UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JA RO JONES,	§	
Plaintiff	§	
	§	
v.	§	**Civil Action No. A 00-CA-278-JN**
	§	
UNITED STATES GOLF	§	
ASSOCIATION, INC.	§	
Defendant.	§	

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

I. INTRODUCTION AND STATEMENT OF INTEREST

Pursuant to 28 U.S.C. § 517, the United States of America submits this amicus curiae brief that addresses the threshold question of whether defendant, United States Golf Association, Inc. ("USGA"), is a public accommodation subject to the requirements of Title III of the Americans with Disabilities Act of 1990 ("ADA").[1] The Department of Justice ("Department") has substantial enforcement responsibilities under Title III. 42 U.S.C. § 12188(b). Pursuant to 42 U.S.C. §§ 12186(b) and 12206(c)(3), the Department has also issued regulations and a Technical Assistance Manual interpreting Title III. See 28 C.F.R. Pt. 36; ADA Title III Technical Assistance Manual. Because this case presents a fundamental question addressing the nature of a public accommodation as defined in 42 U.S.C. § 12181(7), the Court's decision in this case could affect the Department's enforcement of Title III. In addition, the United States has filed an amicus brief in a similar case raising the same issue. Martin v. PGA Tour, Inc., 204 F.3d 994 (9th Cir. 2000).

[1/] The district court has jurisdiction under 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 12188(a).

II. STATEMENT OF THE CASE

Plaintiff is a professional golfer who seeks a modification of the USGA's no-cart rule under Title III of the ADA, 42 U.S.C. § 12181 et seq., to permit him to use a golf cart in the United States Senior Open Golf Championship and its qualifying round. Plaintiff has Post Polio Syndrome with Progressive Neuromuscular Atrophy that precludes him from walking an eighteen-hole golf course. He is a person with a disability under the ADA. Title III prohibits discrimination against persons with disabilities in places of public accommodation. Such discrimination includes a failure to make reasonable modifications to policies, practices, or procedures, unless doing so would "fundamentally alter" the nature of the services offered. 42 U.S.C. § 12182(b)(2)(A)(ii). Defendant contends that Title III does not apply because it is not itself a public accommodation and does not own, lease or operate a place of public accommodation when it operates qualifying rounds of the U.S. Senior Open. (Answer ¶ 22.) Every court that has considered this precise issue has, however, found that a golf tournament's competition area is indeed a place of public accommodation subject to the requirements of Title III. See Martin, 204 F.3d at 996-99; Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 930-33 (N.D. Ind. 1999), aff'd on other grounds, 205 F.3d 1001 (7th Cir. 2000).

III. ARGUMENT

The USGA concedes that those areas on a golf course accessed by the spectators are places of public accommodation subject to Title III of the ADA (USGA Br. 39). The USGA argues, however, that the playing area of a course "inside the ropes" is not a place of public accommodation because access to that area is "tightly restricted and controlled" (USGA Br. 40).

A. The Area "Inside the Ropes" is a Place of Public Accommodation Subject to the Requirements of Title III.

Title III of the ADA proscribes discrimination by private entities in their operation of places of public accommodation. Specifically, 42 U.S.C. § 12182(a) provides that:

> [n]o 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). A "place of public accommodation" is a facility, operated by a private entity, whose operations affect commerce and falls within one of the twelve broad categories of facilities listed in the statute. See 42 U.S.C. § 12181(7). These categories include such facilities as places of lodging, establishments serving food or drink, places of "exhibition or entertainment," and places of "exercise or recreation." See generally 28 C.F.R. Pt. 36, App. B at 622-23.[2]

The golf courses at which the USGA conducts its tournaments fall squarely within the coverage of Title III. "[G]olf course[s]" specifically are listed as a "place of exercise or recreation" in the statutory definition of public accommodation. 42 U.S.C. § 12181(7)(L). Alternatively, even if the golf course is not being used for exercise or recreation during a USGA tournament, it is certainly being used as a "place of exhibition," which is precisely analogous to a "stadium." 42 U.S.C. § 12181(7)(C). Thus, the golf course must be a place of public accommodation under one of these provisions.

[2/] The regulations define a "public accommodation" to be a private entity that owns, leases, or operates a "place of public accommodation." 28 C.F.R. § 36.104. A "place of public accommodation" is the facility operated by a private entity that falls within one of the 12 listed categories. Id. Title III prohibits the "public accommodation" (the private entity) from discriminating in the operation of a "place of public accommodation." See 28 C.F.R. Pt. 36, App. B at 616, 622.

USGA argues that the area "inside the ropes" on the golf course -- i.e., the part of the course where the golfers play -- is not a "place of public accommodation" subject to Title III because it is off limits to the general public (the spectators).[3] But, whether access to a facility may be strictly controlled, or only a narrow group of individuals may be eligible for admission, has little bearing on whether it is a place of public accommodation. "The fact that entry to a part of a public accommodation may be limited does not deprive the facility of its character as a public accommodation." Martin, 203 F.3d at 997 (citing cases).

The cases holding that eligibility requirements to play high school or college sports are subject to Title III support this conclusion. In these cases, the playing area of the place of public accommodation (e.g., the gymnasium or sports facility) is similarly open only to the athletes eligible to participate (and not the audience). See, e.g., Bowers v. NCAA, 9 F. Supp. 2d 460, 485-489 (D.N.J. 1998); Tatum v. NCAA, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998); Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663, 670 (D. Conn.), vacated as moot, 94 F.3d 96 (2d Cir. 1996); Ganden v. NCAA, No. 96-6953, 1996 WL 680000, at *8-11 (N.D. Ill. Nov. 21, 1996); see also Anderson v. Little League Baseball, Inc., 794 F. Supp. 342 (D. Ariz. 1992) (no dispute that Title III applies to access to coaches box on baseball field). As the Ninth Circuit explained, "the underlying premise of the cases dealing with disabled student athletes is that Title III applies to the playing field, not just the stands. Martin, 204 F.3d at 998. (emphasis supplied).[4]

[3/] PGA Tour, Inc. advanced this same argument in the Casey Martin case. See Martin, 204 F.3d at 997.

[4/] As the Olinger district court explained, "[t]he athletes in these cases were the performers rather than the audience, just as the 6,881 golfers at the local qualifying events [for the U.S. Open], the 750 golfers at the sectional qualifying events, and the 156 golfers at the championship were the performers." Olinger, 55 F. Supp. 2d at 932. The court correctly added that "[t]he courts in the NCAA cases did not find Title III limited by the roped-off, competitive portion of the field, court, or pool, and nothing supports a finding that the USGA's barrier ropes limit Title III." Id.

Moreover, the example of a private school -- specifically included among the twelve categories of facilities listed in the statute, 42 U.S.C. § 12181(7)(J) -- makes particularly clear that because a facility limits admission to a select few does not mean that it is not a place of public accommodation.[5] Thus, the fact that the playing area of the golf course is open only to "specific invitees" — i.e., those players who have satisfied the USGA's criteria either for exempt status or for participation in the qualifying rounds -- does not mean that it is not a place of public accommodation. And as a practical matter, although non-exempt prospective players must meet certain qualification standards -- anyone who does so can play in the local qualifying round. Thus, the fact that it is athletic skill, and not some other criteria -- such as those determining who may be admitted to a particular private school or to a political convention -- that restricts access to a relatively small percent of the public does not mean that the USGA does not operate the playing areas of the golf course as a place of public accommodation for purposes of Title III.

B. Golf Courses Used for Tournaments are Not "Mixed Use" Facilities.

USGA also argues that its golf courses are "mixed use" facilities -- what it characterizes as a covered facility with a restricted area to which the public accommodations provisions of Title III do not apply -- and that such facilities are recognized in the Title III regulations and case law. (USGA Br. 36). This argument is simply incorrect.

[5/]This conclusion is also supported by the Third Circuit's decision in Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113, 122 (3d Cir. 1998), which held that a physician who alleged that his staff privileges at a private hospital were suspended because of his disability stated a cause of action under Title III of the ADA. Staff privileges at a hospital are only open to a highly restricted group of people -- doctors with certain credentials -- not to the public at large. See also Rothman v. Emory Univ., 828 F. Supp. 537, 541 (N.D. Ill. 1993) (private law school a place of public accommodation).

First, neither Title III nor its regulations contemplate that places of public accommodation may have public and private areas for purposes of ADA application, and the USGA misconstrues the regulations in suggesting the contrary (USGA Br. 36-38). USGA relies heavily upon the preamble to the Department's regulations and the Title III Technical Assistance Manual ("TAM") in pressing this argument. (Id.) The regulatory preamble and TAM discussions upon which USGA relies address a completely different situation than the instant situation -- when facilities that are not otherwise places of public accommodation (i.e., commercial facilities)[6] are open to the public for a limited purpose. For example, the preamble explains that where a commercial facility, like a factory or movie studio, offers tours of its facilities to the general public, the tour route is a place of public accommodation subject to specific requirements, but the other portions are not. See 28 C.F.R. Pt. 36, App. B at 589. The preamble similarly explains that if a private entity, like a produce company, operates a roadside stand where crops are sold to the public, only the roadside stand operation would be considered a place of public accommodation. Id. at 588. The conclusion in these circumstances -- where the starting point is that the facility is not routinely a place of public accommodation, but the regulations provide that some of the operations nevertheless may be -- is fully consistent with the broad reach of a remedial statute.[7] By contrast, the golf course here is plainly covered as a place of public accommodation, but the USGA seeks to carve out a zone of the

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[6/] Commercial facilities are defined as "facilities whose operations will affect commerce; that are intended for nonresidential use by a private entity." 28 C.F.R. § 36.104.

[7/] That conclusion is also consistent with the regulations governing the private club exemption, which provide that the exempt status of a private club does not extend to facilities of the club made available for use by nonmembers as a place of public accommodation. See 28 C.F.R. Pt. 36, App. B at 630; ADA Title III TAM at III-1.6000. As the district court in Martin noted, the regulations limiting the private club exemption are "a far cry from the proposition that an operator of a place of public accommodation can create private enclaves within the facility of public accommodation and thus relegate the ADA to hop-scotch areas." Martin, 984 F. Supp. at 1326-27.

golf course that is not covered simply by imposing stricter admissions criteria for a particular area. There is no basis for doing so.

The preamble and TAM also elaborate on when private entities operate both places of public accommodation and commercial facilities (where a public accommodation operates "many different types of facilities," it has Title III obligations only "with respect to the operations of the places of public accommodation." Title III TAM at III-1.2000.). 28 C.F.R. Pt. 36, App. B at 616. The USGA relies on this statement to advance its mixed use argument (USGA Br. 36). But as explained above, these provisions simply indicate that a private entity simultaneously may operate facilities that are places of public accommodation and places that are not. For example, an oil company may operate service stations that are places of public accommodation and refineries that are not (but which would be covered by the Act as commercial facilities). See TAM at III-1.2000. It does not follow, however, as the USGA suggests, (USGA Br. 37), that these regulations also mean that an operator of a place of public accommodation can create a restricted enclave within the covered facility that would fall outside the reach of the public accommodations provisions of Title III. The regulations are clearly referring to separate facilities, not zones within a single facility.

The USGA also relies upon the preamble's discussion of places of lodging that are mixed use facilities — such as a "large hotel that has a separate residential apartment wing." 28 C.F.R. Pt. 36, App. B at 588. But this circumstance is also clearly distinguishable -- the facility is really two separate entities, and these entities are not "zones" of a single place of public accommodation. Indeed, as the regulations make clear, the residential wing, if not covered by Title III, would be covered by the similar provisions of the Fair Housing Act. See 42 U.S.C. § 3604(f)(3)(B) (requiring "reasonable accommodations" to afford handicapped persons equal opportunity to use and enjoy a

dwelling). Thus, the focus of this discussion is whether Title III or the Fair Housing Act applies to the residential wing, not whether the residential wing is exempt from all coverage. In this regard, it bears emphasizing that the only references in the regulations to a "mixed use" facility concern facilities that may be covered by both the Fair Housing Act and the ADA, 28 C.F.R. Pt. 36, App. B at 623, 658, or the definition of a shopping center and shopping mall, 28 C.F.R. Pt. 36, App. B at 660. A "mixed use" facility, therefore, is not a term of art, as the USGA suggests, that applies whenever the operator of a place of public accommodation seeks to carve out restricted areas of a covered facility based on more selective admissions criteria.

Finally, the USGA makes much of two recent cases, Jankey v. Twentieth Century Fox Film Corp., No. 98-56585, 2000 WL 622073 (9th Cir. May 16, 2000), and Louie v. Ideal Cleaners, Nos. 99-1557, 99-1874, 1999 WL 1269191 (N.D. Cal. Dec. 14, 1999), to support the notion that the competition area of a golf course may be an "exempt area" in a place of public accommodation.[8] Both of these cases, however, are easily distinguishable from the instant situation. In Jankey, the Ninth Circuit held that three areas within a movie studio lot that was a commercial facility — the Commissary, the Studio Store, and an ATM — did not constitute places of public accommodation because they also were not open to the public. 2000 WL 622073 at *1. And, while the Ninth Circuit affirmed the district court's decision, it did not embrace that court's "mixed use facility" discussion, stating, "[b]ecause Jankey does not dispute that the Facilities are 'establishments not in fact open to the public' our analysis needs go no farther." Id.

[8/]Two courts have considered and rejected USGA's mixed-use analysis and found that the competitor area at a golf tournament is a place of public accommodation. Martin, 204 F.3d at 998; Olinger, 55 F. Supp. 2d at 931 ("the regulations, do not provide, however, for a private enclave in a public accommodation.").

In Louie, the court held that an employee-only restroom in a dry cleaning shop was not itself a place of public accommodation and thus, not required to undergo readily achievable barrier removal to be made accessible to persons with disabilities. 1999 WL 1269191 at *1. Here, the court's analysis was incorrect, although the determination that the restroom need not be made accessible for a patron was a proper one. The preamble states, "[b]ecause the purpose of title III of the ADA is to ensure that public accommodations are accessible to their customers, clients, or patrons (as opposed to their employees, who are the focus of title I), the obligation to remove barriers under § 36.304 does not extend to areas of the facility that are used exclusively as employee work areas." 28 C.F.R. Pt. 36, App. B at 611. In the instant matter, Ja Ro Jones does not seek barrier removal of an employee-only area like a private restroom, he seeks a reasonable modification of the USGA's no cart policy so that he can participate in a golf tournament at a facility that is clearly a place of public accommodation. While USGA makes much of this case, it is completely inapposite.

Nothing in the ADA, its regulations, the preamble, or the TAM provides that portions of a place of public accommodation may be "exempt" from coverage.[9] Thus, the competitive areas of a golf course during a tournament are places of the public accommodation subject to the public accommodations requirements of Title III.[10]

[9/]Indeed, the TAM specifically provides, as an example, that "[i]f patients receive medical services in the same building where administrative offices are located, the entire building is a place of public accommodation, even if one or more floors are reserved for the exclusive use of employees." Title III TAM at III-1.2000 (emphasis supplied).

[10/]Martin, 204 F.3d at 998; Olinger, 55 F. Supp. 2d at 932; cf. United States v. Lansdowne Swim Club, 713 F. Supp. 785, 791 (E.D. Pa. 1989) (under Title II of the Civil Rights Act of 1964, "[o]nce an establishment is determined to be a place of entertainment, the entire facility is identified as such") (citing cases), aff'd, 894 F.2d 83 (3d Cir. 1990).

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court find that USGA is a public accommodation subject to the requirements of Title III.

Respectfully submitted,

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