UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-CV-2077-JLK

MARK E. SHEPHERD,

Plaintiff,

v.

UNITED STATES OLYMPIC COMMITTEE, a corporation,

Defendant.

DEFENDANT'S SUBMISSION OF RECENTLY-DECIDED AUTHORITY IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, United States Olympic Committee ("USOC"), through its attorneys, Hogan & Hartson L.L.P. by John W. Cook and Virginia S. Morgan, hereby files this Recently-Decided Authority in Support of its Response in Opposition to Plaintiff's Motion for Partial Summary Judgment:

1. Plaintiff filed his Motion for Partial Summary Judgment on September 18, 2002. The USOC filed a Response in Opposition on October 9, 2002 and Plaintiff filed his Reply on October 16, 2002. Oral argument is currently set for September 21, 2005.

2. On August 31, 2005, the Third Circuit issued an opinion addressing issues of particular relevance to the Plaintiff's Motion presently before the Court. Accordingly, the USOC submits as supplemental authority, *Community Services, Inc. v. Wind Gap Municipal Authority*, ___, F.3d___, 2005 WL 2088424 (3d Cir. 2005) (attached).

3. In his Motion, Plaintiff argues that the USOC is using a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. In support of this argument, Plaintiff cites to a series of cases involving the Fair Housing Amendments Act ("FHAA"): *McWright v. Alexander,* 982 F.2d 222, 223 (7th Cir. 1992); *Alliance for the Mentally Ill v. City of Naperville,* 923 F.Supp. 1057, 1070 (N.D. Ill. 1996); *Horizon House Development Servs. v. Township of Upper Southhampton,* 804 F.Supp. 683, 694 (E.D. Pa. 1992); and *Children's Alliance v. City of Bellevue,* 950 F.Supp. 1491, 1496 (W.D. Wash. 1997).

4. Plaintiff relies on these cases for the proposition that when a criterion used to discriminate is closely aligned with a protected classification, use of that criterion is illegal. For example, in *Alliance* the court found that a fire code that only applied to "facilities that house four or more persons for the purpose of providing personal care services" was a proxy for handicap individuals. *Id.* at 1070. Likewise in *Horizon House*, the court found that an ordinance requiring 1000 feet between facilities in which "permanent care or professional supervision is present" to be a proxy for handicap individuals. *Id.* at 694.

5. It is Plaintiff's position that the USOC's policy of providing Olympic programming and funding to only Olympic caliber athletes is a "proxy" for disabled athletes.

6. The recently-decided case, *Community Services*, examines the cases cited by Plaintiff and finds that four elements must be present before a neutral classification will be deemed a proxy for a protected class. First, the alleged discriminatory classification must be one actually defined by the challenged regulation in terms that largely coincide or "fit" with the FHAA definition of "handicap." Second, the classification must be used specifically to "single out" facilities for handicapped individuals for different treatment "because of" their disability. Third, there must be direct or circumstantial evidence of discriminatory animus—longstanding community opposition to neighborhood homes for the

mentally disabled, for example—indicating an intent to discriminate "because of" the disabled status of the facilities' residents. And fourth, the purported reason for treating the facility differently must be based on a justification for treating disabled persons differently that is of questionable legitimacy. *Community Services* at 8.

7. In the present case, Plaintiff argues that the USOC uses the term "Paralympian" as a proxy to discriminate against a protected class of disabled athletes. That, however, is demonstrably wrong. Eligibility for Olympic Programming turns not on whether someone is a Paralympic athlete, but rather whether someone is an Olympic athlete. The criterion used by the USOC is therefore not Paralympian, but Olympian. That is crucial. The term Olympian is not closely aligned with the ADA's definition of "disability." Moreover, the term Olympian is not a classification that by its terms specifically "singles out" handicap individuals or is one that evidences any discriminatory animus towards handicapped individuals. And, of course, there is nothing in the record to suggest that the USOC's classification was adopted based on animus to individuals with disabilities.

8. The USOC's neutral classification of being an Olympic athlete to participate in or qualify for Olympic programming is not a proxy for discrimination because there is no close "fit" between that term and disability. It is thus unlike the loaded terms found to be proxies in cases cited by Plaintiff.

Certification Pursuant to Local Rule 7.1A

The undersigned certifies that she conferred with counsel for Plaintiff who stated that Plaintiff did not object to the instant submission provided Plaintiff is given the opportunity to respond. Defendant does not object to any response.

Respectfully submitted this 19th day of September, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2005, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses :

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