STATE OF VERMONT
WINDHAM COUNTY, SS.

MARY TIER,
Plaintiff,

v. **WINDHAM SUPERIOR COURT**
DOCKET NO. S286-7-97 Wmcv

THE BRATTLEBORO RETREAT,
Defendant.

ENTRY ORDER

Plaintiff, an individual person, seeks relief from Defendant, an institution which owns a campus on which it operates a variety of programs and services in several buildings. There are two bases for Plaintiff's claims: in Counts I and II, she seeks relief and attorneys fees for discrimination on the basis of alleged architectural barriers under Title III of the Americans with Disabilities Act of 1990 (ADA) and its Vermont counterpart, 9 V.S.A. § 4501 et seq. In Count III she seeks damages for negligence which allegedly caused her permanent disability. Currently pending are two motions related to Counts I and II only. First is Defendant's Motion for Summary Judgment on Counts I and II on the issue of standing. Also pending is Plaintiff's Motion for Summary Judgment for injunctive relief.

Summary judgment is appropriate on a particular claim if the court determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law with respect to that claim. V.R.C.P. 56(c)(3); Select Design, Ltd. v. Union Mutual Fire Ins. Co., 165 Vt. 69, 72 (1996).

The general background of the case is as follows. The Brattleboro Retreat (hereafter the "Retreat") owns and operates facilities in Brattleboro, Vermont, consisting of a mental hospital, an outpatient treatment facility for the treatment of addictions, a nursing home, and an educational and training facility, all of which are open to the general public. The Retreat campus is made up of nine different buildings, some of which are connected by an underground tunnel, and parking lots on extensive grounds. Plaintiff, a Brattleboro resident, visited the Retreat on September 15, 1994, to apply for a job. At the time she was not disabled. While she was ascending the exterior steps to the Administration Main Building, she tripped and fell. Plaintiff contends that as a result of injuries caused by that accident, she suffered a permanent mobility impairment to her knees such that she is now a person with a disability as defined under the ADA. In Count III she is seeking damages based on negligence. In Counts I and II, she is seeking an injunction for the removal of architectural barriers, damages, a civil penalty, and attorneys fees based on discrimination against her as a disabled person.

Defendant's Motion for Summary Judgment

In its Motion for Summary Judgment, Defendant challenges Plaintiff's standing to assert claims for injunctive relief pursuant to the ADA and 9 V.S.A § 4501 et seq. Vermont has adopted federal precedents for evaluating standing where plaintiffs request injunctive relief. Parker v. Town of Milton, 169 Vt. 74, 76-77(1999). Originating in Article III of the United States Constitution, standing requirements limit court jurisdiction to actual cases or controversies. The purpose of these requirements is to enforce the separation of powers between the three branches of government by confining the judiciary to the adjudication of actual disputes. Id. at 77.

Vermont has adopted the three-part test to determine standing set forth by the United States Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561(1992): a plaintiff must, at a minimum, show (1) injury in fact, (2) causation, and (3) redressability. Hinesburg Sand and Gravel Co., 166 Vt. At 341 (adopting test set forth in Lujan), Parker, 169 Vt. at 77-78. The United States Supreme Court further explained the first prong as requiring: "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical'." Lujan, 504 U.S. at 560 (internal quotations and citations omitted). Defendant contends that Plaintiff cannot meet this prong.

Pursuant to V.R.C.P. 56(c)(2), Defendant filed a statement of undisputed material facts. Defendant's proposed undisputed facts state that Plaintiff has not had any occasion to utilize the Defendant's facilities since the onset of her disability, nor has she demonstrated that she will visit in the future. According to Plaintiff's responsive affidavit and statement of undisputed material facts, during the period from about June 1995 until December 1995, Plaintiff did visit the Retreat after she became disabled for the purpose of receiving rehabilitation services from the Vermont Department of Vocational Rehabilitation, which was then located in the Administration North building on the Retreat campus, a building separate from the Administration Main building. Plaintiff also claims that as a licensed practical nurse and local resident, she has an ongoing desire to attend educational programs and seminars for health care professionals as well as other programs which are open to the general public which are routinely offered at the Retreat, apparently generally in the Administration Main building. These include diet, disease prevention, and health care classes, courses, and workshops. She claims that she has not done so because of the presence of architectural barriers which preclude her safe use of the premises.

Defendant contends that Plaintiff's facts still fall short of establishing standing under the ADA or its Vermont counterpart. As Defendant points out, the ADA, while it provides a broad mandate for the elimination of discrimination against the disabled, does not allow a right of enforcement for the general public. To proceed, a plaintiff must establish that she is actually among those injured by unlawful discrimination. See Lujan, 504 U.S. at 563.

Defendant relies on a number of cases applying the Lujan standards. For example, Defendant points to City of Los Angeles v. Lyons, 461 U.S. 95(1983), in which the Supreme Court found no standing for a plaintiff who had been subjected to a police choke hold without provocation during a routine traffic stop and sought an injunction against further use of the tactic

by the police. While Lyons could easily show that he had been injured in the past, the Court rejected his claim for standing because he could not show that he was "realistically threatened by a repetition of his experience...". Id. at 109. Similarly, in Hoepfl v. Barlow, 906 F.Supp. 317(E.D. Va. 1995), a federal district court rejected an ADA plaintiff's standing in a suit against a doctor who allegedly refused to perform surgery on her because she was HIV positive. The court remarked that the plaintiff, who had already had her surgery, had experienced injury that was "entirely in the past", she had moved out of state and it was highly unlikely she would ever again be discriminated against by the defendant. Id. at 320. As in Lyons, the plaintiff could neither predict nor even desire to plan for a repeat of the circumstances that brought on her discrimination, nor could she predict whether the same injury would occur if they did repeat.

The instant Plaintiff is in a somewhat different situation. She has previously visited the Retreat for two purposes: to apply for a job prior to becoming disabled, and to attend vocational rehabilitation treatment after the onset of her disability. She desires to visit the Retreat campus again, and continues to live in the community. Moreover, because the kind of discrimination which she alleges is architectural, she can predict with a great deal of certainty that the discrimination will recur if she does visit. Defendant cites Lujan for the proposition that mere "some day" plans are not enough to support the necessary finding of actual injury. Lujan, 504 U.S. at 564. Defendant also cites Lyons for the proposition that a person does not have standing to seek an injunction unless there is reason to believe that she personally would directly benefit from the equitable relief sought, and claims that Plaintiff's prospective use is conjectural.

It appears from the facts that the only buildings on the Retreat campus Plaintiff has visited in the past are the Administration Main building, where she went for her job interview, and the Administration North building, where she attended vocational rehabilitation. The Administration Main building is apparently the building where courses and workshops for professionals and the public are offered. She has not established a past history of attending such courses, and she has not shown a continuing need for vocational rehabilitation services. Because the facts do not establish that she has need for the inpatient mental health services, the outpatient addiction treatment services, or the nursing home services offered in separate buildings for these purposes, Defendant argues that she has not shown a reason to visit the Retreat that is more particularized than might be given by any person in the community in which the Retreat is located.[1] This raises questions of whether she can use past visits to two buildings on the Retreat campus for specific purposes together with a desire to visit the Retreat campus in the future for different purposes as grounds for standing, and whether standing to address architectural discrimination in one portion of an extensive campus (which has different buildings for different services and uses) confers standing to seek injunctive relief as to all locations within the campus.

Plaintiff claims that the facts of her case are similar to those of Parr v. L. & L. Drive-Inn Restaurant, 96 F. Supp. 2d 1065(D. Hi. 2000). Plaintiff Parr, who was wheelchair-bound, brought an ADA architectural barriers complaint against a fast food restaurant. The federal

---

[1]Plaintiff alleges that she may need the nursing home services in the future "if her mobility disability worsens."

district court based its finding of standing on the fact that the plaintiff had previously visited the defendant's restaurants and had a sincere desire to return. Id. at 1080. The court noted that the restaurant was within a reasonable distance of the plaintiff's home and along a familiar route. Id. It also stressed the nature of fast food patronage in distinguishing itself from Lujan. Id. at 1079.

Plaintiff has previously visited the campus for employment and rehabilitation services, and lives within the same town as the Retreat. The Retreat, unlike a fast food restaurant, is an extensive physical institution on which a wide variety of programs and services are offered. Presumably employment opportunities are also available for a licensed practical nurse. Plaintiff claims that she need not engage in the "futile gesture" of visiting a building containing known barriers that the owner has no intention of remedying, since other courts have found standing for an architectural barrier claim where a plaintiff has shown knowledge of the existence of barriers and that the plaintiff would visit the building in the imminent future but for those barriers.

Some cases addressing the kind of issues presented by this case include: Steger v. Franco, Inc., 228 F. 3d 889, 892 (8th Cir. 2000) (holding that ADA plaintiffs who had no knowledge of defendant's property and had no intent to visit were without standing but a plaintiff who had actually visited the building and encountered architectural barriers did); Moreno v. G. & M. Oil Co., 88 F. Supp. 2d 1116 (C.D.Ca. 2000) (holding ADA plaintiff could sue gas station owner for architectural barriers he had actually encountered but had no standing as to defendant's 82 additional stations that plaintiff had never visited); and Filardi v. Loyola University, 1998 WL 111683 (N.D. Ill. 1998) (holding mobility impaired plaintiff could not establish standing against her alma mater despite statement that she intended to make use of alumni services). There are no doubt other cases that may be helpful in addressing two questions present in this case but not specifically discussed in the memoranda of law previously submitted: whether Plaintiff must show, in order to establish standing, that the purposes for which she wants to go to the Retreat in the future are the same, or sufficiently similar, as the purposes for her prior visits during which she encountered architectural barrier discrimination. Specifically, the facts show that the reasons she advances for wanting to go to the Retreat in the future are different from the reasons for her past visits: previously, she went for employment application and rehabilitation purposes, whereas now she wishes to attend professional education events and public workshops and courses. Do her past visits to the Retreat place her in any different position than a member of the public who is interested in going to the Retreat for those purposes, but has never done so in the past? The second question is, assuming that she establishes standing as to any portion of the Retreat campus, does that give her standing to seek injunctive relief for architectural discrimination within the Retreat campus as a whole, without limitation?

In this case, there is an issue as to whether Plaintiff's facts show standing at all. It is not clear that there is a link between her past encounters with discrimination at certain locations on the Retreat campus and the purposes for which she wishes to return to the Retreat in the future, or even whether such a link is necessary. In addition, assuming that she can show a basis for standing with respect to one location or building, i.e., the Administration Main building and/or Administration North, a further issue is whether the Plaintiff may only have standing with respect

to those locations, or whether the scope of her standing extends to all possible locations throughout the Retreat campus.

Neither the issue of past use purposes and locations in relation to prospective use purposes and locations, nor the issue of scope with respect to standing, have been sufficiently addressed by the parties in their memos to enable the court to sort out whether the facts support standing as to all, none, or some areas on the Retreat campus. The attorneys should have an opportunity for further argument, and more detailed facts may be helpful to support more refined arguments on these issues.

Plaintiff's Motion for Summary Judgment

Plaintiff asks the Court to rule on her entitlement to injunctive relief on Counts I and II as a matter of law. Clearly this Motion cannot be addressed until the issues of standing and scope of standing are determined. If the Court determines that she has not shown a basis for standing because, for example, her past encounters with discrimination at the Retreat involved a physical location discreet from the ones for which she alleges prospective use, then she may not have a basis for standing as to injunctive relief at all. If the Court determines that Plaintiff has established standing with a limited scope, then some portions of the request for injunctive relief become moot. If the Court determines that Plaintiff has standing with respect to the whole Retreat campus, then all aspects of Plaintiff's requested relief must be considered. In any event, the Plaintiff's motion cannot be addressed until the standing issues have been ruled upon.

In addition, if the Court rules that Plaintiff has standing and proceeds to address Plaintiff's Motion, Defendant's Opposition does not set forth an argument sufficiently specific to show which material facts are in dispute. Further identification of the elements in dispute will assist the Court to address the Motion.

ORDER

For the foregoing reasons:

Each party shall have twenty days to supplement her or its prior filings with additional affidavits, amended statements of undisputed facts, and memoranda of law addressing the issues identified in this Entry Order, as well as an additional ten days to respond to the opposing party's supplemental filings on the issues identified.

Dated at Brattleboro, Vermont, this 5th day of April, 2001.

Mary Miles Teachout

Honorable Mary Miles Teachout
Superior Court Judge