

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.

SECOND AMENDED COMPLAINT

Plaintiff Mark E. Shepherd, by and through his attorneys, Fox & Robertson, P.C., and Miller, Lane, Killmer & Greisen, LLP, hereby bring this Second Amended Complaint against Defendant United States Olympic Committee (“USOC”) for violation of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act and for breach of contract or promissory estoppel.

Jurisdiction

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343 and 1367.
2. Venue is proper within this District pursuant to 28 U.S.C. § 1391.
3. A charge of employment discrimination on the basis of disability was filed with the Equal Employment Opportunity Commission (“EEOC”), within 180 days of the commission

of the unlawful employment practice alleged herein. The claims related to retaliation are like or related to the original EEOC charge and/or arise out of the allegations contained in that charge.

4. The EEOC issued a Notice of Right to Sue on October 25, 2000 and a Dismissal and Notice of Rights on November 14, 2000. All administrative prerequisites to the bringing of this action have been met.

Parties

5. Plaintiff Mark E. Shepherd is and was at all times material hereto a resident of Colorado. As a result of a spinal cord injury, Mr. Shepherd is substantially impaired in several major life activities including but not limited to walking and requires manual a wheelchair for mobility. He has a record of such impairments and is regarded by Defendant as having such impairments.

6. Defendant USOC is a federally chartered corporation, 36 U.S.C. § 220502(a), registered to do business in the State of Colorado with its principal place of business in Colorado Springs, Colorado.

Facts

7. Defendant USOC has “exclusive jurisdiction, directly or through constituent members of committees, 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 the organization of the Olympic Games, the Paralympic Games, and the Pan-American Games when held in the United States.” 36 U.S.C. § 220503(3).

8. The USOC is charged with “obtain[ing] for the United States, directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each event of the Olympic Games [and] the Paralympic Games” 36 U.S.C. § 220503(4).

9. One of the USOC’s purposes is “to foster the development of amateur athletic facilities for use by amateur athletes and assist in making existing amateur athletic facilities available for use by amateur athletes.” 36 U.S.C. § 220503(9).

10. Another of the USOC’s purposes is “to encourage and provide assistance to amateur athletic programs and competition for amateur athletes with disabilities, including, where feasible, the expansion of opportunities for meaningful participation by such amateur athletes in programs of athletic competition for able-bodied amateur athletes.” 36 U.S.C. § 220503(13).

11. The USOC serves as the United States Paralympic Committee and is so recognized by the International Olympic Committee. United States Paralympic athletes are under the jurisdiction of the USOC.

12. Pursuant to this authority, the USOC controls many aspects of Olympic and Paralympic organization, administration, housing, training, and competition in the United States, including but not limited to managing, regulating and/or controlling the conditions of such organization, administration, housing, training, and competition. As such, the USOC operates the places of public accommodation where such organization, administration, housing, training, and competition take place.

13. The USOC operates and, on information and belief, owns several places of public accommodation, including but not limited to the Colorado Springs Olympic Training Center in Colorado Springs, Colorado, the Lake Placid Olympic Training Center in Lake Placid, New York, and the ARCO Olympic Training Center, in Chula Vista, California.

14. Plaintiff Shepherd is an elite wheelchair basketball athlete. He can compete in elite wheelchair athletic events with and/or without reasonable accommodation. As such, he is a qualified individual with a disability as that term is used in 29 U.S.C. § 794.

15. Plaintiff competed in the 1996 Paralympic Games in Atlanta, Georgia and the 1998 World Championships in Sydney, Australia.

16. Since 1998, he has continued to compete as an elite athlete for the National Wheelchair Basketball Association (“NWBA”). He was invited to attend the 2000 Paralympic trials in 1999 but did not attend because of resistance and lack of support from the USOC.

17. He is currently competing for a space on the 2002 men’s wheelchair basketball world championship team and is identified as an elite athlete by Wheelchair Sports USA and the NWBA.

18. The USOC discriminates, directly and indirectly, against athletes with disabilities, including Mr. Shepherd, and the organizations that represent them. This discrimination includes but is not limited to that discussed in this Second Amended Complaint.

19. The USOC provides certain goods, services, facilities, privileges, advantages, and accommodations to non-disabled amateur athletes that it either does not provide to amateur athletes with disabilities, including Mr. Shepherd, or provides to such athletes in inferior

quantities, manners and/or forms. These include but are not limited to tuition assistance and other financial support both for individual athletes, programs and organizations as well as medical insurance, eligibility for the Resident Athlete Program and other goods, services, facilities, privileges, advantages, and accommodations.

20. The USOC provides goods, services, facilities, privileges, advantages, and accommodations to organizations representing non-disabled athletes that it either does not provide to organizations representing amateur athletes with disabilities or provides to such organizations in inferior quantities, manners and/or forms.

21. The USOC improperly segregates athletes with disabilities, including Mr. Shepherd, and the organizations that represent them from non-disabled athletes and the organizations that represent them.

22. The USOC refuses to make reasonable modifications in policies and procedures that are necessary to afford its goods, services, facilities, privileges, advantages, or accommodations to athletes with disabilities, including Mr. Shepherd, and the organizations that represent them.

23. The USOC imposes and applies eligibility criteria that screen out or tend to screen out athletes with disabilities, including Mr. Shepherd, and the organizations that represent them from fully and equally enjoying its goods, services, facilities, privileges, advantages, and accommodations.

24. The USOC provides athletes with disabilities, including Mr. Shepherd, and the organizations that represent them with goods, services, facilities, privileges, advantages, and

accommodations that are different or separate from those provided to other individuals and organizations but that are not as effective as those provided to other individuals and organizations.

25. The disparities, segregation, criteria, policies, practices and procedures referred to in this Second Amended Complaint constitute discrimination based on disability.

26. Defendant's discrimination has caused, and will continue to cause, injury to Mr. Shepherd, including but not limited to the fact that he receives inferior support and incentives in his training program, must spend money out of pocket for benefits provided to non-disabled athletes, and is otherwise impeded in his opportunity to advance and compete on the level of an elite athlete.

27. From September 6, 1994 to May 8, 2001, Mr. Shepherd was employed by the USOC as Manager of Disabled Sports Services. He was employed by the USOC pursuant to an employment contract.

28. In his position as Manager of Disabled Sports Services, Mr. Shepherd's duties included but were not limited to promoting awareness of disabled sports and policies with respect to disabled sports, advising and assisting the USOC on matters pertaining to international issues in disabled sports, attending and participating in disabled sporting events and serving as liaison to various disabled sports organizations.

29. Plaintiff was and is qualified for this position and other positions in that he could and can perform their essential functions with and/or without reasonable accommodation.

30. The USOC intentionally discriminated and retaliated against Plaintiff. These acts of discrimination and retaliation include but are not limited to those described in this Second Amended Complaint.

31. The USOC failed and refused to provide Plaintiff with pay, advancements, bonuses, budgeting and support staff equal to similarly situated non-disabled employees of the USOC. For example, the USOC did not afford Mr. Shepherd perquisites equivalent to those provided similarly-situated non-disabled employees and removed him from the Senior Staff listing following the initiation of the present lawsuit.

32. The USOC failed and refused to promote Plaintiff, who was the only employee with a visible disability on the Senior Staff, to a position comparable to the able-bodied members of the Senior Staff and refused Plaintiff access to Senior Staff meetings.

33. The USOC failed and refused to make reasonable accommodations for Mr. Shepherd's known physical limitations.

34. The USOC has retaliated and continues to retaliate against Mr. Shepherd for his activities in opposing acts and practices illegal under the Americans with Disabilities Act and because he filed the present claims and otherwise assisted and participated in proceedings under the Americans with Disabilities Act.

35. The USOC has coerced, intimidated, threatened, and/or interfered (and continues to coerce, intimidate, threaten and/or interfere) with Mr. Shepherd in the exercise and/or enjoyment of, and/or on account of his having exercised or enjoyed, and/or on account of his

having aided or encouraged any other individual in the exercise or enjoyment of, rights granted and/or protected by the Americans with Disabilities Act.

36. The USOC's discrimination culminated in its discriminatory and retaliatory termination of Mr. Shepherd on May 8, 2001.

37. Pursuant to its agreement with Mr. Shepherd, the USOC promised that Mr. Shepherd would be permitted to train for and participate in national and international wheelchair basketball competitions during working hours and continue to receive compensation from the USOC for such time.

38. The USOC breached this agreement by not permitting Mr. Shepherd to be compensated for any such time.

39. As such, the USOC breached its agreement with Mr. Shepherd and did not fulfil its promise to him.

40. Mr. Shepherd performed and worked for the benefit of USOC during sporting events without consideration from USOC.

41. Defendant's discrimination, breach of contract and/or breach of its legally enforceable promise to Mr. Shepherd has caused, and will continue to cause, injury to Mr. Shepherd, including but not limited to lost wages, benefits and employment opportunities, pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

Count I: Violation of Title I of the Americans with Disabilities Act

42. Plaintiff realleges and incorporates by reference the allegations set forth in this Second Amended Complaint as if fully set forth herein.

43. The USOC employs more than 15 employees and is therefore an “employer” as that term is defined in 42 U.S.C. § 12111(5)(A). On information and belief, the USOC has -- and has had at all times relevant to the litigation -- more than 500 employees.

44. For reasons including but not limited to those described in this Second Amended Complaint, the USOC has discriminated and continues to discriminate and retaliate against Mr. Shepherd because of his disability in regard to hiring, advancement, discharge, compensation, and other terms, conditions and privileges of employment in violation of in violation of Title I of the Americans with Disabilities Act, 42 U.S.C. § 12111 *et seq.*, and its implementing regulations.

45. Plaintiff has been and continues to be damaged by the USOC’s discrimination and retaliation in regard to hiring, advancement, discharge, compensation, and other terms, conditions and privileges of employment.

46. In violating the Americans with Disabilities Act, Defendant acted intentionally and with malice and/or reckless, callous and/or deliberate indifference to Plaintiff’s federally protected rights. Plaintiff is therefore entitled to compensatory and punitive damages pursuant to 42 U.S.C. § 12117.

Count II: Violation of Title III of the Americans with Disabilities Act

47. Plaintiff realleges and incorporates by reference the allegations set forth in this Second Amended Complaint as if fully set forth herein.

48. For reasons including but not limited to those described in this Second Amended Complaint, the USOC owns, operates, leases and/or leases to places of public accommodation.

49. For reasons including but not limited to those described in this Second Amended Complaint, the USOC has discriminated and continues to discriminate against Mr. Shepherd on the basis of his disability in the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq., and its implementing regulations.

50. Plaintiff has been and continues to be damaged by the USOC's discrimination on the basis of disability in the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations, making prospective, injunctive relief appropriate pursuant to 42 U.S.C. § 12188.

Count III: Violation of The Rehabilitation Act

51. Plaintiff realleges and incorporates by reference the allegations set forth in this Second Amended Complaint as if fully set forth herein.

52. The USOC and its programs and activities receive -- and have received at all times relevant to the litigation -- federal financial assistance as that term is used in 29 U.S.C. § 794.

53. For reasons including but not limited to those described in this Second Amended Complaint, the USOC has excluded Plaintiff from participation in, denied him the benefits of, and subjected him to discrimination in employment, programs and activities solely by reason of his disability in violation of 29 U.S.C. § 794 and its implementing regulations.

54. Plaintiff has been and continues to be damaged by the USOC's exclusion, denial and discrimination referred to in this Second Amended Complaint.

55. In violating the Rehabilitation Act, Defendant acted intentionally, maliciously, and/or with reckless, callous and/or deliberate indifference to Plaintiff's federally protected rights.

Count IV: Breach of Employment Contract or, in the Alternative, Promissory Estoppel

56. Plaintiff realleges and incorporates by reference the allegations set forth in this Second Amended Complaint as if fully set forth herein.

57. Mr. Shepherd was employed by the USOC pursuant to an agreement the terms of which that took both written and oral form. Pursuant to this agreement, the USOC offered Mr. Shepherd employment on terms that included but were not limited to permitting Mr. Shepherd to train for and participate in athletic competitions on company time.

58. Mr. Shepherd accepted the USOC's offer to allow him to complete on company time and was employed by the USOC pursuant to this agreement and promise.

59. The USOC breached that agreement by refusing to permit Mr. Shepherd to train for or participate in athletic competitions on company time.

60. The USOC promised that Mr. Shepherd could train for and participate in athletic competitions on company time as part of his employment with the USOC.

61. The USOC should reasonably have expected that this promise would induce Mr. Shepherd to accept employment and to anticipate being able to train for and participate in athletic competitions on company time.

62. Mr. Shepherd reasonably relied on the USOC's promise to his detriment, including foregoing other employment.

63. Mr. Shepherd has been harmed by the USOC's breach of contract and failure to abide by its promise.

64. Injustice can be avoided only by enforcement of USOC's promise.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays:

1. That this Court assume jurisdiction;
2. That this Court declare the actions of Defendant USOC described in this Second Amended Complaint to be in violation of Titles I and III of the Americans with Disabilities Act and the Rehabilitation Act and to constitute breach of contract or breach of a legally enforceable promise.
3. That this Court award Mr. Shepherd damages for backpay, front pay, benefits and other compensation in an amount to be proved at trial;
4. That this Court award Mr. Shepherd compensatory damages in an amount to be proved at trial;
5. That this Court award Mr. Shepherd punitive damages in an amount commensurate with Defendant's ability to pay and sufficient to deter future illegal conduct;
6. That this Court enter an injunction ordering Defendant to provide him full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations in a

fashion to be specified following trial and award any further injunctive or equitable relief allowed by law;

7. That this Court award Mr. Shepherd his reasonable attorneys' fees and costs; and

8. That this Court award such additional or alternative relief as may be just, proper and equitable.

JURY DEMAND: Plaintiff demands a jury on all issues which can be heard by a jury.

Respectfully submitted,

FOX & ROBERTSON, P.C.

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

Darold Killmer
Paula Greisen
Andrea Faley
Miller, Lane, Killmer & Greisen, LLP
730 17th Street, Suite 600
Denver, CO 80202
303.534.6400

Attorneys for Plaintiff

Dated: October 9, 2001

Address of Plaintiff Mark E. Shepherd:

8418 Winncrest Lane
Colorado Springs, CO 80920