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Does the ADA Require a Compliance Management System?

A new type of Americans with Disabilities Act ("ADA") class action has been developing, in which plaintiffs charge that defendants have violated the ADA by failing to have policies to systematically seek out physical barriers. But this theory may not be viable for much longer. A Pennsylvania federal court has just concluded that companies have no freestanding ADA duty to maintain such policies.

Title III of the ADA prohibits discrimination by places of public accommodation against people with disabilities. With respect to physical access, a covered entity that builds or renovates a facility must make the facility readily accessible to those with disabilities. A covered entity with an existing facility (one predating the 1990 enactment of the ADA) must remove barriers to access wherever that is readily achievable.[1]

Individuals can enforce these requirements by suing for injunctive relief[2]. A number of states have effectively provided a damages remedy as well. For example, in California, a violation of the ADA is automatically a violation of the state's Unruh Act, and a private plaintiff can recover statutory damages of $4,000 per violation[3].

How to handle existing facilities has been a difficult issue from the onset. Fully renovating all existing facilities to meet the standards applicable to new construction would be incredibly expensive. The compromise in the ADA is that a company must remove barriers at an existing facility only when that is "readily achievable," depending on factors like the cost of the work to remove a barrier, the "overall financial resources of the facility," the impact of the removal on operations, the nature and size of the workforce, and [4]more. However, the "readily achievable" concept produces its own challenges. Identifying barriers—such as entrance ramps that have the wrong slope and doors that require too much force to open—is time-consuming and costly, and assessing which ones should be removed under the "readily achievable" standard even more so. When a company learns about an access barrier, it should certainly determine promptly whether to remove the barrier or provide an alternative mode of access. But does a company have an ongoing obligation to scrutinize its facilities for barriers that can "readily" be removed?

In recent years, plaintiffs have had increasing success pushing companies to implement compliance policies regarding physical access to facilities. These cases have relied mainly on two theories. First, US Department of Justice (DOJ) regulations under the ADA say a company must "maintain in operable working condition those features of facilities and equipment that are required to be readily accessible[5]." The word "maintain" suggests an ongoing obligation, and some plaintiffs argue that a company that has no policy to review its facilities for access problems is not fulfilling its maintenance obligation. Second, the ADA says that injunctive relief can, "[w]here appropriate," include "modification of a policy[6]." If a plaintiff proves a store has an access barrier, the plaintiff might ask the court to require the company to establish a policy to find and remove further barriers[7]. In some cases, plaintiffs have also used the content of company policies to justify certifying class actions covering access barriers across entire chains of stores[8]. For example, a federal court in Pennsylvania noted that a defendant's "application of its centralized policies" regarding physical accessibility "and its failure to implement effective accessibility policies is generally applicable to all class members.[9]"

The issue these cases present goes beyond whether a company ought to be working to remove physical barriers to access. Under the ADA, a barrier for which removal is "readily achievable" must be removed, and companies should be making reasonable efforts to fix such barriers. But the suggestion in these cases is that the ADA imposes a distinct obligation to implement a policy to search for and eliminate barriers; and that private plaintiffs can litigate over the content of the *policy*, independent of what barriers they have personally faced.

Federal courts in Pennsylvania have now substantially constrained that theory in a case that involves Steak 'n Shake, a nationwide restaurant chain. The plaintiffs alleged they had trouble using the accessible parking spaces at several locations because the sidewalk ramps were too steeply sloped. Beyond simply asking that the court require Steak 'n Shake to fix those ramps, the plaintiffs sought to represent a class regarding all sorts of access barriers at the company's restaurants across the country. The common link, they said, was that Steak 'n Shake does not have a policy to eliminate access barriers.

1 42 U.S.C. §§ 12182(b)(2)(iv), 12183.

2 42 U.S.C. § 12188(a)(2); 42 U.S.C. § 2000a-3(a).

3 Cal. Civ. Code §§ 51(f), 52(a).

4 42 U.S.C. § 12181(9).

5 28 C.F.R. § 36.211.

6 42 U.S.C. § 12188(a)(2).

7 *See Heinzl v. Cracker Barrel Old Country Stores, Inc.*, 2016 U.S. Dist. LEXIS 58153, *55 (W.D. Pa. Jan. 27, 2016).

8 *See Heinzl*, 2016 U.S. Dist. LEXIS 58153, at *58-64; *Brodie v. Speedway LLC*, 2017 U.S. Dist. LEXIS 54544, *10-*11 (W.D. Pa. Apr. 7, 2017).

9 *Brodie*, 2017 U.S. Dist. LEXIS 54544, at *11.

The Third Circuit struck the first blow by holding the class could not be certified for lack of a common question[10]. Given the wide range of possible access barriers—unclear signage, several different types of ramp, narrow doors, etc.—different class members at different stores would not necessarily have faced the same type of access barrier. Therefore, the Third Circuit said, the class members would have experienced different types of injury, not susceptible to common proof. But in addition, the court questioned the plaintiffs' theory that Steak 'n Shake was required "to adopt policies for ADA compliance that require Steak 'n Shake to actively seek out potential violations[11]." Although the court purported to leave open whether that theory is valid, in fact the decision necessarily rejected it. If a company has a legal obligation to maintain a policy on accessibility that meets minimum ADA standards, the existence and content of Steak 'n Shake's policy ought to be a common question. By focusing on the specific barriers at individual stores, the Third Circuit has evidently rejected corporate policy as a legitimate target for an ADA claim.

On remand, the district court hammered the point home by explicitly dismissing the plaintiff's "policy" claim. "[A] public accommodation can fulfill [its] duties," the court held, "by making repairs when it finds problems or when problems are brought to its attention, which is not the same proposition as requiring it to create a policy to inspect for such problems[12]." "[P]lac[ing] the burden to inspect for such potential issues on the public accommodation," the court continued, "is not supported anywhere in the statute or regulations[13]."

Clarity on this issue will be valuable, and defendants will welcome this result from the Western District of Pennsylvania. Still, it remains to be seen whether other circuits will agree with the Third Circuit. Until the issue is resolved, companies that operate physical stores will need to think carefully about their duties to undertake proactive measures to find and remove potential barriers at their existing facilities.

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10 *Mielo v. Steak 'n Shake Ops., Inc.*, 897 F.3d 467 (3d Cir. 2018).

11 *Mielo*, 897 F.3d at 477.

12 *Mielo v. Steak 'n Shake Ops. Inc.*, No. 15-180, 2019 U.S. Dist. LEXIS 48916, *22 (W.D. Pa. Mar. 25, 2019).

13 *Id.*

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