The Americans with Disabilities Act: Legislation Concerning Notification Prior to Initiating Legal Action

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Summary

The Americans with Disabilities Act (ADA) provides broad nondiscrimination protection in employment, public services, and public accommodation and services operated by private entities. Since the 106th Congress, legislation has been introduced to require plaintiffs to provide notice to the defendant prior to filing a complaint regarding public accommodations. In the 112th Congress, H.R. 881 was introduced by Representative Hunter to amend Title III of the ADA to require notification.

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Introduction

The Americans with Disabilities Act[1] has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. It provides broad nondiscrimination protection and, as stated in the act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] Title III of the ADA prohibits discrimination against individuals with disabilities by places of public accommodations, and has been the basis of numerous legal actions. Several of these have involved the filing of multiple law suits by an individual with a disability based on de minimus violations. Of the actions which have resulted in judicial decisions, some have rejected the allegations, finding that the plaintiff was a vexatious litigant, while others have rejected the suits finding that the plaintiff had no standing since the plaintiff could not establish an intent to return to the entity with the alleged ADA violations. Some courts, however, have upheld the plaintiff's action even where numerous previous suits had been filed. Legislation has been introduced since the 106th Congress to require that a plaintiff provide notice of non compliance with the ADA to an entity prior to commencing a legal action.

The Americans with Disabilities Act

Statutory Provisions

Title III of the ADA provides that 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 operates a place of public accommodation.[3] Entities covered by the term "public accommodation" are listed and include, among others, hotels, restaurants, theaters, auditoriums, laundromats, museums, parks, zoos, private schools, day care centers, professional offices of health care providers, and gymnasiums.[4] Although the sweep of Title III is broad, there are some limitations on its nondiscrimination requirements. A failure to remove architectural barriers is not a violation unless such a removal is "readily achievable."[5] "Readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[6] Reasonable modifications in practices, policies or procedures are required unless they would fundamentally alter the nature of the goods, services, facilities, or privileges.[7] No individual with a disability may be excluded, denied services, segregated or otherwise treated differently than

[1] 42 U.S.C. §§12101 et seq.

[2] 42 U.S.C. §12102(b)(1). For a more detailed discussion of the ADA generally see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by (name redacted).

[3] 42 U.S.C. §12182. The Department of Justice amended the regulations promulgated under Title III in 2010. For a discussion of these changes see CRS Report R41376, *The Americans with Disabilities Act (ADA): Final Rule Amending Title II and Title III Regulations*, by (name redacted).

[4] 42 U.S.C. §12181.

[5] 42 U.S.C. §12182(b)(2)(A)(iv).

[6] 42 U.S.C. §12181.

[7] 42 U.S.C. §12182(b)(2)(A)(ii).

other individuals because of the absence of auxiliary aids and services unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, or facilities or would result in an undue burden.[8] An undue burden is defined as an action involving "significant difficulty or expense."[9]

The remedies and procedures of section 204(a) of the Civil Rights Act of 1964 are incorporated in Title III of the ADA.[10] This allows for both private suit and suit by the Attorney General when there is reasonable cause to believe that there is a pattern or practice of discrimination against individuals with disabilities. Monetary damages are not recoverable in private suits but may be available in suits brought by the Attorney General.[11] Section 204(c) of the Civil Rights Act requires that when there is a state or local law prohibiting an action also prohibited by Title II, no civil action may be brought "before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority...." The ADA does not specifically incorporate this requirement, and the courts which have considered the issue have generally found that this requirement was not incorporated in the ADA.[12]

Judicial Decisions

Although situations involving the filing of multiple law suits by an individual with a disability based on de minimus violations have generally been settled out of court, there have been judicial decisions involving these issues.[13] Generally, the cases that have gone to court have addressed questions concerning whether the plaintiff is a vexatious litigant or whether the plaintiff has standing.

In *Molski v. Mandarin Touch Restaurant*[14] a California district court found that the plaintiff was a vexatious litigant who filed hundreds of law suits designed to harass and intimidate business owners into agreeing to cash settlements.[15] The plaintiff, Jack Molski, had a physical disability which required that he use a wheelchair and had filed between 300-400 lawsuits in federal courts since 1998. The district court reviewed the cases and found that "many are nearly identical in terms of the facts alleged, the claims presented, and the damages requested."[16] In fact, the court noted in one complaint Mr. Molski claimed that on May 20, 2003, he went to El 7 Mares

[8] 42 U.S.C. §12182(b)(2)(A)(iii).

[9] 28 C.F.R. §36.104.

[10] 42 U.S.C. §12188. Section 204a-3(a) of the Civil Rights Act of 1964 is codified at 42 U.S.C. §2000a-3(a).

[11] 42 U.S.C. §12188(b)(4).

[12] See e.g., *Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000). For a detailed discussion of this issue see Adam A. Milani, "Go Ahead. Make my 90 Days: Should Plaintiffs be Required to Provide Notice to Defendant Before Filing Suit Under Title III of the Americans with Disabilities Act?" 2001 Wisc. L. Rev. 107 (2001). This article argues that the best reading of the ADA is that it requires, like Title II of the Civil Rights Act, that plaintiffs provide thirty days notice to a state or local agency responsible for combating discrimination prior to filing suit. The article concludes that this interpretation renders federal legislation to provide notice unnecessary.

[13] Commentators have also explored these issues. See e.g., Carri Becker, "Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable?" 17 HASTINGS WOMEN'S L.J. 93 (2006); Samuel R. Bagenstos, "The Perversity of Limited Civil Rights Remedies: The Case of 'Abusive' ADA Litigation," 54 UCLA L. REV. 1 (2006).

[14] 347 F.Supp.2d 860 (C.D.Calif. 2004).

[15] California has seen several of these cases since, although the ADA only provides for injunctive relief, attorneys' fees, and costs, California state law permit the recovery of money damages. See Cal. Civ. Code §§ 51(f), 54(c), 54.3(a).

[16] *Id.* at 861.

restaurant which he alleged lacked adequate parking and had a food counter that was too high. After the meal, the plaintiff alleged that he attempted to use the restroom but because the toilet's grab bars were improperly installed, he injured his shoulder and he was also unable to wash his hands due to faulty design. In two other cases, Mr. Molski alleged that he encountered almost identical problems in another restaurant and at a winery on the same day, May 20, 2003. The court found these complaints to be indicative of a clear intent to harass businesses.[17] Even though the court noted that it was "possible, even likely, that many of the businesses sued were not in full compliance with the ADA," the court found the sanctions for bad faith were not therefore barred, especially where the motive was to garner funds. The district court ordered the plaintiff to obtain the leave of the court prior to filing any other claims under the ADA observing that "in addition to misusing a noble law, Molski has plainly lied in his filings to this Court. His claims of being the innocent victim of hundreds of physical and emotional injuries over the last four years defy belief and common sense."[18] In a related suit, the California district court also found against the counsel in the *Molski* case holding that the counsel was required to seek leave of the court before filing any additional ADA claims.[19]

These two cases were upheld on appeal to the ninth circuit in *Molski v. Evergreen Dynasty Corp*.[20] After a detailed examination of the cases in light of standards for vexatious litigation, the ninth circuit noted:

> For the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA. But as important as this goal is to disabled individuals and to the public, serial litigation can become vexatious when, as here, a large number of nearly-identical complaints contain factual allegations that are contrived, exaggerated, and defy common sense.[21]

Similarly, the court of appeals held that the district court was within its discretion to impose a pre-filing order. The ninth circuit observed "[t]hat the Frankovich Group filed numerous complaints containing false factual allegations, thereby enabled Molski's vexatious litigation, provided the district court with sufficient grounds on which to base its discretionary imposition of sanctions."[22]

Several courts have addressed the standing issue. Some courts have found that a plaintiff lacks standing to bring an ADA claim for injunctive relief under Title III if the plaintiff cannot establish that he or she intends to return to the entity with the alleged ADA violations. For example, in *Harris v. Stonecrest Care Auto Center*,[23] the district court questioned the plaintiff's credibility due

[17] The district court observed: "The Court is tempted to exclaim: 'what a lousy day!' It would be highly unusual—to say the least—for anyone to sustain two injuries, let alone three, in a single day, each of which necessitated a separate federal lawsuit. But in Molski's case, May 20, 2003, was simply business as usual. Molski filed 13 separate complaints for essentially identical injuries sustained between May 19, 2003 and May 23, 2003. The Court simply does not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period." *Id* .at 865.

[18] 347 F.Supp.2d 860, 867 (C.D.Calif. 2004).

[19] *Molski v. Mandarin Touch Restaurant*, 359 F.Supp. 924 (C.D.Calif. 2005). See also *Molski v. Arby's Huntington Beach*, 359 F.Supp.2d 938 (C.D.Calif. 2005).

[20] 500 F.3d 1047 (9th Cir. 2007), cert. denied, 129 S. Ct. 594, 172 L. Ed. 2d 455 (2008).

[21] *Id.* at 38.

[22] *Id.* at 43.

[23] 472 F. Supp.2d 1208 (S.D. Calif. 2007). See also, Fiedler v. Ocean Prop., 683 F.Supp.2d 57 (D.Me. 2010); Access 4 All v. Boardwalk Regency Corp., 2010 U.S. Dist. LEXIS 124625 (D.NJ, Nov. 23, 2010).

to the fact that he had brought at least twenty other ADA related lawsuits, and carefully examined the requirements of standing. Noting that Title III of the ADA was intended to remedy discrimination in the area of public accommodation by providing injunctive relief, the court concluded that since the plaintiff had visited the gas station "solely for the purpose of bringing a Title III claim and supplemental state claims, any injunctive relief (the court) might grant would not satisfy the redressability requirement of standing."[24] Similarly, in *Tampa Bay Americans with Disabilities Association, Inc. v. Nancy Markoe Gallery, Inc.*,[25] the court found that the plaintiff failed to demonstrate a real and immediate threat of future injury since her visits to the store were infrequent, there was a gap in time between visits, and she did not live in the same city as the store. The court also noted "with some concern" that the Tampa Bay Americans with Disabilities Association had filed 16 previous ADA cases and the individual plaintiff had filed 14.[26] However, in *Hollynn D'Llil v. Best Western Encina Lodge and Suites*,[27] the Ninth Circuit held that the plaintiff's declaration and testimony were sufficient to confer standing despite her past ADA litigation which involved about 60 ADA suits. The court, emphasizing the plaintiff's testimony detailing her intent to return to Santa Barbara and noting her friends who lived there, found that her past litigation did not impugn her credibility.[28]

Notification Legislation

Overview

Changes in the ADA's statutory language to address the issue of vexatious law suits have been proposed since the 106th Congress. Proponents of such legislation have argued that notification requirements would help prevent the filing of suits designed to generate money for plaintiffs and law firms.[29] Those opposed to the legislation have argued that it would undermine enforcement of the ADA and that vexatious suits are best dealt with by state bar disciplinary procedures or by the courts.[30]

Legislation in the 111th and 112th Congresses

Representative Hunter introduced H.R. 881, the ADA Notification Act of 2011, 112th Congress, on March 2, 2011. This bill is identical to H.R. 2397 which Representative Hunter introduced in the 111th Congress. H.R. 881 would amend Title III of the ADA to deny state or federal court

[24] *Id.* at 1220.

[25] 2007 U.S.Dist. LEXIS 53866 (M.D. Fla. May 3, 2007).

[26] *Id.* at 6. See also *Steven Brother v. Tiger Partner, LLC*, 331 F.Supp.2d 1368 (M.D. Fla 2004), where the court found a lack of a "continuing connection" to the business being sued but argued for an amendment to the ADA stating that "[o]nly Congress can respond to vexatious litigation tactics that otherwise comply with its statutory frameworks."

[27] 538 F.3d 1031 (9th Cir. 2008).

[28] *Id.* at 1040.

[29] See Testimony of the honorable Mark Foley, hearing on H.R. 3590, The ADA Notification Act, Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. Published at http://www.house.gov/judiciary/fole0518.htm.

[30] See Letter to Honorable Charles Canady, chairman, Subcommittee on the Constitution, House Committee on the Judiciary from Robert Raben, Assistant Attorney General reprinted at http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728_0f.htm.

jurisdiction in a civil action brought under Title III of the ADA, or under a state law that conditions a violation of its provisions on a violation of Title III, except in certain situations. The courts would have jurisdiction if

- a plaintiff provides the defendant written notice of the alleged violation by registered mail prior to filing a complaint;
- the written notice identifies the facts that constitute the alleged violation, including the location and date of the alleged violation;
- a remedial period of 90 days elapses after the date on which the plaintiff provides the written notice;
- the written notice informs the defendant that the plaintiff is barred from filing the complaint until the end of the remedial period; and
- the complaint states that, as of the date on which the complaint is filed, the defendant has not corrected the alleged violation.

H.R. 881 also provides that a court may extend the remedial period by not more than thirty days if the defendant applies for an extension.

Legislation in Previous Congresses

The legislation in previous Congresses is similar, but not identical, to that in the 111th and 112th. H.R. 3479, 110th Congress, and H.R. 2804, 109th Congress, had essentially the same notification provisions as those in H.R. 881, 112th Congress. However, the notification provisions would not have applied to civil actions brought under Rule 65 of the Federal Rules of Civil Procedure or civil actions under state or local court rules requesting preliminary injunctive relief or temporary restraining orders.

H.R. 728, 108th Congress, differed from the more recent legislation by, for example, allowing notice to be provided in person, not just by registered mail. Although the bill was not passed in the 108th Congress, the House Subcommittee on Rural Enterprises, Agriculture, and Technology of the House Small Business Committee held hearings on the bill on April 8, 2003.[31]

The two ADA Notification Acts in the 107th Congress, H.R. 914[32] and S. 792,[33] like their predecessors H.R. 3590[34] and S. 3122,[35] 106th Cong., contained similar language.[36] Hearings were held by the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 3590 on May 18, 2000.[37]

[31] http://wwwc.house.gov/smbiz/hearings/108th/2003/030408/New.asp.

[32] H.R. 914 was introduced by Rep. Foley.

[33] S. 792 was introduced by Sen. Inouye.

[34] H.R. 3590 was introduced by Rep. Foley.

[35] S. 3122 was introduced by Sen. Hutchinson.

[36] H.R. 914, 107th Cong., H.R. 3590, 106th Cong., and S. 3122, 106th Cong. are identical. S. 792 contains some minor differences.

[37] Hearing on H.R. 3590, the ADA Notification Act, Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728_0f.htm.

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