Civil Action No. 96-WY-2493-AJ

COLORADO CROSS DISABILITY COALITION and KEVIN WILLIAMS,

Plaintiffs,

V.

HERMANSON FAMILY LIMITED PARTNERSHIP I,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON PLAINTIFF'S LACK OF STANDING

The defendants' Motion for Summary Judgment Based on Plaintiff's Lack of Standing, filed by defendant Hermanson Limited Partnership I ("Hermanson"), Ann Taylor, Inc. ("Ann Taylor") and Nine West Group, Inc. ("Nine West"), and the plaintiff's response thereto came before the Court for consideration. The Court, having considered the motion and the plaintiffs response, the submissions of the parties, the applicable law, the pleadings of record, and being fully advised in the premises, FINDS and ORDERS as follows:

Background

Earlier in this litigation, this Court entered its Order Denying Motions to Dismiss. Much of the background of the case is described in that order.

In the pending motion for summary judgment based on

plaintiff's lack of standing, defendants contend that plaintiff Kevin Williams has suffered no actual injury and that his potential future injury is merely conjectural. Plaintiff opposes the motion.

Plaintiff uses a power wheelchair for mobility due to a spinal cord injury. In October of 1996, plaintiff Williams visited Larimer Square with a friend, with the intention of surveying which buildings were or were not accessible to him in his wheelchair. The four buildings that are at issue in this case had either one or two stairs at their front entrances which precluded plaintiff from gaining access to those businesses. There were no other means of access into the buildings that were available to wheelchair users. Plaintiff has been to Larimer Square many times in the past and intends to go there in the future. Plaintiff indicated that he does Christmas shopping in Larimer Square and would be doing so again in the future.

Defendant has contended that plaintiff, who had never attempted to go into the buildings that are the subject of this suit prior to October of 1996, has no specific plans to enter those places in the future. Defendants also note that both Nine West and Ann Taylor have other stores that are wheelchair accessible in the Denver area, including the stores located in Cherry Creek and Park Meadows malls. Defendants also note that plaintiffs home is, in fact, closer to the Cherry Creek Mall

than to Larimer Square.

In their motion, defendants argue that plaintiff has failed to prove that he has suffered an injury, as is required by Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Defendants assert that the future harm contemplated by the standing requirements enunciated by the Supreme Court must be imminent and likely, not merely hypothetical or possible. Defendants claim that plaintiffs allegations that he will some day or will in the future return to Larimer Square and these stores is not sufficient to establish the imminent injury required by federal standing precedent. They also argue plaintiff is unable to show irreparable injury necessary for injunctive relief. Defendants also urge this Court to find that the same standing requirements of federal law will obtain under the Colorado Anti-Discrimination Act claims, C.R.S. 5 24-34-601 et seq. Defendants claim plaintiff has suffered no injury in fact and that he has not been denied access to any goods or services he sought.

Plaintiff has opposed the defendants' standing motion and argues that his case is about injuries to the legally protected right to be free from discrimination on account of disability, a right protected by Title III of the Americans with Disabilities Act (ADA) The right that is protected by the ADA is the right to the full and equal enjoyment of the goods, services, and

facilities of the public accommodations at issue in this case. Plaintiff argues that he need only show that he has a reasonable desire to enter the stores at- issue which has been frustrated by defendants, discriminatory conduct. He has been to Larimer Square countless times and plans to be there many more times in the future. When he goes there, he shops and browses in stores that are accessible and eats at restaurants and plans to do so in the future.

Plaintiff argues that the ADA does not require persons with disabilities to engage in futile gestures to obtain injunctive relief barring discriminatory conduct and that he is not required to plan specifically to shop at stores that are inaccessible. He asserts that the defendants' argument that he can shop at other Nine West and Ann Taylor stores in the Denver area is erroneous, in that the ADA is not merely a guarantee that disabled persons have a right to make purchases at some place within a given greater metropolitan area. Rather, the ADA guarantees the full and equal enjoyment, not just the right to purchase, of all places of public accommodation, not just of chains of businesses or specific categories of stores.

Standard of Review
Motions for Summary Judgment

Pursuant to Fed. R. Civ. P. 56 (c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits on file, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law." The moving party has the burden of showing the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party's burden may be met by identifying those portions of the record demonstrating the absence of a genuine issue of material fact. Celotex Co=. v. Catrett, 477 U.S. 317 (1986) . In determining whether these burdens have been met, the court is required to examine all evidence in the light most favorable to the non-moving party. Barber v. General Electric Co., 648 F.2d 1272 (10th Cir. 1981).

Once the moving party has met its initial burden, the burden shifts to the party resisting the motion. That party must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Manders v. Oklahoma ex rel. Dept. of Mental Heallt*-h, 875 F.2d 263, 265 (10th Cir. 1989) citing Celotex, 477 U.S. at 325.

Discussion

The parties agree that the three-part test for standing to be applied in this case is set out in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992):

> First, the plaintiff must have suffered an “injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, - - . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not th[e] result [of] the independent act of some third party not before the court." . . . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Lujan v. Defenders of Wildlife, 112 S.Ct. at 2136 (citations omitted). Plaintiff has the burden of establishing that he has standing to raise the claims asserted. Id.

The goal of the ADA is to ensure that public accommodations are readily accessible to persons with disabilities, including those persons who utilize wheelchairs for mobility. 42 U.S.C. 12182 provides, in part:

> (a) General rule
>
> No individual shall be discriminated against on the basis of disability 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. 5 12188(a) provides in part:

> (1) Availability of remedies and procedures
>
> The remedies and procedures set forth in section 2000e-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.
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> * * * *

It is undisputed that the facilities at issue in this case are not accessible to those who use wheelchairs for mobility because of the presence of stairs in front of the store entrances and the absence of alternative entrances or other means of access to the stores, such as ramps. There are factual disputes, however, about whether the facilities at issue in this case may be made readily accessible to and usable by individuals with disabilities and whether that accessibility is readily achievable.

The plaintiff has, in the opinion of this Court, satisfied the burden required of him under the three part test enunciated in Lujan v. Defenders of Wildlife. He has undoubtedly suffered an injury in fact which is concrete and particularized and actual or imminent and not conjectural or hypothetical.

Plaintiff has personally experienced an inability to gain access to the premises at issue in this case. The injury to plaintiff is caused by the presence of the stairs precluding access to the businesses. A favorable decision would serve to redress any injuries caused by violation of the statute.

The plaintiffs injury is not, as defendants have contended, merely a speculative injury. The Court does not believe that the fact that plaintiff had not attempted to enter the stores at issue in this case prior to his October 1996 trip to Larimer Square is dispositive. Nor is the Court persuaded that plaintiffs plans to shop in the future at Larimer Square render his injury "conjectural" as the defendants have argued. Shopping is one of the great American pastimes. People browse in shops and shopping areas, see what is available and make purchases if something catches their fancy. There simply is no requirement in the ADA that a person desiring entrance into a place of public accommodation have a specif **ic desire to make a purchase at that particular business, as defendants' arguments intimate.

The defendants have argued that plaintiffs trip to Larimer Square was not triggered by a desire to shop in the businesses there, but was rather driven by a desire to ferret out which buildings were in violation of the ADA's accessibility requirements. They argue he was acting as a "tester" and that

this status requires the Court to determine that plaintiff does not have standing. The defendants cite Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268 (D.C.Cir. 1994), in support of their position.

In that case, the plaintiffs were black fair employment testers who were posing as job applicants. They worked as "testers" for the Fair Employment Council of Greater Washington. In 1990, plaintiffs, who were black, were paired with white testers who also worked for the Council. The two pairs of testers, on successive days, equipped with comparable fake credentials, sought employment referrals from the defendant, BMC Marketing Corporation, which ran an employment agency in the District of Columbia. Both times, the white tester received a referral and the black tester did not. Allegedly the employment agency even refused to accept an application from one of the two black testers.

On the basis of these tests, the black testers and the Fair Employment Counsel of Greater Washington sued BMC, alleging that it had a pattern, practice, and policy of employment discrimination on the basis of race, violations of 42 U.S.C. @ 1981 and 42 U.S.C. 5 2000e, and a local statute. BMC moved to dismiss for lack of standing. The court determined that the individual testers could not maintain their suit. The court stated that neither of the federal statutes invoked by the

plaintiffs gave a cause of action for damages and the plaintiffs lack standing to seek other forms of relief. Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d at 1270. The court determined that @ 1981 did not provide a cause of action to the plaintiffs. 42 U.S.C. @ 1981 gives all citizens of the United States the "same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." Plaintiffs asserted that BMC violated their rights under 5 1981 by (1) depriving them of the opportunity to enter into contracts with BMC for employment referrals, and (2) by depriving them of the opportunity to enter into employment contracts on referral by BMC. The court determined these assertions did not state valid claims for relief under 5 1981, because "the testers made conscious and material misrepresentations of fact by deceiving BMC about their intentions and by presenting BMC with fictitious credentials, which would have caused any resulting contract to be voidable at BMC's option. We conclude, therefore, that the loss of the opportunity to enter into a contract voidable at the other party's will is not cognizable under § 1981." Id. at 1270-1271.

The court compared § 1981 to provisions of the Fair Housing Act which had been found to confer upon tester-plaintiffs an enforceable right, citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) Id. at 1271.

The applicable Fair Housing Act provisions, in § 804 (d), made it unlawful to "represent to any person because of race . . . that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available," rights enforceable by civil actions in district courts. The circuit court distinguished Havens, by stating that "[u]nder these statutory provisions, it did not matter that the testers merely posed as potential renters or purchasers; regardless of their intentions, the statute gave them 'an enforceable right to truthful information concerning the availability of housing.'" Fair Employment Council of Greater Washington v. BMC Marketing Corp., at 1271 (most citations omitted).

In Fair Employment Council of Greater Washington v. BMC Marketing, Inc., the court also considered arguments relating to plaintiffs' standing to seek injunctive relief and arguments relating to future injuries as a result of future violations of plaintiff's rights. In the complaint, the court determined that the testers had not "even come close to alleging that they will suffer any future illegality at BMC's hands." Id. at 1273. The testers had sought referrals on the basis of their fictitious credentials and misrepresentations about desires for jobs. The plaintiffs did not allege the tester plaintiffs were ever likely to return to BMC seeking employment referrals or that they would do so at any point in the reasonably near future. There was no

suggestion whatsoever that the tester plaintiffs would ever "re-initiate contact" with BMC. The court determined that "the facts as alleged in the complaint do not come close to indicating that either tester 'will again be subjected to the alleged illegality.'" Id, at 1274.

The Tenth Circuit has also considered standing issues in a recent case, Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590 (10th Cir. 1996). In that case, the circuit court reviewed claims under the Fair Housing Act brought by plaintiffs who were nonstudents against landlords, alleging violations of that Act for advertising and rental of gender-segregated student apartments. The circuit court did not reach the merits of nonstudent plaintiffs, claims because it concluded "that plaintiffs lacked standing to bring the gender discrimination claims." Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d at 592. The Tenth Circuit stated:

> Plaintiffs claiming discrimination in the denial of a benefit need not show that they would have obtained the benefit in the absence of the discrimination to establish standing; it is enough to show the discrimination deprived them of the ability to compete for the benefit on an equal footing . . . . However, a person who fails to satisfy lawful, nondiscriminatory requirements or qualifications for the benefit lacks standing to raise claims of discrimination in the denial of the benefit. The discrimination does not deprive the person of the ability to compete because he or she is disqualified from competing for other, legitimate reasons. A favorable decision on the discrimination claim could not redress the injury because the person would still be disqualified from competing. "[A] mere abstract

> denial of equal opportunity does not constitute injury in fact. A general denial of equal opportunity does not confer standing on a particular individual unless that individual would have had access to the benefit at stake in the absence of discrimination."..... Discrimination cannot be the cause of injury to an applicant who could not have obtained the benefit even in the absence of he discrimination.
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> Id. at 594 (citations omitted).

The Court has reviewed the cases submitted by the parties in support of their respective positions. The Court finds that the plaintiff has standing to raise the issues that confront the Court in this ADA case. Plaintiff has suffered, and will suffer in the future if the discrimination on the basis of disability is not redressed, an injury-in-fact that is not hypothetical or speculative. Plaintiff, although arguably a tester in October of 1996, will still confront the architectural barriers that preclude him from gaining access to the public accommodations at issue. As an individual required to utilize a wheelchair for mobility, the Court finds that it is enough that plaintiff show the discrimination on the basis of disability has deprived him of the ability to gain access to the public accommodations and that a failure to redress the injury will continue to deprive him of access to those facilities in the future. It is not necessary that plaintiff have specific plans to shop at any of the four shops at any specific date. His averments that he intends and plans to shop in Larimer Square are sufficient for purposes of this motion to support a determination that

plaintiff has standing. The presence of the stairs demonstrates that the buildings are not readily accessible to those in wheelchairs, a group that includes plaintiff all of the time in all circumstances. The Court finds that the legislative purposes underlying the enactment of the ADA will be fulfilled if the plaintiff is permitted to pursue this cause of action.

The Court rejects the defendants' contention that the existence of other Nine West or Ann Taylor stores that may be wheelchair accessible requires the Court to conclude that plaintiff has no cause of action under the ADA. The Court believes that the ADA's directives regarding public accommodations require considering on a facility-by-facility basis whether a place of public accommodation has complied with the provisions of the ADA. The Court was unable to discover any law that suggests the ADA should be interpreted otherwise. It is specious to assume that the existence of another store or branch of a business, operating under the same name in more than one location, will always act to satisfy the ADA's requirements regarding places of public accommodation.

The Court further finds that plaintiff has standing to seek damages under the Colorado Anti-Discrimination Act, C.R.S. 55 2434-601 and -602 because he claims to have suffered in the past an injury to the rights protected by that statute. C.R.S. 5 24-34 601(2) provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation[.]

The Court finds that the plaintiff's allegations are sufficient to overcome the defendants' assertions that plaintiff Williams does not have standing to seek damages under Colorado's statutory scheme. Plaintiff may seek damages, pursuant to C.R.S. § 24-34-602, for the violation of C.R.S. 5 24-34-601, causing the injury he alleges.

Accordingly, and for the foregoing reasons, it is therefore

ORDERED that the "Defendants' Motion for Summary Judgment Based on Plaintiff's Lack of Standing" shall be, and is, **DENIED.**

Dated this fifth day of August 1997.

Alan B. Johnson

UNITED STATES DISTRICT JUDGE

BY DESIGNATION