IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DR. JORGE ZAMORA-QUEZA, M.D., DR. MARTIN GUERRERO, M.D., and THEIR NAMED AND UNNAMED PATIENTS AND SURVIVORS OF PATIENTS,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. SA-97-CA-726-FB
HEALTHTEXAS MEDICAL GROUP OF SAN ANTONIO, PRIMARY CARENET OF TEXAS, L.L.C., HUMANA GOLD PLUS, PACIFICARE OF TEXAS AND SECURE HORIZONS,	)	
Defendants.	)	

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER THE JURY INSTRUCTIONS

INTRODUCTION

This matter, brought pursuant to, inter alia, title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq., involves allegations that "because of disability" defendants denied the "patient/plaintiffs" full and equal enjoyment of the medical care and treatment to which they were entitled under the terms of their health plans.

For example, in their complaint the patient/plaintiffs allege that defendants discriminated against them on the basis of disability by, among other ways: maintaining contractual arrangements with financial incentives to under-treat and withhold treatment from people with

disabilities by limiting, denying, and delaying the provision of appropriate health care to people with disabilities; and by engaging in certain behaviors with the goal of encouraging the plantiffs and others with disabilities to seek medical care from another plan or provider.

On July 24, 2000, this Court issued an Advisory Opinion setting forth jury instructions to be submitted in the trial of this matter. The United States respectfully urges the Court to reconsider Question No. 1 and Question No. 2 of those instructions because they do not correctly state the standard of liability under title III of the ADA. These Questions provide:

Question No. 1

Do you find from a preponderance of the evidence that HealthTexas and/or Primary CareNet unreasonably denied the following patient/plaintiffs full and equal access to medically necessary health care based solely upon that patient/plaintiff's disability, if any?

Question No. 2

Do you find from a preponderance of the evidence that HealthTexas and/or Primary CareNet unreasonably delayed the provision of full and equal access to medically necessary health care to the following patient/plaintiffs based solely upon that patient/plaintiff's disability, if any?

These Questions are improper for two reasons: First, under the ADA, a plaintiff is not required to prove that disability was the "sole" reason for a defendant's discriminatory conduct. Rather, a plaintiff need only show that discrimination was a motivating factor in the defendant's action. Second, because patient/plaintiffs allege that they have been denied equal access to health services in violation of the ADA, they should not be required to prove, in addition, that those services were "medically necessary." Rather, each patient/plaintiff need only show that, because of his or her disability, defendants denied the patient/plaintiff full and equal enjoyment of the medical benefits as compared to non-disabled individuals.

ARGUMENT

I. Patient/Plaintiffs Need Only Show That Disability Was a Motivating Factor in Defendants' Discriminatory Conduct

Title III of the ADA provides:

> 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) (emphasis added). The language of title III does not include the word "solely"; rather, title III prohibits discrimination that is simply "on the basis of disability." As the Supreme Court has stated, "It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain meaning." United States v. Apfelbaum, 445 U.S. 115, 121 (1980); see also FDIC v. Meyerland Co., 960 F.2d 512, 516 (5th Cir. 1992) (noting Supreme Court's instruction to adhere to the plain language of a statute). Therefore, because "solely" is not in the statute, it would be improper to include that standard in the jury charge.[1]

Moreover, seven courts of appeals – including the Fifth Circuit – have held that the word "solely" should not be read into the ADA. Rather, these courts have held that a plaintiff need only show that disability was a "motivating factor" in the defendant's conduct. See Newberry v. East Texas State Univ., 161 F.3d 276, 279 (5th Cir. 1998) ("Newberry was required to show that his disability (or perception or record thereof) was a motivating factor in the decision to dismiss

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1/ Moreover, the legislative history confirms that Congress did not intend the word "solely" to be included in the ADA. See H.R. Rep. No. 101-485, pt. 2, at 85-86 (1990); see also discussion at pp. 4-5, below.

him." (citing Hypes v. First Commerce Corp., 134 F.3d 721, 726 (5th Cir. 1998))).[2]

In their submissions to the Court,[3] defendants cite just one decision, Mayberry v. Von Valtier, 843 F. Supp. 1160 (E.D. Mich. 1994), to support their contention that, under title III, a plaintiff must prove that discrimination was based "solely" on disability. Mayberry imposes this standard, however, without any explanation for why it should apply. The court simply ignores the plain language of title III, which does not include the word "solely," and grafts on its own language, regardless of what Congress intended. In fact, it is quite clear that Congress did not intend for the word "solely" to be read into the ADA: in drafting the ADA, Congress did not include the word "solely" in any of the ADA titles, unlike in its earlier legislation, the Rehabilitation Act. See 29 U.S.C. § 12112(a) (prohibiting entities receiving federal funding

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2/ See also Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000) (**"**[W]e join those circuits that have held that, in establishing a prima facie case of disability discrimination, a plaintiff need not demonstrate that disability was the sole cause of the adverse employment action. Rather, he must show only that disability played a motivating role."); Baird v. Rose, 192 F.3d 462, 469 (4th Cir. 1999) ("We . . . adopt the conclusion that the ADA does not impose a 'solely by reason of' standard of causation."); Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999) (holding that the "motivating factor" standard should be applied to the ADA); Katz v. City Metal Co., Inc., 87 F.3d 26, 33 (1st Cir. 1996) (describing the "third element" of plaintiff's case as whether plaintiff "was fired because of a disability, or that his disability was a motivating factor in [his employer's] decision to fire him"); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068 (11th Cir. 1996) (rejecting the argument that "because of" in the ADA means "solely because of" and holding "that the ADA imposes liability whenever the prohibited motivation makes the difference in the employer's decision, i.e., when it is a 'but-for' cause."); Pedigo v. P.A.M. Transport, Inc., 60 F.3d 1300, 1301 (8th Cir. 1995) (applying "motivating factor" standard to ADA claim). But see Sandison v. Michigan, 64 F.3d 1026, 1036 (6th Cir. 1995) (requiring plaintiff proceeding under title II to "prove that the exclusion from participation in the program was 'solely by reason of disability'").

3/ See Defendants HealthTexas Medical Group of San Antonio and Primary CareNet of Texas, L.L.C.'s Objections and Proposed Changes to Order of January 14, 2000, at ¶ 4 (filed Feb. 12, 2000).

from discriminating "solely by reason of disability"(emphasis added)). The intentional exclusion of the word "solely" in the ADA demonstrates that Congress wanted to ensure that the ADA would cover instances of discrimination where disability was one factor, even if it was not the only factor. See Parker v. Columbia Pictures Indus., 204 F.3d 326, 336 (2d Cir. 2000).

Moreover, the ADA is drafted quite similarly to title VII, which prohibits discrimination "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In 1991, Congress clarified that liability under title VII is established where the plaintiff demonstrates that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). This similar use of language in title VII and the ADA suggests that the same interpretation should be given to both in this regard. See Parker, 204 F.3d at 337; see also Buchanan v. City of San Antonio, 85 F.3d 196, 200 (5th Cir. 1996) (noting that "[t]he remedies provided under the ADA are the same as those provided by Title VII" and that title VII prohibits "discrimination 'which was a motivating factor for any employment practice, even though other factors also motivated the practice'" (quoting 42 U.S.C. § 2000e-2(m))); Pedigo v. P.A.M. Transport, Inc., 60 F.3d 1300, 1301 (8th Cir. 1995) (same). In fact, when Congress drafted the ADA in 1990, the Supreme Court had recently determined that the "because of" language in title VII does not mean "solely because of." See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Congress is presumed to know the current law whenever it acts, see Cannon v. University of Chicago, 441 U.S. 677, 696-99 (1979), so we must presume that, when it omitted the word "solely" from the ADA, Congress intended for the ADA to be interpreted consistently with title VII. See McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996).

In view of the foregoing, the United States respectfully urges the Court to remove the word "solely" from Question Nos. 1 and 2 of its jury instructions in order to use the proper standard of causation under the ADA, that is, whether disability was a motivating factor in the defendants' discriminatory conduct.

II. Patient/Plaintiffs Need Not Show That the Health Services They Were Denied Were "Medically Necessary".

As set forth above, title III prohibits 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." 42 U.S.C. § 12182(a) (emphasis added). Title III further prohibits the following conduct:

- affording an individual, on the basis of a disability, "with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals." 42 U.S.C. § 12182(b)(1)(A)(ii) (emphasis added).

- imposing eligibility criteria that screen out individuals with disabilities "from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the [goods and services] being offered." Id. § 12182(b)(2)(A)(i) (emphasis added).

As a plain reading of the statute demonstrates, title III of the ADA is concerned with providing individuals with disabilities with equal access to the goods and services being offered by places of public accommodation. It does not require places of public accommodation to provide individuals with disabilities with a particular good or service (such as "medically necessary" treatment); rather, it requires places of public accommodation to provide individuals with disabilities with equal access to whatever goods and services they provide to non-disabled individuals.

The patient/plaintiffs in this case have alleged, inter alia, that they were denied "the full and equal enjoyment of the medical care and treatment to which they are entitled under the terms of their health plans." Third Amended Compl. at ¶ 5.1.1. They have further alleged that they were provided "with services that are different than that provided to other individuals." Id. at ¶ 5.1.2. Question Nos. 1 and 2 of the jury charge, by asking the jury to decide whether the defendants delayed or denied patient/plaintiffs "full and equal access to medically necessary health care," misconstrues the allegations in the complaint and imposes a burden not required under the ADA. This is a case about whether patient/plaintiffs have been denied equal access to the health benefits available to all participants under defendants' medical plan, as compared to non-disabled individuals. It is not a case about "medical necessity", and that phrase should be deleted from the jury questions. As defendants recognized in their own submission to this Court,[4] the issue for the jury to decide is whether plaintiffs have been denied "'full and equal medical treatment,' as compared to non-disabled individuals." See United States v. Morvant, 898 F. Supp. 1157, 1161 (E.D. La. 1995) (requiring the Government to prove, in a title III case, "that the subject persons were denied full and equal medical treatment because of their disability").[5]

4/ See Defendants HealthTexas Medical Group of San Antonio and Primary CareNet of Texas, L.L.C.'s Objections and Proposed Changes to Order of January 14, 2000, at ¶ 3 (filed Feb. 12, 2000).

5/ Patient/plaintiffs allege, for example, that one of the ways defendants treated them differently from non-disabled individuals was by "leaving such patients [with disabilities] in waiting or examining rooms for excessively long periods of time." Third Amended Compl. at ¶ 4.2.5.b. While excessively long waits may not, in most circumstances, constitute a denial of "medically necessary" health care, this practice could, if proven, constitute a violation of title III, because defendants have deprived patient/plaintiffs of "full and equal enjoyment" of defendants' goods and services.

To add to patient/plaintiffs' case the obligation to prove medical necessity not only imposes on the patient/plaintiffs an obligation not contained in title III, but it unnecessarily complicates their case. Asking the jury to evaluate whether the patient/plaintiffs were denied equal access to "medically necessary" health care will require several mini-trials to determine what health care was "medically necessary" for each patient/plaintiff and for others similarly situated. Such an exercise would waste valuable judicial resources, as patient/plaintiffs' burden in this case is simply to show that they were not provided access to the same health care – medically necessary or otherwise – that non-disabled patients enjoyed.

In sum, the jury charge, as drafted, asks the jury to compare the medical care received by the patient/plaintiffs with the medical care ultimately proven to be "medically necessary." That is not the proper standard under the ADA. The jury's job here is to decide whether the patient/plaintiffs had full and equal access to the benefits available under defendants' health plans as compared to non-disabled individuals.

CONCLUSION

Based on the foregoing, the United States respectfully requests that the Court amend Question Nos. 1 and 2 of the jury instructions to reflect the proper standards of liability under title III of the ADA.

Respectfully submitted,

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