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FEBRUARY 11-13, 2013 • HOUSTON, TEXAS

ADA Title III Litigation: What are the Courts Saying?

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ADA-Title III

Title III of the ADA set forth the underlying prohibition against discrimination as follows:

“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 operated a place of public accommodation.” 42 U.S.C. § 12182(a).

Application of Title III

- No exceptions to ADA compliance for a place of public accommodation or a commercial facility – existing properties are not “grandfathered”.
- Only different standards to apply depending on whether your property is considered an existing facility, whether construction or alterations are completed by March 15, 2012, or whether the elements concerned are newly covered by the 2010.
- 2010 Standards provides the scoping and technical requirements for new construction and alterations resulting from the adoption of revised 2010 Standards.
- Public accommodations must remove architectural barriers when it is readily achievable to do so.

Readily Achievable Defined

Readily achievable means that removal of a barrier must be “accomplishable and able to be carried out without much difficulty or expense.” Whether any modification is “readily achievable” depends on many factors. These criteria include:

- 1) the nature and the cost of the modification;
- 2) the overall financial resources of the business in question;
- 3) the number of persons employed at the facility; and
- 4) the impact of removing the barrier on the operation.

Under this fact-based test, what may be “readily achievable” for a small local business will be far different from what might be required of a larger organization.

Elements of a Title III Lawsuit

- No failure to exhaust administrative remedies
- No pre-suit notice requirement needed
- Monetary damages and civil penalties
- Attorneys fees and costs awarded to prevailing party
- Rebuttable presumption of compliance by certification of building code
- Has your property been certified by access specialist?
- Vexatious litigant issues
- Injury in Fact + causal connection + likely not speculative redress

Case Analysis 2012

- Standing
- Alternative Entrances
- Alternative Accessibility Devices
- Civility and the ADA
- Internet and the ADA

Case Analysis-Standing

Norkunas v. Seahorse NB, LLC (11th Cir. 2011):

- ADA violations alleged in a restaurant bar.
- Plaintiff argued that once a single barrier was encountered, he had standing to bring the entire facility into ADA compliance.

RESULT: the plaintiff only had standing to sue for the discrimination he actually suffered due to his stay at the hotel.

Lesson Learned: ADA violations limited only to ADA violations that affect them directly. **No “Cat and Mouse” games allowed.**

Case Analysis-Standing

Access for the Disabled, Inc. v. First Resort, Inc. (M.D. 2012):

- Plaintiff went to the defendant's hotel located approximately 200 miles from her home, on the other side of the state. She went there on "ADA business" with her ADA expert. She was at the hotel for approximately 30 minutes.
- Afterwards, without notice to the hotel, the plaintiff filed a lawsuit alleging unspecified barriers to her handicap.
- Corrected most of these deficiencies but faced with additional allegations of ADA violations at trial.

RESULT: No standing for barriers unaware at time of complaint filed, no standing about items did not use during stay and no standing because did not have good faith basis of intent to return. DEFENSE JUDGMENT.

Alternative Entrances-Hollister

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Case Analysis-Alternative Entrances

CCDC, et al. v. Abercrombie & Fitch Co., et al., (U.S.D.C. Colo. 2012):

- Storefront -built a raised platform porch entrance that requires people to go up the steps to the porch and then go back down from the porch to get into the store.
- Wheelchair users can use unmarked side entrances that looked like window shutters.
- Lawsuit claiming discrimination -porch-like entrances with steps that prevented them from getting in the main entrance.
- Abercrombie argued that the ADA regulation requiring the main entrance to be accessible is "aspirational," not mandatory.

RESULT: “Defendants have unnecessarily created a design for their brand that excludes people using wheelchairs from full enjoyment of the aesthetic for that brand. “

Disney

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Case Analysis-Accessibility Devices

Baughman v. Walt Disney World Company (9th Cir. 2012):

- Disney's policy "two-wheeled vehicles or devices," like bicycles and Segways, are prohibited.
- Plaintiff sued Disney under the Americans with Disabilities Act ("ADA"), claiming that Disney denied her full and equal access to Disneyland, claimed motorized scooters that could rent not sufficient.
- Department of Justice ("DOJ") new regulations identify two classes of mobility devices: (1) wheelchairs and manually powered mobility aids and (2) other power-driven mobility devices. § 36.311.
- Regulations say "make reasonable modifications" to permit the device unless it can demonstrate that the device can't be operated "in accordance with legitimate safety requirements." § 36.311(b)(1).

RESULT: District court defense dismissal overturned because that in the vast majority of circumstances" public accommodations have to admit Segways.

Case Analysis-Accessibility Devices

Ault v. Walt Disney World Company (11th Cir. 2012):

- Disney's policy Segway prohibition challenged via class action Title III claim.
- Class settlement reached whereby Disney would not let people bring in their personal devices but rather Disney would develop a four-wheeled, electric stand-up vehicle ("the ESV") for those for whom a stand-up mobility device is a necessity.
- Objection filed citing new DOJ regulations.
- Fairness hearing-Disney presents evidence of significant safety risk of Segways and its ESV reasonable alternative.

RESULT: Settlement uphold due to legitimate safety concerns and settlement was reasonable and appropriate to address the class members needs and was not an abuse of discretion. **Injunction upheld barring nationwide waiver of declaratory or injunctive claims relating to Disney's policy banning all two-wheeled devices.**

QUESTION: WILL DECISION HAVE PRECLUSIVE EFFECT IN CALIFORNIA?

ESV-Fictional and Otherwise

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Case Analysis-Civility

Krist v. Kolombos Restaurant, Inc. (2nd Cir. 2012):

- Longtime disabled patron of restaurant starts bringing service animal to restaurant.
- Plaintiff continued to frequent the restaurant but claimed that employees would tell her to move her dog and would “yell” at her and some friends did not elect to socialize with her-files Title III action.
- Evidence at trial shows she continues to go to restaurant and stay as long as she wants and dog asked to stay out of walk lanes.

RESULT: Defense judgment upheld. Perceived insensitivity toward a patron will not subject a restaurant to a Title III violation.

Case Analysis-Internet

National Association for the Deaf v. Netflix, Inc. (U.S.D.C. Mass. 2012):

- Class action lawsuit under Title III for failing to provide closed captioning for many of the on-demand movies available on its website.
- Argument that Title III of the ADA applies only to physical places and therefore could not apply to website-only businesses.

RESULT: First court to hold that the Americans with Disabilities Act (“ADA”) applies to website-only businesses. Be “irrational to conclude” that: “places of public accommodation are limited to actual physical structures.” ADA was made to adapt to technology and internet was not even readily available in 1990.

POST-DECISION: Consent Decree ensuring closed captions in 100% of Netflix streaming content within two years.

Case Analysis-Internet

Cullen v. Netflix, Inc. (U.S.D.C. N. D. Cal. 2012):

- Similar allegation as Mass. case as to closed captioning for its instant streaming.
- Netflix moved to dismiss the case for a number of reasons, one being that Netflix is not covered under Title III of the ADA because it is not a physical place.

RESULT: Ninth Circuit precedent holding that “**place of public accommodation**” under the ADA, is limited to “**an actual physical place**”, the complaint was dismissed with leave to amend.

EPILOGUE: The new complaint attempted to avoid the Title III issues as to public accommodation. Complaint dismissed with prejudice based on a lack of standing by the Plaintiff. Specifically, Plaintiff was unable to show under the California statutes that he suffered a legally cognizable injury.-NO STANDING

California-New Accessibility Standards

Effective January 1, 2013

- **Mandatory pre-suit demand letter**
- **State Bar Reporting**
- **Verified Complaint Required**
- **Small Business-Early Evaluation Right**
- **Plaintiffs must have personally encountered the alleged violations or were personally deterred from accessing the site.**
- **Reduced per violation statutory damages**
 - \$4,000 to \$1,000 if already evaluated by a certified access specialist (Casp) and the property owner has corrected all construction-related violations 60 days post-service.
 - \$4,000 to \$2,000 if correction within 30 days post service and small business.

Prevention Strategies

- Coordinate with a certified access specialist before making changes to help with compliance.
- Review elements that will be subject to stricter or different specifications under
- Bring into compliance with the 2010 Standards any newly covered elements to the extent doing so is “readily achievable”.
- Revisit plans for upcoming alterations or new construction to confirm compliance with the 2010 Standards.
- Modify reservations systems to comply with new requirements and contact your ATM provider to add communication features.
- Be sure that you have a written policy for other power-driven mobility devices.
- Review and update your effective communication policy as well as your service animal policies based on new regulations and state/local requirements

Prevention Strategies

Determine strategy and tactics early and then implement



Prevention Strategies

Compliance plan, including audits, should be synergized with your other practices, procedures & policies



Leadership

**It is our individual and team responsibility
to practice**

PREVENTION!

THANK YOU
FOR ATTENDING!