaration. (Third Declaration of Amy F. Robertson ("Third Robertson Decl.") ¶¶ 2-10 & Exs. 1-29.) This process culminated with Defendant's signing of a Joint Motion for Briefing Schedule and to Extend Discovery (filed Aug. 22, 2002) ("Joint Motion"), which stated:

> Defendant does not contest that there are disparities in funding and support between Olympic and Paralympic athletes. Rather, it asserts that these disparities do not constitute illegal discrimination under the ADA or Rehabilitation Act. In light of this, the Parties have agreed to enter a series of stipulations concerning the USOC's funding and support and to submit cross-motions for summary judgment to the Court on the question whether these disparities constitute illegal discrimination. The Court's determination of that question will then guide the Parties in more limited discovery.

(Id. ¶ 3 (emphasis added).) The parties' correspondence makes clear that they contemplated reserving other disputed issues. (Third Robertson Decl. Exs. 9 & 28.) As part of this agreement, Plaintiff withdrew his Motion to Compel (filed May 29, 2002) and agreed to a stay of discovery on his athletic claims. (Joint Motion ¶ 5.) Defendant explicitly agreed to the procedure pursuant to which Plaintiff filed his Motion and Plaintiff relied on that agreement to his detriment. Defendant is estopped from objecting to the procedure.

B. Rule 56 Permits This Court to Rule on the Issue Raised in Plaintiff's Motion.

The parties agree that it would simplify the litigation and streamline discovery to resolve the legal question whether the USOC engages in illegal disability discrimination when it provides benefits to Olympic athletes that it does not provide to Paralympic athletes. (See Pl. MPSA at 5-8; Joint Motion ¶ 3.) Plaintiff filed a motion for partial summary adjudication to accomplish this agreed-upon goal. This Court has a number of procedural routes by which it can rule on this question, including, but not limited to, granting Plaintiff's Motion.

As this Court held in Cook v. Rockwell International Corp., "'[a] partial summary

judgment ruling may dispose of only a single issue relevant to a claim. . . . In availing itself of the ability granted by Rule 56 to issue orders which resolve significant questions, a court can focus the litigation on the true matters in controversy.'" 181 F.R.D. 473, 486 n.13 (D. Colo. 1998) (ellipses in original) (quoting 11 J. Moore, Moore's Federal Practice ¶ 56.40[2] at 56-280 to 56-281 (3d ed. 1998)). In that case, the plaintiffs had moved for summary judgment on three issues, none of which would have fully resolved a claim in the litigation. This Court -- citing to Rules 56(a) and 56(d) -- "reject[ed] Defendants' argument that Plaintiffs' motion [was] procedurally defective in that . . . it [did] not seek to resolve any single claim in the lawsuit in its entirety." Id. Through the parties' motions here, this Court has the opportunity to resolve a significant question and focus the litigation on the true matters in controversy. This would accord with the duty to construe the Federal Rules of Civil Procedure so as "to secure the just, speedy, and inexpensive determination" of this case. Fed. R. Civ. P. 1.

Defendant argues that it is inappropriate to bring an independent motion under Rule 56(d). Plaintiff concedes that courts are split on this question. See Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc., No. C-93-20853 RMW, 1995 WL 419747, at *2-4 (N.D. Cal. Jul. 10, 1995) (Third Robertson Decl. Ex. 30) (discussing split and concluding that considering partial summary judgment on the issue of patent infringement was appropriate). However, even if Defendant is correct, Plaintiff's Motion is not moot:

- Defendant asserts that "Rule 56(d)'s issue-narrowing provision operates only in the wake of a proper, but unsuccessful motion for summary judgment." (Def. Opp. at 3.) According to this approach, this Court may deny Defendant's motion

for summary judgment and rule in Plaintiff's favor on the issue raised in his Rule 56(d) motion in the wake of that denial.

- This Court may construe Plaintiff's Motion as a motion for partial summary judgment pursuant to Rule 56(a) and -- in accord with Defendant's approach quoted above -- resolve the issue he raised either pursuant to that Rule or Rule 56(d). See, e.g. Americans Disabled for Accessible Pub. Transp. (ADAPT) Salt Lake v. Skywest Airlines, Inc., 762 F. Supp. 320, 323 (D. Utah 1991) (granting partial summary adjudication pursuant to Rule 56(d)).
- This Court may enter summary judgment (or partial summary adjudication) against the USOC sua sponte on the issue raised in Plaintiff's motion, as it has been fully briefed by both parties. See, e.g., Howell Petroleum Corp. v. Leben Oil Corp., 976 F.2d 614, 620 (10th Cir. 1992) (holding court may grant summary judgment sua sponte if the losing party is on notice).

As the Advanced Semiconductor court noted, "the purpose of summary judgment is met when the summary adjudication of preliminary issues . . . helps to focus the issues to be litigated, thus conserving judicial resources." 1995 WL 419747, at *4.

C. Granting Plaintiff's Motion for Partial Summary Adjudication Would Not Constitute an Advisory Opinion.

Both parties agree that the question whether the USOC discriminates in denying benefits to Paralympic athletes is central to resolution of this case. They also agree that Plaintiff is a Paralympic caliber athlete who is not eligible to apply for the USOC's Olympic programming. (Def's. Mot. for Summ. J. at 8.) As such, the ruling Plaintiff requests could not possibly be

farther from an advisory opinion or one based on hypothetical facts.

Several of Defendant's arguments to the contrary are particularly baffling. For example, the USOC specifically agreed that the question of disability discrimination should be put before the Court while reserving the question whether the USOC is a place of public accommodation. (See Third Robertson Decl. ¶ 9 & Ex. 28.) Yet it now argues that "[i]f the USOC's Olympic programming were ultimately found not to be a place of public accommodation," then the Plaintiff's requested ruling would be advisory only. (Def. Opp. at 5.)

The USOC also argues that Plaintiff has no standing to raise the question of discrimination. Again, this is a question that Defendant agreed to reserve. (See Third Robertson Decl. ¶ 7 and Ex. 9.) Defendant is, in any event, wrong. Plaintiff has stated that he is training for the 2004 Paralympics, (Declaration of Mark E. Shepherd, Sr. ¶ 5 (filed Sep. 18, 2002)), and Defendant has introduced no evidence to the contrary. Because discrimination inheres in the denial of opportunity, not the absence of a particular result, Plaintiff has standing to challenge the USOC's denial of the opportunity to compete for Project Gold medal incentives, to obtain priority in use of training facilities or to obtain other benefits. See, e.g., Adarand, 515 U.S. at 211. Plaintiff has standing to challenge the USOC policy that makes him ineligible for the benefits it provides to Olympic athletes.

CONCLUSION

For the reasons set forth above and in Plaintiff's Memorandum in Support of his Motion for Partial Summary Adjudication, Plaintiff respectfully requests that this Court grant his Motion and hold that the USOC's policy excluding Paralympic athletes from certain benefits constitutes

facial disability discrimination in violation of 42 U.S.C. § 12182(b)(1)(A)(i) & (ii) or, in the alternative, that it screens out elite athletes with disabilities, in violation of § 12182(b)(2)(A)(i)

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Dated: October 16, 2002

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Certificate of Service

I hereby certify that on October 16, 2002, copies of Plaintiff's Reply Memorandum in Support of His Motion For Partial Summary Adjudication and Third Declaration of Amy F. Robertson, were served by first-class mail, postage prepaid, on:

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