IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-2491-AJ

COLORADO CROSS DISABILITY COALITION

and

KEVIN W. WILLIAMS, for himself and all others similarly situated,

Plaintiffs,

v.

ANNTAYLOR STORES CORPORATION,

ANNTAYLOR, INC.,

and

HERMANSON LIMITED PARTNERSHIP I,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO HERMANSON FAMILY LIMITED PARTNERSHIP I'S MOTION TO DISMISS

Plaintiffs Kevin Williams and Colorado Cross-Disability Coalition hereby submit their Brief in Opposition to Hermanson Family Limited Partnership I's Motion to Dismiss. As set forth more fully below, Hermanson Family Limited Partnership I's Motion to Dismiss ("Motion to Dismiss") should be denied because neither the Americans with Disabilities Act ("ADA") nor C.R.S. § 24-34-602 require plaintiffs to have exhausted their administrative remedies prior to filing this action.

ARGUMENT

1. Title III of the Americans with Disabilities Act Does Not Require Plaintiffs to Exhaust Their Administrative Remedies Before Filing Suit.

Plaintiffs' First Claim for Relief seeks redress under Title III of the ADA. Section 12188(a)(1) of Title 42, the enforcement section of Title III, prescribes that "[t]he remedies and procedures set forth in section 2000a-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 ...." 42 U.S.C. § 12188(a)(1). There is no requirement in 42 U.S.C. § 2000a-3(a) that plaintiffs must exhaust administrative remedies before filing suit and thus defendant's motion to dismiss should be denied.[1/]

[1/] 2000a-3(a) of Title 42 provides:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as

the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

Several courts have concluded that there is no exhaustion requirement under Title III of the ADA. For example, in Devlin v. Arizona Youth Soccer Ass'n, No. CIV 95-745 TUC ACM, 1996 WL 118445, at *2 (D. Ariz. Feb. 8, 1996) (Attachment 1 hereto), a member of a youth soccer organization brought suit against the organization alleging violations of, among other laws, the ADA. The defendant asserted an affirmative defense that the plaintiff had failed to exhaust his administrative remedies and the plaintiff moved to strike this defense. The court granted the plaintiff's motion to strike, finding that "Plaintiff's ADA claims are not subject to arbitration and/or exhaustion of administrative remedies requirements." See also Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 553 (7th Cir. 1996) (holding that "[b]ecause there is no first obligation to pursue administrative remedies [under Title III]," the statute of limitations was not tolled while the plaintiff participated in an internal appeals process); Grubbs v. Medical Facilities of America, Inc., No. 94-0029-D, 6 Nat'l Disability L. Rep. ¶ 105, at 4 (W.D. Va. Sept. 23, 1994) (Attachment 2 hereto) (holding that there is no requirement under Title III of the ADA that a plaintiff exhaust his administrative remedies prior to filing suit).

The Department of Justice, which is charged with enforcing and promulgating regulations under Title III, has made it exceedingly clear that there is no exhaustion requirement under Title III. In response to a request for a "right to sue" letter, the Department stated:

> You do not need a 'right to sue' letter in order to institute a civil action to redress your rights under title III of the Americans with Disabilities Act. The Americans with Disabilities Act contains a private right of action under title III. Any person who is being subjected to discrimination on the basis of disability in violation of the Act may institute a civil action for preventive relief, such as an injunction or other order. The Department of Justice does have the authority to investigate complaints under title III; however, it is not necessary to file a complaint with the Department prior to exercising your private right of action.

Letter from Department of Justice to Senator Orrin Hatch, 4 Nat'l Disability L. Rep. ¶ 360, at 1-2 (Apr. 27, 1993) (emphasis added) (Attachment 3 hereto).

With all due respect, the courts in the two decisions cited by the defendant simply misread section 12188(a)(1) to incorporate all of section 2000a-3 rather than only subsection 2000a-3(a). Thus these courts incorrectly rely on subsection 2000a-3(c), which does contain an exhaustion requirement, to find an exhaustion requirement under Title III of the ADA. For example, in Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148, 1149-50 (D. Colo. 1996), the court incorrectly stated that "the remedies and procedures set forth in section 2000a-3" apply to Title III of the ADA and thus found that, based on section 2000a-3(c), an exhaustion requirement existed. In addition, in dicta, the court in Bechtel v. East Penn. School Dist., No. 93-4898, 1994 U.S. Dist. LEXIS 1327, at *6 (E.D. Penn. Jan. 4, 1994)(attached to defendant's Motion to Dismiss), broadly stated without analysis that "Section 12188 makes the enforcement procedures of the Civil Rights Act of 1964" applicable to Title III and on that basis stated that an exhaustion requirement existed.

Defendant's claim that there is an exhaustion requirement under Title III requires this Court to ignore the plain language of section 12188(a)(1), and requires this Court to assume that Congress made a mistake -- that is, that Congress meant to refer to all of 42 U.S.C. § 2000a-3 but "accidentally" referred only to 42 U.S.C. § 2000a-3(a). An interpretation that is based on speculation that Congress erred in the words it used in a statute must be rejected under established canons of statutory construction. See, e.g., Russell v. Department of Air Force, 915 F. Supp. 1108, 1115 (D. Colo. 1996) ("The 'cardinal canon' on statutory construction is that 'courts must presume that the legislature says in the statute what it means and means in the statute what it says there.'" (citations omitted));

Southern Ute Indian Tribe v. Amoco Production Co., 874 F. Supp. 1142, 1152 (D. Colo. 1995) ("In determining congressional intent, I look first to the language of the statute and assume that its plain meaning accurately expresses legislative purpose.").[1/]

Because section 12188(a)(1) unambiguously incorporates only subsection 2000a-3(a) and not section 2000a-3 in its entirety, the exhaustion requirement of subsection 2000a-3(c) is not a part of Title III of the ADA and defendant's motion to dismiss plaintiffs' ADA claim should be denied.

II. There Is No Exhaustion Requirement Under C.R.S. § 24-34-602.

In addition to their ADA claim, plaintiffs seek relief under C.R.S. § 24-34-602 for defendant's violations of C.R.S. § 24-34-601. Defendant moves to dismiss this claim for failure to exhaust administrative remedies. Section 24-34-602 provides in relevant part:

> Any person who violates any of the provisions of section 24-34-601 by denying to any citizen . . . the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated or by aiding or inciting such denial, for every such offense, shall forfeit and pay a sum of not less than fifty dollars nor more than five hundred dollars to the person aggrieved thereby to be recovered in any court of competent jurisdiction in the county where said offense was committed . . . [T]he relief provided by this section shall be an

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[2/] In any event, other subsections within section 2000a-3 make it clear that Congress said precisely what it meant and did not make a mistake by incorporating only subsection 2000a-3(a) in the ADA. For example, subsection 2000a-3(b) provides that a court may award attorneys' fees to the prevailing party. The ADA also provides -- separately and explicitly -- for attorneys' fees. 42 U.S.C. § 12205. Congress must have intended to incorporate only subsection 2000a-3(a), otherwise the ADA's separate attorneys' fee provision would have been redundant.

> alternative to that authorized by section 24-34-306(9), and a person who seeks redress under this section shall not be permitted to seek relief from the commission.

(Emphasis added). Thus under section 24-34-602: (i) the remedies and procedures set forth in section 24-34-602 are "alternative[s]" to those authorized in section 24-34-306(9), and (ii) a plaintiff who seeks redress under section 24-34-602 cannot seek relief from the commission. As set forth below, these two clauses establish that their is no exhaustion requirement prior to bringing suit under section 24-34-602.

Defendant's motion to dismiss plaintiffs' claims under section 24-34-602 is based on an exhaustion requirement found in section 24-34-306(14), which reads in relevant part:

> No person may file a civil action . . . based on an alleged discriminatory or unfair practice prohibited by parts 4 to 7 of this article without first exhausting the proceedings and remedies available to him under this part 3 unless he shows, in an action filed in the appropriate district court, by clear and convincing evidence, his ill health which is of such a nature that pursuing administrative remedies would not provide timely and reasonable relief and would cause irreparable harm.

(Emphasis added). By its terms, section 24-34-306(14) only requires that a plaintiff exhaust those remedies and procedures which are "available to him" under part 3. As set forth above, however, the remedies and procedures under section 24-34-602 are alternatives to those under part 3 and a plaintiff who sues under section 24-34-602 cannot seek to invoke the procedures and remedies under part 3. In other words, once a person decides to bring suit under section 24-34-602, the remedies and procedures under part 3 are no longer available to him and thus the exhaustion requirement in section 24-34-306(14) is inapplicable.[1/]

[3/] The case cited by defendant, Brooke v. Restaurant Services, Inc., 881 P.2d 409 (Colo. App. 1994), rev'd, 906 P.2d 67 (Colo. 1995), is not to the contrary. The cause of action in Brooke was a

common law tort which, unlike section 24-34-602, did not prohibit the plaintiff from seeking relief from the commission and thus the remedies and procedures under part 3 were available to the plaintiff in Brooke.

Defendant's interpretation would create a direct conflict between sections 24-34-306(14) and 24-34-602. While section 24-34-306(14) would require a plaintiff that wanted to bring suit under section 24-34-602 to first seek relief from the commission, section 24-34-602 would prohibit such a plaintiff from seeking relief from the commission. This interpretation must be rejected. Mountain City Meat Co. v. Oqueda, 919 P.2d 246, 253 (Colo. 1996) ("'If separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, we should adopt that construction which results in harmony.'" (citation omitted)); People v. Bobo, 897 P.2d 909, 912 (Colo. App. 1995) (same); Martinez v. Shapland, 833 P.2d 837, 841 (Colo. App. 1992) (same).

Because the remedies and procedures of part 3 are not available to a plaintiff who sues under section 24-34-602, the exhaustion requirement of section 24-34-306(14) is inapplicable and thus defendant's motion to dismiss plaintiffs' claims under section 24-34-602 should be dismissed.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request that defendant's Motion to Dismiss be denied.

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I hereby certify that on _____, 1996, a copy of PLAINTIFFS' BRIEF IN OPPOSITION TO HERMANSON FAMILY LIMITED PARTNERSHIP I'S MOTION TO DISMISS was sent by first-class mail, postage prepaid, to the following:

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