IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-2490-AJ

COLORADO CROSS-DISABILITY COALITION

and

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

Plaintiffs,

v.

CAMPBELL-RITTER CORP., et al.,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON STANDING

INTRODUCTION

This case is about discrimination; it is not about the ability to purchase clothing, shoes or ice cream somewhere in Denver. Plaintiff Kevin Williams -- who uses a power wheelchair for mobility -- has standing to sue Defendants because they have invaded and will continue to invade his right, protected by Title III of the Americans with Disabilities Act ("ADA"), to the full and equal enjoyment of the goods, services, and facilities of the public accommodations at issue here. In order to have standing to bring this suit, Mr. Williams need only show that he has a reasonable desire to enter the stores at issue which is frustrated by Defendants' discriminatory conduct. Mr. Williams has shown much more than that. His testimony demonstrates that:

- he has been to Larimer Square countless times and has plans to be there many times in the future including specific plans to be there repeatedly in the coming summer months;
- when there, he browses and shops in various accessible stores and dines in accessible restaurants and plans to continue to do so whenever he is there;
- he would like to browse, shop in or otherwise enjoy the goods, services and facilities of the public accommodations at issue but is deterred from doing so and denied the opportunity to do so because they are completely inaccessible to him; and
- he is able and ready to browse, shop in or otherwise enjoy the goods, services and facilities of the public accommodations at issue as soon as they are accessible to him.

Defendants argue that Plaintiff does not have standing because he has no "specific plans" to shop at their stores. That is, they would deny Plaintiff's right to challenge the steps that prevent him from entering their stores on the grounds that he cannot state a specific date on which he plans to return to their stores and -- yet again -- sit outside and be denied entry by those self-same steps. Defendants ignore the explicit (and practical) language of the ADA which provides that persons with disabilities need not engage in a "futile gesture" in order to obtain an injunction barring discriminatory conduct. Mr. Williams has standing because he has specific plans to be in Larimer Square where he will experience the discrimination of being excluded from Defendants' stores; he is not required to make plans to shop at inaccessible stores, a truly futile gesture.

Defendants also argue that Mr. Williams lacks standing because he could purchase the goods they sell at other stores in the Denver area. This argument might work if the ADA only guaranteed to persons with disabilities the right to make purchases somewhere in a given metropolitan area. This is, of course, not the case. Rather, the ADA guarantees the "full and equal enjoyment" -- not just the right to purchase -- of "places of public accommodation" -- not of chains or categories of stores.

Under Defendants' theory of standing, a business could enforce a "Whites only" policy and then argue that an African-American plaintiff who had been turned away had no standing to claim injunctive relief unless -- with the policy still in force -- he made "specific plans" to return to the restaurant (it would not be sufficient under their theory that he desire to return after the policy was changed) and unless the plaintiff were unable to purchase the goods in question elsewhere in the city.[1] In other words, no African-American could challenge a Whites-only restaurant if there were integrated restaurants elsewhere in the same city. This is not the law and Defendants' motion must be denied.

BACKGROUND

Larimer Square is a one-block stretch of Larimer Street between 14th and 15th Streets in Denver that consists of a number of different stores, restaurants and offices housed in a series of adjacent buildings, each with its own entrance onto Larimer Street. Most of the buildings on the block are owned by Defendant Hermanson Family Limited Partnership I ("Hermanson"), which is a defendant as to all four of the buildings at issue in this litigation. The owners of Larimer Square promote the area as an important part of Denver and as a place with many and various businesses appropriate for shopping, eating and serendipity. Their brochure states:

[1] Title III of the ADA borrows its remedial provision from Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) et seq., which prohibits discrimination in public accommodations on the basis of race, color, religion or national origin. See 42 U.S.C. § 12188, incorporating by reference 42 U.S.C. § 2000a-3(a).

> In every great city, there's a great place. You know them. Now get to know one more. Larimer Square. It's eight restaurants, twenty-eight shops and two nightclubs where you never know what you'll see or who you'll bump into.

Exh. 1 hereto.

Some of the stores and restaurants on Larimer Square are accessible to wheelchairs; others are not. Among those buildings that are not accessible to wheelchairs are those at issue in this litigation. Ann Taylor is a clothing store located at 1421 Larimer Street; it has two steps at its entrance blocking access to wheelchairs. Nine West is a shoe store at 1439 Larimer Street; it has one step blocking its entrance. AnnTaylor Stores Corporation ("Ann Taylor") and Nine West Group, Inc. ("Nine West") -- along with landlord Hermanson -- are defendants as to the buildings housing their respective stores. Managers from both stores testified that they encourage people to browse in their stores. A. Johnson Depo. at 28 (testifying that, as store manager, she encouraged browsers; it "[d]efinitely" would be "a good thing for Ann Taylor to have people drop in and take a look at merchandise") (Exh. 2 hereto); Sutton Depo. at 20 (testifying that Nine West encourages browsers; "if people come to the Larimer area not necessarily with the intent of buying shoes, [it would] be Nine West's hope that they might stop in and take a look at the shoes.") (Exh. 3 hereto). The Sussex Building is an office building at 1430 Larimer Street; Hermanson is the only defendant with respect to the Sussex Building. When this litigation commenced, the fourth property at issue -- 1425 Larimer Street -- was occupied by a lingerie store by the name of Chatelaine. It has since been vacated and a lease signed with the franchisee of a Ben & Jerry's ice cream store. See Vostrejs Depo. at 84 (Exh. 4 hereto). (This property will be referred to as the "Chatelaine/Ben & Jerry's space.") The Chatelaine/Ben & Jerry's space currently stands empty. Williams Aff. ¶ 10 (Exh. 5 hereto). Hermanson -- the owner -- is currently the only

defendant with respect to this store, although Plaintiff has moved to amend his complaint to add the Ben & Jerry's franchisee as a party defendant.

Plaintiff Kevin Williams is a Denver lawyer who uses a power wheelchair for mobility as the result of a spinal cord injury. He, like many others in Denver, enjoys strolling, shopping, eating, and browsing in Larimer Square, often with one or more non-disabled friends. Williams Aff. ¶ 3. He has been to Larimer Square so many times he cannot count. Williams Depo. at 17 (Exh. 6 hereto). When he goes to Larimer Square, he often browses or shops in the stores -- and eats in the restaurants -- that are accessible to him. Williams Aff. ¶ 2. On virtually all of the occasions on which he has gone to Larimer Square, however, he has noticed that there are a number of stores -- including those at issue in this litigation -- that are not accessible to him, some due to a barrier of only one or two steps. Williams Aff. at ¶ 3. He has been aware on these trips that non-disabled people are able to enter these stores while he is not. Williams Aff. ¶ 3. Especially where -- as with the stores at issue here -- elimination of the steps appeared readily achievable, perpetuation of those barriers indicated to him that the owners and tenants of the buildings considered him and other people who use wheelchairs to be second-class citizens, not worthy of the effort to follow the law by making their premises accessible. Williams Aff. ¶ 4.

On October 7, 1996, Mr. Williams took a trip to Larimer Square. When he made this trip, he had already decided -- based on his extensive prior experience in Larimer Square -- that he wanted to bring suit to force the elimination of architectural barriers in some of the buildings. The trip was made with the dual purpose of browsing the shops on Larimer Street and recording precisely which stores had

what sorts of architectural barriers. Mr. Williams's October 7, 1996, observations were set forth in the Amended Complaints in this consolidated action.

Mr. Williams has definite plans to continue his habit of visiting and patronizing the stores in Larimer Square, especially in the coming summer months. Williams Aff. ¶ 5. As Mr. Williams made clear in his deposition, he "would love to" patronize AnnTaylor and Nine West. Williams Depo. at 29-30, 33 (Exh. 6 hereto). That is, he would like to be able to get in the front door but, until that is possible, cannot make specific plans to patronize these stores. Williams Aff. ¶ 6. Similarly, Mr. Williams would love to patronize Ben & Jerry's -- once it opens -- if it is accessible to him. Williams Aff. ¶ 7. And Mr. Williams would like to enter the Sussex Building so that he can -- as non-disabled people are currently able -- determine what offices are housed in that building. Williams Aff. ¶ 8. Until there are ramps in each of these buildings, however, Mr. Williams is unable to fully and equally enjoy their goods, services, facilities, privileges, advantages, and accommodations based on his disability. Williams Aff. ¶¶ 7-9.

ARGUMENT

I. Plaintiff Kevin Williams Has Standing to Sue Defendants under the Americans with Disabilities Act

Plaintiff has standing because his right to the full and equal enjoyment of the Defendants' public accommodations has repeatedly been invaded -- and is in actual and imminent danger of being invaded -- by Defendants' refusal to install ramps in the buildings at issue.

The parties agree that the three-part test for Article III standing to obtain prospective injunctive relief was set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (hereinafter "Defenders"). In order to have standing:

> 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 . . . trace[able] to the challenged action of the defendant, and not . . . . th[e] reuslt [of] the independent action 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."

Id. at 560-61 (cites omitted). Defendants do not deny that any injury to Mr. Williams through failure to install ramps was caused by them or that installation of a ramp would redress this injury, the second and third factors. Nor do they argue that the harm to Mr. Williams -- when he travels down Larimer Street and cannot enter the stores in questions -- is not concrete or particularized. As such, the only questions confronting this Court are: (1) What is the legally protected interest at stake in this case? and (2) Is this interest in actual or imminent danger of being invaded?

1. Plaintiff Is Injured by Defendants' Discriminatory Barriers, Not by His Inability to Purchase Clothing, Shoes or Ice Cream in Larimer Square.

1. The Interest That Has Been Invaded Is Plaintiff's Statutory Right to the Full and Equal Enjoyment of Defendants' Public Accommodations Free from Discrimination on the Basis of Disability.

"'The . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" Defenders, 504 U.S. at 578 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)). In Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), for example, the Court held that § 804(d) of the Fair Housing Act of 1968, 42 U.S.C. § 3604(d), created "an enforceable right to truthful information concerning the availability of housing" and that an African-American "tester" -- who received false information in connection with a housing inquiry but had no intention of renting or purchasing the residence -- had standing under that provision. Id. at 373-74.

Title III of the ADA provides that:

> 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. § 12182(a). "Discrimination" under that statute includes the "failure to remove architectural barriers . . . that are structural in nature, in existing facilities . . . where such removal is readily achievable." Id. § 12182(b)(2)(A)(iv). These provisions -- by their plain language -- create an enforceable right to be free from discrimination 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 including the right to barrier-free access where readily achievable.[2] See Duffy v. Riveland, 98 F.3d 447, 453 (9th Cir. 1996) (holding that the ADA creates legal rights the invasion of which creates standing).

2. Plaintiff Is Injured by Defendants' Discrimination, Not by the Inability to Purchase Their Goods or Services.

The Supreme Court and the Tenth Circuit have repeatedly held that, in cases alleging discrimination, injury for standing purposes inheres in the discrimination itself, not in the plaintiff's inability to obtain the desired result. In Heckler v. Mathews, 465 U.S. 728 (1984), an Equal Protection challenge to gender discrimination in Social Security benefits, the Court held:

> the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately

[2] The language of this provision disposes of Defendants' argument that Plaintiff has suffered no injury because he can purchase the goods offered in the subject stores at other locations in Denver. The ADA requires "any place of public accommodation" -- including "a . . . clothing store" and "a restaurant" -- to be accessible, not "chains of public accommodations," "public accommodations under common ownership" or "categories of public accommodations." See 42 U.S.C. §§ 12181(7)(B) & (E), 12182(a) (emphasis added).

> inferior" and therefore as less worthy participants in the political community . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in an disfavored group.

Id. at 739-40 (citations omitted). The Court there held that the plaintiff had standing to challenge unequal treatment even where his benefits might not increase if he prevailed. Id. at 740.

More recently, in Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) (hereinafter "General Contractors"), the Court addressed the standing of a white contractor to challenge a city's minority set-aside program. The defendants argued that the contractors did not have standing because they could not demonstrate that they were likely to suffer future injury caused by the program. The Court rejected this argument, holding that "in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." Id. at 666; see also Adarand Constructors, Inc. v. Pena, --- U.S. ---, 115 S.Ct. 2097, 2102 (1995) (holding that a white-owned contractor "need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing;'" quoting General Contractors, 113 S.Ct. at 2303); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 281 n.14 (1978) (white applicant denied school admission under affirmative action program was injured by inability to compete for such admission and did not have to prove that he would have been admitted in the absence of the program); Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994) (holding that a majority contractor had standing to challenge minority/gender preference program in spite of the fact that it did not show that it

was refused a contract based on race or gender; injury in fact existed because it had been "prevented . . . from competing on an equal basis with minority and women-owned prime contractors."), cert. denied 115 S.Ct. 1315 (1995); Cunico v. Pueblo School District No. 60, 917 F.2d 431, 441 (10th Cir. 1990) ("When a claim is made for a violation of equal protection resulting from discriminatory conduct, 'the "right invoked is that to equal treatment" . . .,'"quoting Heckler, 465 U.S. at 740).

The Tenth Circuit has applied this reasoning in the statutory fair housing and employment discrimination context as well. In Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590 (10th Cir. 1996) -- a fair housing case -- that court stated that "[p]laintiffs 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." Id. at 593 (citing General Contractors, 508 U.S. at 666-68, and Adarand, 115 S.Ct. at 21-4-05).[3] In Murphy v. Derwinski, 990 F.2d 540 (10th Cir. 1993), the Tenth Circuit upheld the standing of a Catholic woman to challenge, under Title VII, 42 U.S.C. § 2000e et seq., a Veterans Administration requirement that VA chaplains be ordained. The injury there, the court held, was the plaintiff's exposure to the discriminatory rule, not her inability to obtain the position:

[3] The plaintiffs in Wilson lacked standing only because they were non-students challenging gender discrimination in student-only housing at Brigham Young University -- and could not have obtained the benefit even in the absence of the discrimination. Id., 98 F.3d at 593.

> Whether she ultimately obtains the position is irrelevant for standing purposes because her alleged injury stems from the VA's use of gender based qualifications to reject her application -- not its failure to hire her. Such an injury goes to the heart of Title VII.

Id. at 543-44.

The ADA -- like the Equal Protection Clause, Title VII and the Fair Housing Act -- prohibits a certain type of discrimination. And as is the case with the Equal Protection Clause, Title VII and the Fair Housing Act, injury under the ADA consists of the discrimination -- in and of itself -- that deprives the plaintiff of the opportunity to obtain a benefit rather than the lack of the benefit itself. Under the reasoning of Heckler, General Contractors, Adarand, Concrete Works, Wilson, Murphy, and Cunico, a disabled plaintiff who has encountered and will encounter a discriminatory barrier demonstrates injury in fact sufficient to confer standing to challenge that barrier. Mr. Williams was, is, and will be injured by the act of rolling down Larimer Square and being deprived, due to the presence of easily-removable architectural barriers,[4] of the opportunity to enjoy the goods, services, facilities, privileges, advantages, or accommodations of the stores at issue -- including browsing, wandering and making spur-of-the-moment shopping decisions -- that is afforded non-disabled people. The injury does not consist, as Defendants argue, of Plaintiff's inability to purchase the goods or services offered in those buildings.

[4] The question whether it would be readily achievable to remove the barriers at issue goes to the merits and thus cannot be resolved in the standing context. Warth v. Seldin, 422 U.S. 490, 500 (1975).

3. Plaintiff Is Injured Even in the Absence of the "Futile Gesture" of Attempting to Enter Defendants' Premises.

Title III of the ADA explicitly recognizes that the presence of obvious discriminatory barriers may deter persons with disabilities from even attempting to enjoy the goods and services of a place of public accommodation -- and thus that they may be injured in the absence of specific plans to go to inaccessible public accommodations. The remedial provision of Title III states that "[n]othing 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." 42 U.S.C. § 12188(a)(1). In the legislative history of the ADA, Congress noted that the "futile gesture" doctrine was set forth in the case of International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). See H.R. Rep. 101-485(II), 101st Cong., 2d Sess. at 82-83, reprinted in 1990 U.S.C.C.A.N. 303, 365. The Teamsters Court observed that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection," Teamsters, 431 U.S. at 365, and held that

> [w]hen a person's desire for a job is not translated into a formal application because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

Id. at 365-66, quoted in H.R. Rep. 101-485(II), 101st Cong., 2d Sess. at 82-83, reprinted in 1990 U.S.C.C.A.N. 303, 365. See also Morgan v. Secretary of Housing and Urban Dev't, 985 F.2d 1451, 1458 (10th Cir. 1993)(adopting the futile gesture theory in the fair housing context).

Under the "futile gesture" theory, one who is aware of an architectural barrier at a place of public accommodation and is thereby deterred from patronizing that place also suffers an injury in fact as defined by the ADA. Requiring Mr. Williams to make "specific plans" to enter inaccessible stores -- over and above his definite intent to return to Larimer Square -- is not only absurd as a practical matter but would also constitute the ultimate in futile gestures. It would, in the words of the Teamsters Court, make him "subject [himself] to the humiliation of explicit and certain rejection." Id., 431 U.S. at 365. Injury under Title III occurs when a person with a disability has a reasonable desire to enjoy the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation but is deterred from doing so by his or her knowledge of a defendant's noncompliance with that statute.

4. Plaintiff Is Also Injured by the Stigma of Defendants' Discrimination.

Discrimination causes injury not only through the denial of an opportunity to participate but through the stigma attached to that exclusion. As the Supreme Court held in Heckler, a person may be injured by discrimination by being stigmatized as "'innately inferior' and therefore as [a] less worthy participant[ ] in the political community." Id., 465 U.S. at 739-40. Such stigmatic injury exists where, as here, it is "suffered as a direct result of having personally been denied equal treatment." Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590 (10th Cir. 1996) (citing Allen v. Wright, 468 U.S. 737, 756 (1984)). In Wilson, the Tenth Circuit noted with approval the injury found in Smith v.

City of Cleveland Heights, 760 F.2d 720 (6th Cir. 1985), cert. denied 474 U.S. 1056 (1986), a case in which the plaintiff challenged a municipal policy of steering blacks away from the city to maintain integrated neighborhoods. The plaintiff was a black resident of the city who had not, himself, been subjected to steering but who alleged that "'the city's steering policies stigmatized him as a member of the group deemed undesirable by the city.'" Smith, 760 F.2d at 726-28, quoted in Wilson, 98 F.3d at 596. As such, the steering practice had a "concrete and personal effect on the plaintiff," Wilson, 98 F.3d at 596, because it consisted of an attempt to "'shape the racial composition of his community.'" Id., 98 F.3d at 597 (quoting Smith, 760 F.2d at 723).

Defendant Hermanson proclaims that "Historic Larimer Street District . . . is widely-recognized as the birthplace of Denver." Response No. 2, Defendant Hermanson Family Limited Partnership I's Response to Plaintiffs' First Set of Interrogatories (Exh. 7 hereto). And Russell Brown -- retained as an expert by all Defendants -- states that

> Larimer Square became a national symbol and standard for historic developments throughout the country. . . . Larimer Square attracted people back to downtown Denver for shopping and entertainment. Larimer Square taught a generation of Coloradoans to appreciate the unique qualities of historic buildings and their importance to the city.

Report of Russell Brown, dated May 9, 1997 at 2-3 (Exh. 8 hereto). That an area as important and prominent as Larimer Square, housing tenants as well-known and well-heeled as Ann Taylor and Nine West, has buildings that -- almost seven years after the passage of the ADA -- are rendered inaccessible by a single or at most two steps is a slap in the face to wheelchair users throughout the

city.[5] It sends the message that the owners and tenants of these buildings are not willing to take the basic measures necessary to allow wheelchair-users into their premises. Mr. Williams has been and will be personally denied equal treatment at these stores. He has had and will have the humiliating experience of strolling down Larimer Street and being unable to enter these shops while non-disabled people can. This, under the reasoning of Heckler and Wilson, injures and will injure him through stigmatizing him as a member of a disfavored and inferior group.

2. Plaintiff's Right to the Full and Equal Enjoyment of the Goods, Services, Facilities, Privileges, Advantages, or Accommodations of the Places of Public Accommodation at Issue is in Actual and Imminent Danger of Being Invaded.

The Defenders test requires that injury to the plaintiff be "actual or imminent, not conjectural or hypothetical." Id., 504 U.S. at 560 (internal quotes omitted). The Defenders Court explained these

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[5] The Larimer Square area contains a number of other ADA violations that -- while not at issue here -- serve to compound the insult and further stigmatize persons in wheelchairs. For example, while the area known as "Avenue of the Shops" has a ramped entrance off a back alley, there is no signage on Larimer Street instructing wheelchair users of this fact and the door to the ramped entrance has non-conforming hardware that makes it impossible for tetraplegics such as Mr. Williams to gain access without assistance. Mexicali resaurant -- which is not only in a building leased from Hermanson but is operated by a related company, see J. Hermanson Depo. at 10-17 (Exh. 9 hereto) -- also has an accessible entrance off a back alley but provides no indication on Larimer Street that this entrance exists. See generally Williams Aff. ¶ 11.

terms thus: "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes -- that the injury is 'certainly impending.'" Id. at 564 n.2 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). Through Whitmore, the Defenders court provided an excellent example of an injury that is not actual or imminent: the plaintiff in that case was a death row inmate attempting to raise the claims of another death row inmate. As demonstrated above, it is sufficient to establish standing to sue under Title III of the ADA -- including its "futile gesture" language -- that Plaintiff state that he has a reasonable desire to enter, browse in, shop at or otherwise enjoy the goods, services or facilities of Defendants' public accommodations but that he is deterred from acting on that desire on by the presence of architectural barriers. Plaintiff is further injured in this case each time he goes to Larimer Square and, while there, is not able to enter, browse or shop in these stores while non-disabled people are able to do all these things. Because he has definite plans to return to Larimer Square repeatedly in the coming months and would like to shop in the stores at issue but is prevented from doing so by the architectural barriers there, his injury is actual and imminent, and in no way conjectural, hypothetical or speculative.

Defendants argue that this is not sufficient and that Plaintiff's injury is merely hypothetical or speculative because he has no "specific plans" to shop in their still-inaccessible stores. In addition, again, to being absurd as a practical matter, the legal frailty of Defendants' argument is perhaps best demonstrated by their reliance on Aikins as their lead ADA standing case. The Aikins court originally held that the plaintiff's allegation that she resided near defendant hospital several days out of each year was insufficient to confer standing to challenge the hospital's policies under the ADA. Aikins v. St.

Helena Hosp., 843 F. Supp. 1329, 1333 (N.D. Cal. 1994). Defendants overlook the fact that, once that same plaintiff amended her complaint to add that it was "reasonably possible" that she might need to use the hospital, the court held this sufficient to withstand a motion to dismiss. Aikins v. St. Helena Hosp., 1994 WL 794759, *3 (N.D. Cal. April 4, 1994) (Exh. 11 hereto). Plaintiff here has, of course, demonstrated far more than a reasonable possibility that he will return to Larimer Square and suffer injury.

The Supreme Court has held, in the discrimination context, that an injury is sufficiciently actual or imminent for standing purposes when a plaintiff is ready and able to participate in a benefit but is prevented from doing so by the defendant's discriminatory conduct. In General Contractors, the plaintiffs challenged a minority set-aside program that they alleged discriminated against them. As noted above, the Court held that the injury was the discrimination -- "the inability to compete on an equal footing in the bidding process," id., 508 U.S. at 666 -- rather than the loss of the resulting contract. It thus followed that, "[t]o establish standing . . . a party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." Id.; see also Adarand, 115 S.Ct. at 2105 (holding that contractor's injury is "imminent" for standing purposes if it can show "that sometime in the relatively near future it will bid on another government contract" subject to the challenged minority preference).

These holdings and those of other discrimination cases recognize that "specific plans" to participate are impossible where the precise discriminatory barriers being challenged prevent participation in the first place. In Bras v. Calif. Pub. Util. Comm'n, 59 F.3d 869 (9th Cir. 1995), cert. denied, 116 S.Ct. 800 (1996), for example, a male architect sued Pacific Bell and the California Public

Utilities Commission based on their use of preferences for minority- and women-owned businesses. Plaintiff's standing was challenged on the grounds that he did not state that he intended to submit bids to Pacific Bell and thus could not allege the loss of future business. The court noted, however, that "Bras cannot presently 'bid' on future projects for Pacific Bell because Pacific Bell has entered long-term business relationships" with companies selected in reliance on the challenged preferences. It was sufficient to confer standing under General Contractors that Bras "'earnestly desire[d] to reinstate [his] long term business relationship with Pacific Bell . . . in the future and [stood] ready, willing and able to provide such services should [he] be given the opportunity to do so.'" Id. at 874 (quoting the plaintiff's declaration). That is, where the very discrimination challenged by the plaintiff prevented him from acting on his desire to participate, that desire -- rather than any "specific plans" -- was all that was required for standing. See also Tarpley v. Jeffers, 96 F.3d 921, 923-24 (7th Cir. 1996) (unsuccessful job applicant would have standing if he could demonstrate that he would have been "able and ready" to apply for the position but was prevented from doing so by the challenged employment practice); Concrete Works of Colo. v. City & County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994) (quoting "ready and able" language and holding that contractor had standing to challenge set aside program where it had -- in the past -- bid on three projects in which it was prevented from competing on an equal basis with minority and women-owned businesses); Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 976 (9th Cir. 1993)(holding that white job applicant had standing to challenge affirmative action plan; "To establish standing, a person need only allege that a discriminatory policy exists that prevents him from competing on an 'equal basis;'"quoting General Contractors, 508 U.S. at 666); Contractors Ass'n of E. Pa. v. City of Philadelphia, 6 F.3d 990, 995-96 (3d Cir. 1993) (holding that contractors have standing

to challenge a set-aside program where they were "able and ready" to bid on contracts but could not do so based on failure to meet minority requirements).

In a case alleging public accommodations discrimination based on race, a court has held that the existence of a policy of discrimination -- equivalent to the existence of the architectural barriers in the present case -- was sufficient to confer standing. In Jackson v. Motel 6 Multipurpose, Inc., 931 F. Supp. 825 (M.D. Fla. 1996), two African-American police officers alleged that they were denied a room at a Motel 6 based on their race. The court held that it was sufficient to confer standing that the plaintiffs alleged "that 'Motel 6 has a nationwide policy of discrimination against African-Americans in affording accommodations throughout the United States.' . . . Thus, Plaintiffs have alleged facts that, if true, are sufficient to establish that African-Americans who attempt to seek accommodations at Motel 6 are subjected to discriminatory practices regardless of their own conduct." Id. at 830.

The future harm to Mr. Williams caused by the Defendants' violations of the ADA in the case at bar is much more certain than the harm in Aikens, General Contractors, Bras, Motel 6 and the other cases discussed above. Mr. Williams will go to Larimer Square several times this summer to shop and browse and he "would love" -- and is able and ready -- to enter Defendants' public accommodations as soon as their discriminatory barriers are removed. Thus it is not just "reasonably possible" that Mr. Williams will experience future harm, it is an absolute certainty that he will be harmed when he visits Larimer Square because he will want to enter the public accommodations at issue but will be unable to do so because of Defendants' failure to install ramps.

Defendants' cases are not to the contrary. Plaintiffs in those cases did not, in contrast to Mr. Williams, state definite plans to return to a place where they would suffer injury. Defenders differs from

the present case in one crucial respect: it did not concern allegations of discrimination but rather violations of the Endangered Species Act, under which a plaintiff has standing if he desires to use an area to observe endangered species and is harmed by their absence. Unlike Plaintiff in the present case, nothing was preventing the *Defenders* plaintiffs from going to the subject areas to attempt to observe endangered species.[6] In spite of this, the plaintiffs could not articulate "current plans" to go there. Id., 504 U.S. at 562-63. In contrast, several post-Defenders environmental cases -- including one decided in this Court -- demonstrate that Plaintiff's injury here is sufficiently actual or imminent to confer standing. See, e.g., Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993) (holding that plaintiffs who alleged that they "have observed and wish to continue to observe owls" on the land at issue had standing to challenge logging on that land); Seattle Audubon Soc'y v. Espy, 998 F.2d 699,703 (9th Cir. 1993) (holding that plaintiffs who had "been using and will continue to use forest lands suitable for owl habitat on a regular basis" had standing to challenge the legality of an environmental impact statement on that land); Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364, 367 (D. Colo. 1992) (holding that plaintiff had standing to challenge administrative action concerning two wilderness areas where he was "a long-standing, frequent and active user of two of the areas in dispute."). In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), also relied upon by Defendants, the plaintiff was held not to have standing to challenge the use of chokeholds by the Los Angeles police because he could not demonstrate that it was likely he would (a) be arrested again and (b) if arrested,

[6] In addition, the Defenders plaintiffs would have been injured had they traveled to Sri Lanka or Egypt. It goes without saying that more specific plans are generally made for a trip around the world than a trip across town.

be subjected to the chokehold. Id. at 105-06. Clearly the likelihood that Mr. Williams will return to Larimer Square and face discrimination is greater than the likelihood that any one person will be arrested and choked by the police.

The remainder of Defendants' ADA cases are not to the contrary. Of course, Aikins, as pointed out above, actually supports Plaintiff's standing. See Aikins, 1994 WL 794759, *3. With one exception, all of the others involved medical facilities and plaintiffs who did not allege any likelihood that they would return to the defendant facilities. See, e.g., Naimon v. N.Y. Univ., 1997 WL 249970 (S.D.N.Y. May 13, 1997) (plaintiff did not allege that he was likely to require emergency attention at the defendant hospital); Schroedel v. N.Y. Univ. Medical Center, 885 F. Supp. 594, 599 (S.D. N.Y. 1995) (plaintiff did not allege that she regularly used the services of the defendant hospital); Hoepfl v. Barlow, 906 F. Supp. 317, 320 (E.D. Va. 1995) (allegation of refusal to perform surgery based on HIV status; surgery was performed elsewhere and plaintiff had moved to another state); Atakpa v. Perimeter Ob-Gyn Assocs, 912 F. Supp. 1566, 1574 (N.D. Ga. 1994) (plaintiff did not allege "that she will ever seek services from defendants in the future"). This, again, is in stark contrast to Mr. Williams's specific and declared intent to return to Larimer Square where he will suffer precisely the discrimination at issue here.

Defendant's only non-medical case, the unreported case of McConnell v. Miramar Hotel Hawaii, Inc., Civ. No. 95-925 ACK (D. Hawaii Jan. 24, 1997), is also distinguishable from the present case. In McConnell, the plaintiff challenged certain ADA violations at a hotel located near his residence. While he had suffered these violations in the past, the only thing he could say with respect to future harm was that he was going to have his carpet cleaned sometime in the next few months and

hoped to stay at some hotel in the area, possibly the defendant hotel. Again, this is far less "actual or imminent" than Mr. Williams's plans to return to Larimer Square repeatedly and soon.[7]

[7] It is also likely that the McConnell court was simply wrong. Title III of the ADA imposes certain substantive requirements on public accommodations to remove architectural barriers that discriminate against people who use wheelchairs, see 42 U.S.C. § 12182(b)(2)(A)(iv), and the same statute provides for injunctive relief to remedy violations of these requirements. Id., § 12188(a). These provisions are not meant to be merely decorative or hortatory. They are intended to provide a method to effectuate the purposes of the ADA: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . .." 42 U.S.C. § 12101(b). A finding that a plaintiff who will repeatedly visit a place where he will experience discrimination does not have standing to seek an injunction to remedy that discrimination would be completely contrary to the stated purposes of the ADA.

Finally, the fact that Mr. Williams's trip to Larimer Square on October 7, 1996 had as a goal to record, in preparation for litigation, the discriminatory barriers he had so often observed does not detract from his standing. As described above, he has been and will be injured by these barriers. Even if the October 7 trip had been his only one, however, he would have standing to challenge these barriers. "Tester" standing has a long and proud tradition in rooting out discrimination. See, e.g., Havens Realty Co. v. Coleman, 455 U.S. 363, 374 (1982) (holding that African-American "tester" plaintiffs had standing to challenge housing discrimination where they inquired concerning rental housing with no intent to rent but rather to test for such discrimination);[8] Pierson v. Ray, 386 U.S. 547, 558 (1967) (holding that African-American ministers who used a "White only" waiting room expecting to be arrested had a cause of action to challenge the arrest under 42 U.S.C. § 1983); Evers v. Dwyer, 358 U.S. 202, 204 (1958) (holding that African-American plaintiff who rode segregated bus for the purpose of instituting litigation had standing); Hamilton v. Miller, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("While actions intended to found a law suit are not favored they at times must be tolerated. . . . It would be difficult indeed to prove discrimination in housing without this means of gathering evidence."); Smith v. Young Men's Christian Ass'n of Montgomery, Inc., 462 F.2d 634, 654-56 (5th Cir. 1972) (Plaintiffs had standing under public accommodations law in spite of the fact that they applied to a

[8] Havens remains good law -- and testers are still found to have standing -- even following the Supreme Court's decision in Defenders. See, e.g., Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 904 (2d Cir. 1993); City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086, 1094-95 (7th Cir. 1992), cert. denied, 508 U.S. 972 (1993); Hispanics United of DuPage County v. Village of Addison, Ill., 958 F. Supp. 1320 (N.D. Ill. 1997); Pumphrey v. Stephen Homes, Inc., 1994 WL 150947 (D. Md. Feb. 24, 1994) (Exh. 10 hereto); Open Housing Center, Inc. v. Samson Management Corp., 152 F.R.D. 472, 476 n.8 (S.D.N.Y. 1993).

segregated camp "for the sole purpose of integrating the camp. . . .The Supreme Court ruled in [Evers] that such a purpose is sufficient to confer standing and does not detract from whether an actual case or controversy exists between the parites.").

II. Plaintiff Kevin Williams Has Standing to Sue Defendants under the Colorado Anti-Discrimination Act.

Plaintiff has standing to seek damages under the Colorado Anti-Discrimination Act, C.R.S. §§ 24-34-601 &602, because he has suffered, in the past, an injury to rights protected by that statute. Section 24-34-601 provides that

> 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 . . .

Plaintiff has alleged -- and, in his deposition, testified -- that on October 7, 1996 and numerous previous occasions he was denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of Defendants' places of public accommodation on the basis of his disability. See generally Exh. 6 hereto. Plaintiff does not seek injunctive relief for this injury but rather statutory damages of $50 under § 24-34-602. Where a plaintiff alleges past injury, he is entitled to seek damages for that injury. See Adarand, 115 S.Ct. at 2104; Bangerter v. Orem City Corp., 46 F.3d 1491, 1498 (10th Cir. 1995).

Defendants argue -- again -- that Plaintiff was not injured because he did not intend to purchase anything in particular or to enter any one particular store. Like the ADA, however, § 24-34-601

protects far more than the right to purchase. It protects the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of these stores. That is, it protects Plaintiff's right to browse "without specifically looking for anything" and to wander down Larimer Street and shop in various stores without "the intention of going to one particular store," as these are all privileges that these stores afford -- even encourage, see A. Johnson Depo. at 28; Sutton Depo. at 20 -- in non-disabled people.

Plaintiff has alleged and demonstrated sufficient past injury to his rights under C.R.S. § 24-34-601 to support a cause of action for damages under § 24-34-602.

CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment based on standing should be denied.

Respectfully submitted,

FOX & ROBERTSON, P.C.

Timothy P. Fox
Amy F. Robertson
1675 Larimer Street
Suite 610
Denver, C O 80202
(303) 595-9700

Dated: June 11, 1997 Attorneys for Plaintiff

I hereby certify that on June 11, 1997, a copy of **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON STANDING** was served by first-class mail, postage prepaid, on:

Stewart McNab, Esq.
Morrison & Foerster
370 17th Street
#5200
Denver, CO 80202

Joe L. Silver, Esq.
Silver & DeBoskey, P.C.
The Smith Mansion
1801 York Street
Denver, CO 80206

Christopher G. Bell, Esq.
Jackson, Lewis, Schnitzler & Krupman
1625 K Street, N.W.
Suite 700
Washington, D.C. 20006