IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	§	
Plaintiff,	§	
vs.	§	Civil Action # H-00-3390
HOUSTON AREA SHEET METAL JOINT APPRENTICESHIP COMMITTEE,	§	
Defendant.	§	

ORDER

Pending before the Court is The Apprenticeship Committee's Motion for Summary Judgment (Document #34). Having considered the motion, submissions, and applicable law, the Court determines that the motion for summary judgment should be denied.

I. INTRODUCTION

Plaintiff, the Equal Employment Opportunity Commission ("the EEOC"), brought the instant suit against Defendant, Houston Area Sheet Metal Joint Apprenticeship Committee ("the Committee"), for alleged violations of Title I of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12117(a) ("the ADA").[1] The

[1] The EEOC also invokes the Court's jurisdiction pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) and (3) and the Civil Rights Act of 1991, 42 U.S.C. §

#52

EEOC alleges that the Committee violated the ADA by refusing to allow Thumas Lee entry into its apprenticeship program in 1996 and 1999 because of his disability. Lee is deaf and unable to speak. The EEOC also contends that the Committee relied upon physical qualifications that have the effect of discrimination on the basis of disability. The Committee now moves for summary judgment on the EEOC's claims.

II. FACTUAL BACKGROUND

The Committee exists pursuant to a Taft-Hartley trust agreement between Sheet Metal Workers Local Union No. 54 and employers of sheet metal workers in the Houston area who are parties to a collective bargaining agreement with Local No. 54. The Committee ensures that there is a supply a properly qualified persons who will enter the four-to-five year apprenticeship program to eventually become journeymen in the sheet metal construction industry.

In April 1996, Lee was employed by Gowan, Inc., as a preapprentice helper under the supervision of Gowan's journeymen sheet metal workers. In July 1996, Lee visited the offices of the Committee to inquire about admission into the Committee's sheet metal apprenticeship training program. Lee was accompanied by a hearing-impaired sheet metal apprentice who served as a sign language interpreter. Lee spoke

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1981a because the ADA incorporates these statutes by reference.

to Jake Freund, who was at that time the Committee training director, to inquire about how to apply for the apprenticeship program. Freund informed Lee that he needed to provide his high school transcript and to complete an application.

On August 27, 1996, Lee returned to the Committee's office with his completed application. Lee met with Carl Sides, the Committee's new training director, and the interview was conducted via written questions and answers. At this meeting, Sides asked Lee about his work and educational background. Sides also explained that Lee would be required to take a math and reading test as well as a drug test.

Sides told Lee that he would be interviewed at the September 30, 1996 meeting and that interpreters would be provided for him. Lee took the examination and the Committee contacted Lee for an interview on September 30, 1996. He appeared and was interviewed by Stanley Bordovsky and Paul Alexander. The Committee awarded the available apprenticeships to other individuals, primarily because Lee could not speak or hear. Two of the individuals who were selected for the program had lower test scores than Lee. That same day, the Committee (for the first time) adopted written physical requirements for apprenticeship applicants that included the ability to speak and hear.

Sides contacted Lee and informed him that he had not received an

apprenticeship position. Lee did not ask why he had not been chosen, nor did Sides offer this information. Lee states that Sides told him that he would "see him next year." Lee contends that he returned to the Committee's office in 1997 and wrote a note to a woman asking for Sides. As Sides was not at the office, Lee left. Lee again returned to the office in 1998. He states that he again asked a woman if Sides was present. Sides was not there, so Lee left and made no further contact with the Committee in 1998.

In 1999, Lee's co-workers encouraged him to inquire further about the apprenticeship program. Lee called Sides and asked him whether he could take the admissions test again. Sides said that it was not necessary to retake the test, but that he would ask the Committee to reconsider Lee's application. On July 26, 1999, the Committee met. At the meeting, four journeymen from Gowan urged the Committee to admit Lee to the program. The Committee declined to change its decision to reject Lee based upon his failure to meet the program's physical requirements. Nine individuals who were admitted into the program for the Fall 1999 session had lower test scores than Lee.

On July 29, 1999, Sides met with Lee and an interpreter. Sides explained that Lee could not be admitted to the apprenticeship program because he did not meet the physical requirements of being able to speak and hear. Sides also communicated this

explanation to Lee via written letter dated August 9, 1999. Lee strongly disagreed about the physical requirements, pointing out his safe work record on the job and ability to communicate without problems on the job. Lee filed a charge of discrimination with the EEOC on August 5, 1999. The EEOC initiated suit against the Committee on September 28, 2000. The Committee now moves for summary judgment.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Initially, the movant bears the burden of demonstrating to the court that there is an absence of a genuine issue of any material fact. *Id.* at 323. The burden then shifts to the party who bears the burden of proof on the claims on which summary judgment is sought to present evidence beyond the pleadings to show there is a genuine issue for trial. *Id.* at 324. A genuine issue for trial exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Conclusory allegations unsupported by specific facts will not prevent an

award of summary judgment; the plaintiff cannot rest on his allegations to get to a jury without any significant probative evidence tending to support the complaint. *E.g., Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 713 (5th Cir.1994). Moreover, where the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must conclusively establish all of the essential elements of the claim or defense to warrant judgment in his favor. *E.g., Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

IV. DISCUSSION

The Committee moves for summary judgment on the following grounds: (1) the EEOC's case is time-barred; (2) Lee is not a "qualified individual with a disability" under the ADA; (3) the Committee's physical requirements are legitimate because they are job-related safety-based qualifications, consistent with business necessity; and (4) Lee could not be admitted to the program because he posed a direct threat to the safety of himself and others. The Court will address these issues in turn.

A. 300-Day Limitations Period

The Committee first argues that because Lee did not file a charge of discrimination within 300 days of the Committee's refusal to admit him into the apprenticeship program in 1996, the EEOC's claim of disability discrimination is

barred under the applicable statute of limitations. The EEOC responds that the limitations period did not begin to run until July 29, 1999, the date when Sides told Lee the reason he was not accepted into the program. As support for this position, the EEOC contends that its claim is timely pursuant to the "continuing violation doctrine."

The ADA incorporates by reference the administrative procedures set forth in Title VII. 42 U.S.C. § 12117 (2000); *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996). Under Title VII, in a deferral state like Texas, a plaintiff must file an EEOC charge of discrimination within 300 days of the adverse employment action. 42 U.S.C. § 2000e-5(e)(1) (2000); *Huckabay v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998).

Federal courts have created equitable exceptions to the 300-day limitations period, including the continuing violation doctrine. *E.g.*, *Celestine v. Petroleos de Venezuella S.A.*, 266 F.3d 343, 351 (5th Cir. 2001). The continuing violation doctrine, which may be used in "limited circumstances," relieves a plaintiff of establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the limitations period. *Id.* (citing *Messer v. Meno,* 130 F.3d 130, 135 (5th Cir.1997)). "The focus is on what event, in fairness and logic, should have alerted

the average lay person to act to protect his rights." *Messer*, 130 F.3d at 134-35.

The continuing violation doctrine accommodates plaintiffs who can show that there has been "a pattern or policy of discrimination continuing from outside the limitations period into the statutory limitations period, so that all discriminatory acts committed as part of this pattern or policy can be considered timely." *Celestine*, 266 F.3d at 351-52. A plaintiff seeking to invoke the continuing violation doctrine must demonstrate more than a series of discrete discriminatory acts. *Id.* at 352. Instead, the plaintiff must show "an organized scheme leading to and including a present violation, such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action." *Id.* (citing *Huckabay v. Moore,* 142 F.3d 233, 239 (5th Cir.1998)).

The district court should consider the following non-exclusive factors to determine whether a continuing violation exists: (1) whether the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation; (2) whether the alleged acts were recurring or isolated incidents; and (3) whether the act had the degree of permanence that should have triggered an employee's awareness of and duty to assert his or her rights. *Id.* (citing *Huckabay,* 142 F.3d at 239). The third factor is "perhaps of most importance." *Huckabay*, 142 F.3d at

239. A "one-time employment event," including the failure to hire, promote, or train and a dismissal or demotion, is "the sort of discrete and salient event that should put the employee on notice that a cause of action has accrued." *E.g.*, *Celestine*, 266 F.3d at 352.

In this case, the Committee argues that Lee alleges that he made several attempts to enter the apprenticeship program since August 1996 and that he was repeatedly denied entry into the program. Lee further stated in his deposition that he got "much run around by the Committee." However, according to the Committee, Lee only made one application to apprentice program, which was in 1996. Sides informed Lee that he had not been selected for the program, and Lee did not ask why he had not been given the position. The Committee argues that it was under no duty to provide an explanation for its reason not to select Lee for the program and that it did not, in any way, attempt to induce Lee to refrain from exercising his rights to challenge this decision. Further, when Lee returned to the Committee office in 1997 and 1998, he did not inquire about the apprenticeship program nor did he speak to Sides. Thus, according to the Committee, any discriminatory act occurred in 1996, which is outside the 300-day window prior to Lee's August 5, 1999 EEOC charge. Finally, the Committee argues that the fact that it declined to revisit its refusal to allow Lee into the program in 1999 does not bring the EEOC's claims into the 300-

day limitations period because carrying out (or failing to disturb) a prior action, which is itself outside the limitations period, is insufficient to establish a continuing violation.

The EEOC responds that Lee was not aware of facts giving rise to an ADA claim until July 29, 1999, when he met with Sides and learned the reason he was refused entry into the program. The EEOC states that the Committee never told Lee about any physical requirements for the apprenticeship program; in fact, prior to Lee's application, the Committee only told applicants that they only had to meet the physical requirements of being able to climb ladders and scaffolds.

Moreover, the Committee did not adopt the hearing and speaking physical requirements until just after Lee's September 30, 1996 interview with the Committee. According to the EEOC, Lee did not know, nor did he have reason to know, that his disability was the reason for his rejection; in addition, the EEOC asserts that the Committee deliberately withheld information from Lee about the minimum physical requirements, although it provided this information to every other applicant into the program. Lee is purportedly the only applicant to be denied admission into the program on the basis of physical requirements.

The EEOC also argues that the Committee unreasonably failed to disclose to Lee why he had been rejected in 1996 or that it had adopted physical requirements of

being able to hear and speak. The EEOC states that the employee "is not required to question the moves of the employer or to assume that the employer discriminates" and that a reasonably prudent employee would not necessarily conclude that an employer engaged in discrimination. Finally, the EEOC states that Lee filed his charge of discrimination within 300 days — in fact, within just a few days — of the Committee's 1999 reconsideration, rejection and explanation concerning his application.

As stated above, there are three non-exclusive factors that the district court should consider to determine if the continuing violation doctrine applies. *See Celestine*, 266 F.3d at 351. The first factor, subject matter, is met here, as each of the alleged acts involved discrimination on the basis of Lee's disability. *See Huckabay*, 142 F.3d at 239 (stating that the first inquiry is whether the alleged acts involve the same type of discrimination).

The second factor, frequency, raises a genuine issue of material fact in this case. The summary judgment evidence is unclear whether Lee's contact with the Committee in 1997 and 1998 consisted of repeated inquiries about the program or whether these visits were unrelated to the program. Accordingly, the Court is unable at this time to determine whether the acts of alleged discrimination were recurring or isolated incidents. *See id.* (describing the second inquiry as whether the alleged acts

are "recurring . . . or more in the nature of an isolated . . . work decision").

The third and most important factor, degree of permanence, also raises a genuine issue of material fact. The Fifth Circuit has phrased the inquiry regarding permanence in the following question: "Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" *Id.*

Here, a fact issue exists concerning whether a reasonably prudent person in Lee's shoes would have known that in 1996, when he completed his application and was rejected by the Committee, that his inability to hear and speak was the reason for his rejection. The Committee was under no duty to inform Lee why he was rejected in 1996, but there is still a question as to whether "in fairness and logic" Lee would have known to act to protect his rights under the ADA in 1996. Lee certainly knew in 1999 that he needed to act to protect his rights, and he did so by filing a charge of discrimination within days of learning why he was rejected for the apprenticeship program.

The Court notes that in considering equitable exceptions to the 300-day limitations period, a plaintiff cannot "put his head in the sand and disregard the events

occurring around him" *See Washington v. Occidental Chem. Corp.*, 24 F.Supp.2d 713, 723 (S.D. Tex. 1998). In this case, however, the summary judgment evidence does not reveal that Lee disregarded events that would have triggered protection of his rights; rather, the evidence indicates that Lee may not have known that he was the victim of alleged disability discrimination in 1996. *Cf. Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1562 (5th Cir. 1985) (stating that a reasonably prudent employee "will not necessarily conclude that [the] employer is an illegal discriminator" based only upon one hearsay statement and one arguably non-discriminatory act).

Given the foregoing, the Court determines that a genuine issues of material fact exists concerning when Lee should have been alerted to act to protect his rights. Therefore, the Committee's motion for summary judgment on the ground of limitations is denied.

B. Qualified Individual with a Disability

To establish a case of discrimination under the ADA, the plaintiff must show: (1) he has a disability, (2) he is a qualified individual for the job in question, and (3) the defendant made an adverse employment decision because of the disability. *See* 42 U.S.C. § 12112(a); *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1052

(5th Cir. 1998).[2] The Committee does not dispute that Lee has a disability or that he was subjected to an adverse employment action because of his disability. Rather, the Committee argues that Lee was not a "qualified individual" for the apprenticeship program.

Under the ADA, a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 706 (5th Cir. 1997). The determination of whether an individual is "qualified" depends on the resolution of two corollary questions: (1) what are the essential functions of the job? and (2) are the employee's proposed accommodations, if any, reasonable? *Barber*, 130 F.3d at 706.

1. Essential Functions

The Committee argues that the essential functions of the program included the ability to communicate, and that Lee is not qualified for the position because he cannot hear or speak. The EEOC argues that "communication" is not limited to hearing and speaking; rather, Lee could communicate with other workers through

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[2] The EEOC asserts that there is direct evidence of discrimination in this case; thus, the Court need not employ the familiar *McDonnell Douglas* burden-shifting scheme in analyzing its claims.

writing, use of gestures, body shifting, head nods, and banging on walls and the vibrations produced therefrom.

"Essential functions" are those duties that are fundamental to the job at issue. *Kapche v. City of San Antonio*, 176 F.3d 840, 843 (5th Cir. 1999). A job function is "essential" if, for example, (1) the purpose of the position is the performance of that function, (2) only a limited number of employees are available among whom the performance of that function can be delegated, or (3) an employee is hired because of his expertise or ability to perform a specialized function. *Id.* In making its determination, the court may consider: (1) the employer's judgment as to which functions are essential, (2) written job descriptions prepared before advertising or interviewing applicants for the job, (3) the amount of time spent on the job performing the function, and (4) the work experience of both past and current employees in the job. *Id.*

Citing an excerpt from the Sheet Metal Apprentice Textbook, the Committee argues that the ability to communicate is an essential tool of the craft. Effective communication is defined in the textbook as the ability to describe things clearly and express one's ideas and opinions to others. More importantly, the Committee contends that a sheet metal worker must be able to work alone without supervision and to be aware of (and to warn others of) dangers in the working environment.

The Committee cites several excerpts from Lee's deposition, where defense counsel questioned him about how he could communicate with other workers. Lee responded that if something "unusual" came up during an assignment, another person would communicate to him from the other side of a wall (where the person was working) by banging on the wall and that Lee would "feel (hand to wall) the noise." The Committee questions how Lee would know to put his hand to the wall and "feel" the noise.

In response, the EEOC points out that the Committee's witnesses were unaware whether Lee could in fact make sounds in order to alert another individual of some hazard. Moreover, the Committee did not amend its physical requirements to include the ability to hear and speak until *after* Lee had interviewed for the position; until then, the Committee had only required that individuals be physically fit (i.e., able to climb ladders and scaffolds). The Committee (through Bordovsky) also acknowledged that Lee could possibly communicate by receiving warning through the use of a mechanical or electronic device or by someone tapping him on the shoulder.

Considering the summary judgment evidence, the Court determines that fact issues exist as to the essential functions of the apprenticeship program. The Court agrees that "communication," in some form, certainly qualifies as an essential

function of the apprenticeship program. However, it is unclear at this juncture as to what method(s) of communication would suffice in these circumstances. Therefore, the Court will next consider whether any reasonable accommodation would enable Lee to fulfill the essential functions of the program. *See Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1093 (5th Cir. 1996).

2. Reasonable Accommodation

The term "reasonable accommodation" means modification or adjustment to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that would enable a qualified individual with a disability to perform the essential functions of the position. 29 C.F.R. § 1630.2(o)(ii). In making reasonable accommodations for individuals with disabilities, the ADA does not require an employer to relieve an employee of any essential functions of the job; modify the employee's duties; reassign existing employees; or hire new employees to perform those duties. *Robertson v. The Neuromedical Ctr.*, 161 F.3d 292, 295 (5th Cir. 1998).

The Committee points out that Lee requested no specific accommodation other than the provision of interpreters for the classroom. Lee, in fact, stated in his EEOC charge that he believed he could perform as a sheet metal worker with little or no accommodation at all. Nevertheless, according to the Committee, this belief does not

answer the question of how Lee would communicate on the job. Sides, the training director, testified that the only possible resolution would be to make an interpreter available to Lee at all job site locations and at all times during the workday Further, Sides stated that it would be possible to install mechanical devices (such as vibrating instruments) to warn of dangers. However, the Committee rejected these suggestions as unreasonable because such accommodations would require fundamental modification of the apprenticeship program.

The EEOC responds that the methods of communication proposed by Lee — i.e., writing, gesturing, bodying shifting, nodding his head, banging on the wall — permitted Lee to communicate on a daily basis with the journeymen at Gowan and that there is no reason to believe that he could not continue to do so as an apprentice. The EEOC also argues that certain devices could reasonably accommodate Lee's disability, such as written communication, the use of a vibrating device, or someone tapping Lee on the shoulder.

In addition, the EEOC takes issue with the Committee's reaction to Lee's application. Rather than engaging in an "interactive process" with Lee, the Committee did not ask Lee about his disability nor did they inquire how he communicated with the Gowan sheet metal workers. Moreover, in July 1999, four journeymen from Gowan asked the Committee to admit Lee into the program, but the

Committee refused to reconsider Lee's application.

Given the foregoing, the Court is of the opinion that triable issues of fact exist regarding whether Lee could have been reasonably accommodated in fulfilling the essential function of communication. Accordingly, summary judgment is denied on the ground that Lee is not a "qualified individual with a disability."

C. Business Necessity Defense

The EEOC also asserts that the Committee relied upon physical qualifications that have the effect of discrimination on the basis of disability. The ADA prohibits an employer from using qualification standards that screen out a disabled individual or class. *EEOC v. Exxon Corp.*, 203 F.3d 871, 872 (5th Cir. 2000) (citing 42 U.S.C. § 12112(b)(6)). An employer may raise certain affirmative defenses to a charge of discrimination, including the "business necessity" defense. *Id.* at 873. The business necessity defense provides that "[i]t may be a defense to a charge of discrimination . . . that an alleged application of qualification standards . . . that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity." *Id.* (citing 42 U.S.C. § 12113)). The business necessity defense addresses whether the qualification standard can be justified as an "across-the-board" requirement. *Id.* In evaluating this defense, the district court should consider the magnitude of possible harm and the

probability of occurrence. *Id.*

Here, the Committee argues that employees must be furnished a safe place to work, which necessitates that employees be able to hear and speak so that they can warn others or be warned of imminent hazards or dangers on the jobsite. The EEOC contends that a workplace is not "automatically rendered dangerous" due to the presence of an individual who cannot hear or speak. In addition, the EEOC points out that no individuals in the apprenticeship program have been injured due to difficulty in hearing or speaking.

Again, the Court determines that genuine issues of material fact exist on this matter. The Committee has not demonstrated that the qualification standard of being able to hear and speak is justifiable as an "across-the-board" requirement. Thus, summary judgment on the ground of the business necessity defense is denied.

D. Direct Threat Defense

Finally, the Committee argues that it is entitled to summary judgment because Lee posed a direct threat to his own safety and the safety of others. Employers may assert the defense that reasonable accommodation is not possible because the individual poses a direct threat to the health or safety of other individuals in the workplace. *Kapche*,176 F.3d at 844. An individual constitutes a direct threat if he poses "a significant risk to the health or safety of others that cannot be eliminated by

reasonable accommodation." *Id.* (citing 42 U.S.C. § 12111(3)). The EEOC's implementing regulations provide that the determination of direct threat "shall" be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. *Id.*

In *Kapche*, the Fifth Circuit noted that the ADA is silent as to whether an individualized assessment is required. *Id.* at 844 n.22. Thus, the court noted that deference to the EEOC's regulations is in order, so long as the regulation is based upon a permissible construction of the enabling statute. *Id.* The *Kapche* court acknowledged the Fifth Circuit's prior "tacit exception" to the case-by-case approach in the situation of drivers with insulin-dependent diabetes. *Id.* at 844. The Fifth Circuit, after discussing the continued viability of the per se rule that insulin-dependent drivers with diabetes pose a direct threat, remanded the case to the district court for a determination as to whether the per se rule was still in order given improvements in medical technology. *Id.* at 844-46. Based upon this ruling, in this case the Court determines that the requirement of an individualized assessment is consistent with Fifth Circuit authority. *See id.*

When making the individualized assessment of direct threat, the following factors are relevant: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that potential harm will occur, and (4) the

imminence of potential harm. 29 C.F.R. § 1630.2(r). In this case, although the Committee has provided a report stating that an individualized assessment was made regarding Lee's situation, it is not clear that the Committee in fact employed an individualized inquiry in regard to Lee's alleged direct threat. Lee was not asked about his safety history in the sheet metal industry or how he communicated with others on the job. Moreover, the Court is influenced that the Committee adopted new physical requirements of being able to speak and hear immediately following Lee's interview. Therefore, the Court determines that the Committee is not entitled to summary judgment on its direct threat defense and that this issue should be submitted to a jury.

The Court has also reviewed the objections made by the EEOC to the Committee's summary judgment evidence. These objections are overruled at this time, without prejudice to the EEOC raising the objections at trial.

In accordance with the foregoing, the Court hereby

ORDERS that The Apprenticeship Committee's Motion for Summary Judgment (Document #34) is DENIED.

SIGNED at Houston, Texas, on this 31 day of May, 2002.

DAVID HITTNER
United States District Judge