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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Mark Tauscher,  
  
Plaintiff,  
  
vs.  
  
Phoenix Board of Realtors, Inc.,  
  
Defendant.

No. CV-15-00125-PHX-SPL

**ORDER**

Before the Court are the parties’ Cross Motions for Summary Judgment. (Docs. 45, 48.) For the reasons set forth below, Defendant’s Motion for Summary Judgment (Doc. 48) is granted.

**I. Background**

Plaintiff Mark Tauscher is a deaf individual whose “expressed, preferred, and most effective means of communication” is American Sign Language (“ASL”). (Doc. 1 at 3.) Plaintiff is a licensed real estate agent in the State of Arizona. (Doc. 1 at 3.) Defendant Phoenix Board of Realtors, doing business as Phoenix Association of Realtors (“PAR”), is a real estate professional organization to which Plaintiff belongs. (Doc. 1 at 3.)

On September 28, 2012, Plaintiff contacted Defendant to notify the organization that he intended to attend classes held by PAR and “to request accommodations of ASL interpreters in order to attend the classes.” (Doc. 1 at 3.) Plaintiff and Defendant’s Chief Executive Officer Diane Scherer discussed Plaintiff’s accommodation request for an ASL

1 translator over a telephone call on October 15, 2012, during which time she suggested  
2 alternative accommodations such as the use of a FM loop system or real-time captioning.  
3 (Doc. 1 at 4.) During this conversation, Scherer informed Plaintiff that “PAR could not  
4 provide ASL interpreters because of the cost,” while Plaintiff advised Defendant that  
5 “other forms of accommodation could not provide effective communication in a live class  
6 setting.” (Doc. 1 at 4.)

7 In February 2013, Plaintiff registered for a finance class offered by Defendant.  
8 (Doc. 1 at 4.) The registration form that Plaintiff completed included a checkbox stating,  
9 “I have a disability that requires special accommodation,” which Plaintiff marked and  
10 underneath wrote “sign language interpreter.” (Doc. 1 at 4.) Plaintiff contacted Scherer  
11 on February 7, 2013 to inform her that he planned on attending the class and again  
12 requested that an ASL interpreter be provided for him. (Doc. 1 at 4.) The following day,  
13 Plaintiff received a response from an attorney at the law firm that represents Defendant  
14 explaining that “PAR was under an obligation to accommodate Plaintiff and denied  
15 Plaintiff’s request for an interpreter.” (Doc. 1 at 4-5.) Plaintiff did not attend the class and  
16 received a refund for his registration costs. Subsequent correspondence between Plaintiff  
17 and Defendant’s lawyer confirmed that Defendant would not provide Plaintiff an ASL  
18 interpreter because it was under no obligation to do so. (Doc. 1 at 5.)

19 On October 14, 2014, Plaintiff again reached out to Defendant to inform it that he  
20 enrolled in one of its upcoming courses and requested that an interpreter be provided.  
21 Plaintiff received a response from Defendant’s lawyer maintaining that while it was  
22 under no obligation to provide an interpreter, PAR would be “willing to discuss ‘less  
23 burdensome alternatives.’” (Doc. 1 at 5.)

24 Plaintiff initiated the present case against Defendant for alleged violations of Title  
25 III of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12181 and the  
26 Arizonans with Disabilities Act (“AzDA”), Ariz. Rev. Stat. § 41-1492. (Doc. 1.) The  
27 parties have filed Cross Motions for Summary Judgment. (Docs. 45, 48.)  
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1     **II.     Standard of Review**

2             Summary judgment is appropriate if “the movant shows that there is no genuine  
3     dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
4     Fed. R. Civ. P. 56(a). Summary judgment may also be entered “against a party who fails  
5     to make a showing sufficient to establish the existence of an element essential to that  
6     party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp.*  
7     *v. Catrett*, 477 U.S. 317, 323 (1986).

8             The moving party “bears the initial responsibility of informing the district court of  
9     the basis for its motion, and identifying those portions of [the record] which it believes  
10    demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323  
11    (1986). If the movant carries its initial burden of production, in response, the non-movant  
12    “must do more than simply show that there is some metaphysical doubt as to the material  
13    facts,” and instead must “come forward with ‘specific facts showing that there is a  
14    genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
15    574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)).

16            The court views the evidence and draws reasonable inferences “in the light most  
17    favorable to the party opposing the motion.” *United States v. Diebold, Inc.*, 369 U.S. 654,  
18    655 (1962). However, only disputes over facts that could affect the outcome of the suit  
19    will preclude the entry of summary judgment, and the disputed evidence must be “such  
20    that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*  
21    *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). *See also Scott v. Harris*, 550 U.S. 372,  
22    380 (2007).

23     **III.     Discussion**

24            To state a prima facie case under the ADA, Plaintiff must show (1) that he is  
25    disabled within the meaning of the ADA; (2) that he is a qualified individual with a  
26    disability; and (3) that he was discriminated against because of his disability. *Smith v.*  
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1 *Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013).<sup>1</sup> The parties dispute whether  
2 Defendant is a public accommodation under Title III of the ADA. (Doc. 45 at 5-8; Doc.  
3 48 at 9-11.) Assuming for purposes of the present Cross Motions for Summary Judgment  
4 that Defendant is a public accommodation under the ADA, the crux of this case turns on  
5 whether Defendant met its obligation to facilitate effective communication for Plaintiff  
6 through the provision of auxiliary aids.

7 Plaintiff claims that Defendant was required by law to provide him with an ASL  
8 interpreter and that Defendant's failure to do so amounts to discrimination in violation of  
9 the ADA. This argument fails as a matter of law. It is undisputed that Plaintiff,  
10 Defendant, and Defendant's lawyers engaged in multiple discussions over the course of  
11 two years pertaining to Plaintiff's requests for an ASL interpreter so that he could attend  
12 classes offered by Defendant. (Doc. 46 ¶¶ 51-68; Doc. 49 ¶¶ 29-43.) This discussion  
13 began on October 15, 2012 during Plaintiff's phone call with Defendant's CEO Diane  
14 Scherer, at which time Plaintiff refused to discuss alternative auxiliary aids upon learning  
15 that Defendant would not be able to accommodate his request for an ASL interpreter.  
16 (Doc. 46 ¶¶ 52-53; Doc. 49 ¶¶ 30-31.) Subsequent conversations between Plaintiff,  
17 Defendant, and Defendant's lawyers confirmed Plaintiff's refusal to consider alternative  
18 auxiliary aids. (Doc. 46 ¶¶ 51-52; Doc. 49 ¶¶ 29-32.)

19 As the implementing regulations for Title III of the ADA states, "[a] public  
20 accommodation shall take those steps that may be necessary to ensure that no individual  
21 with a disability is excluded, denied services, segregated or otherwise treated differently  
22 than other individuals because of the absence of auxiliary aids." 28 C.F.R. § 36.303(a).  
23 Accordingly, public accommodations "shall furnish appropriate auxiliary aids and  
24 services where necessary to ensure effective communication with individuals with  
25 disabilities." 28 C.F.R. § 36.303(c). The type of auxiliary aid or service necessary is  
26 highly contextual. 28 C.F.R. § 36.303(c)(ii). Moreover, it is important to note that "[a]

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28 <sup>1</sup> The parties do not dispute that Plaintiff is disabled and a qualified individual under the ADA.

1 public accommodation *should* consult with individuals with disabilities whenever  
2 possible to determine what type of auxiliary aid is needed to ensure effective  
3 communication, *but the ultimate decision as to what measures to take rests with the*  
4 *public accommodation*, provided that the method chosen results in effective  
5 communication.” *Id.* (emphasis added).

6 As 28 C.F.R. § 36.303 indicates, Defendant’s obligation under the ADA was  
7 satisfied when it engaged in a dialogue with Plaintiff about his request for an ASL  
8 interpreter. At no point was Defendant obligated to provide Plaintiff with his auxiliary aid  
9 of choice, it was only obligated to provide one which would facilitate effective  
10 communication. The ADA does not require public accommodations to provide an  
11 individual with their requested auxiliary aid, nor does it impose a duty to give primary  
12 consideration to an individual’s particular auxiliary aid requests.<sup>2</sup> Again, the ADA only  
13 mandates that public accommodations provide an auxiliary aid that would facilitate  
14 effective communication. Defendant met this obligation under the ADA when it engaged  
15 in a dialogue with Plaintiff about his request for an ASL interpreter so that Plaintiff could  
16 attend Defendant’s classes, but was precluded from further meeting its obligations under  
17 the ADA when Plaintiff refused to discuss alternative auxiliary aids.

18 At trial, Plaintiff bears the burden of proof at trial to show that he was  
19 discriminated against as a result of Defendant’s conduct, not his own. Because he cannot  
20 do so, Plaintiff’s claims against Defendant fail as a matter of law. Furthermore, because  
21 Plaintiff’s ADA claims fail as a matter of law, so too do his claims against Defendant  
22 under the AzDA. *See McCoy v. Petwin Hayden LLC*, No. CV-16-02795-PHX-JAT, 2016  
23 WL 7440789, at \*1, n.1 (D. Ariz. 2016); *Hamblen v. Diamonte Crossroads Plaza, LLC*,

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25 <sup>2</sup> In fact, such a position has been expressly rejected. 28 C.F.R. Pt. 36, App. A, §  
26 36.303 (“Many commentators urged the Department to amend this provision to require  
27 public accommodations to give primary consideration to the expressed choice of an  
28 individual with a disability. However, as the Department explained when it initially  
promulgated the 1991 title III regulation, the Department believes that Congress did not  
intend under title III to impose upon a public accommodation the requirement that it give  
primary consideration to the request of the individual with a disability.”).

1 No. CV-08-0561-PHX-JAT, 2009 WL 825809, at \*1, n. 1 (D. Ariz. 2009) (“Although the  
2 Court only discusses the ADA claim in the body of this order, the Court’s discussion is  
3 equally applicable to the AzDA claim. Compliance with Title III and its implementing  
4 regulations equals compliance with the AzDA. *See* A.R.S. § 41-1492.06(B).”).

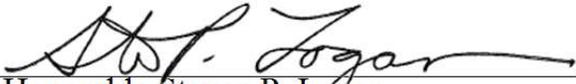
5 **IV. Conclusion**

6 Plaintiff’s claims against Defendant fail as a matter of law. Assuming for purposes  
7 of this motion that Defendant is a public accommodation under Title III of the ADA,  
8 Defendant met its obligations under the ADA and its implementing regulations when it  
9 engaged in a dialogue with Plaintiff about his request for an ASL interpreter for  
10 Defendant’s classes. Defendant was precluded from further meeting its obligations under  
11 the ADA when Plaintiff refused to discuss alternative auxiliary aids. Accordingly,

12 **IT IS ORDERED:**

- 13 1. That Plaintiff’s Motion for Summary Judgment (Doc. 45) is **denied**;  
14 2. That Defendant’s Motion for Summary Judgment (Doc. 48) is **granted**; and  
15 3. That the Clerk of Court shall terminate this action and enter judgment  
16 accordingly.

17 Dated this 29th day of September, 2017.

18   
19 Honorable Steven P. Logan  
20 United States District Judge  
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