

Journal of Civil Rights and Economic Development

Volume 10
Issue 3 *Volume 10, Summer 1995, Issue 3*

Article 19

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THE ADA AND ITS EFFECTS ON AMERICAN INDUSTRIES

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I have represented trade associations and corporations on Capital Hill in Washington, D.C. for over twenty-five years. I represent 100,000 locksmiths in the Associated Locksmiths of America who are thrilled about the passage of the Americans with Disabilities Act ("ADA")¹ because they sell, install and maintain door and window hardware. For the last year, I have advised locksmith associations around the United States how they can knock on the door of their retail customers and tell them how to comply with the ADA, utilizing their services and products, especially in the public accommodation requirements.²

I also represent bars, taverns, and liquor stores for over twelve years. In that capacity, I was involved in the early lobbying on the ADA when it was first brought up on Capitol Hill. I worked with the National Federation of Independent Businesses, the United States Chamber, National Association of Manufacturers, and all sorts of organizations during the formulation of the law, who opposed many of the requirements on small businesses.

The United States Justice Department is currently investigating about 1100 complaints against public accommodation and commercial facilities under Title III.³ Since the inception of Title III, 2500 complaints have been filed. There are about 1100 inves-

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¹ 42 U.S.C. §§ 12101-213 (Supp. V 1993).

² See generally Coral MacKenzie, *Includes Restaurants, Theaters: Sweeping Law Hits Private Establishments Next Year; Guidelines to Make Buildings Completely Accessible to the Disabled*; includes related article; *Construction, Design & Engineering*, INDIANAPOLIS BUS. J., Sept. 23, 1991, at 6B (describing door knobs as thing of past and level handles and push plates as standard).

³ See generally Veronica Anderson, *Few Eateries Rate 4 Stars with Disabled Customers*, CRAIN'S CHI. BUS., Mar. 13, 1995, at 4. Disability cases account for nearly 41% of the 177 accommodation complaints filed with Chicago Commission on Human Relations since 1993, not as many as before the ADA was enacted. *Id.*

tigated. There are 200 eating and drinking establishments being investigated and there are 1200 complaints.⁴

Formal settlements on ADA compliance in the hospitality industry, have resulted in thirteen companies on the list, including Sardi's in New York and Anthony Pier Four in Boston.⁵ Informal settlements have also targeted restaurants including a handful of unnamed fast food franchises,⁶ and a famous Big Apple restaurant that the Justice Department says turned away a customer who was wearing sneakers which he wore due to a physical impairment.

In the retail hospitality industry that I represent around the country, only about 80,000 of them are restaurants.⁷ The complaints or investigations I listed are not a significant number when viewed against the total numbers of retailers in the United States.

There is general consensus in Washington, D.C. that the ADA is a good law.⁸ Employers generally recognize the need to comply with the ADA.⁹ Some employers, and I assume some employees as well, have trouble understanding the ambiguity of the Act.

*Neff v. American Dairy Queen*¹⁰ was cited in the Justice Department's report. The plaintiff in *Neff*, a person with a mobility impairment necessitating a wheelchair, alleged that Dairy Queen failed to remove barriers to access two franchisee-run stores.¹¹ The United States District Court for the Western District of Texas granted summary judgment on behalf of the defendant. It held

⁴ See generally *Rolling Out Information On The ADA*, 63 J. KAN. B.A. 3, 4 (1994). The Department of Justice can and has sought civil fines and compensatory damages for violations. *Id.* A civil penalty for the first violation can be as high as \$50,000, and \$100,000 for any subsequent violation. *Id.* The ADA extends not only to businesses with 25 or more workers but also to those with 15-24 workers. *Id.*

⁵ See generally Alan Solomone, *Is the ADA Working?*, CHI. TRIB., Nov. 27, 1994, at 7 (describing some of 300 settlements reached under ADA).

⁶ Cf. *Matthew Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) (holding reasonableness of modification under ADA involves fact specific case by case inquiry and ADA does not preclude public accommodations from banning smoking).

⁷ See generally Michael Weisskopf, *Liquor Lobbying, Grass-Roots Style; Vendors are Trained to Persuade Hill to Oppose 'Sin Tax' Increase*, WASH. POST, Mar. 10, 1993, at A1 (detailing number of restaurants served by John Chwat).

⁸ See *id.*

⁹ *Disability Law A Success*, USA TODAY, July 26, 1994, at A10; More than 1000 complaints are filed against employers each month under the ADA. *Id.* The threat of a lawsuit for non-compliance with the Act has forced many employers into accommodating disabled employees in order to avoid costly fines and litigation. See Michael Romano, *ADA Round Two Begins; Americans with Disabilities Act*, RESTAURANT BUS., May 20, 1993, at 66.

¹⁰ 879 F. Supp. 57 (W.D. Tex. 1994).

¹¹ *Id.* at 57-58.

that American Dairy Queen, as a franchisor, does not own, operate or lease the two stores, and therefore cannot be held liable as a public accommodation under ADA.¹²

The Department of Justice has filed an amicus brief on appeal arguing that American Dairy Queen retained enough control in its franchise agreement with two stores that it effectively operated the stores within the meaning of Title III.

Dicta in *Neff* directly effects building owners.¹³ The opinion states that if the franchisor refused to approve a franchisee's plan to bring a store into compliance with the Act, then the franchisor might be subject to liability.¹⁴ Consider the ramifications of such a ruling for building owners. The ADA requires barriers in existing places to be removed.¹⁵ The reasoning of *Neff* opens an owner to liability under the ADA if he or she prohibits tenant alterations intended to remove barriers.¹⁶

Another example occurred in one of Denver, Colorado's 2,000 restaurants. An owner of an upscale Italian restaurant spent \$48,000 to build ramps, make accessible bathrooms, create architectural plans, and generally improve his restaurant. He was still prosecuted under the ADA.¹⁷

The Justice Department argued that these efforts were not enough. Apparently, the toilet paper holder in the handicapped-accessible bathroom was mounted 2.5 inches too far away from the toilet, the handicap rail in the front entrance was 1.5 inches too far from the wall and the bar in the bathroom was one inch too low. The defendant had spent about \$22,000 in litigation up to

¹² *Id.* at 57, 59-60.

¹³ Ted Zangara, *ADA: Will Owners Lose Control of Tenant Alterations?*, REAL ESTATE N.Y., Feb. 1995 (citing *Neff*).

¹⁴ *Neff*, 879 F. Supp. at 57.

¹⁵ See Frank C. Morris, Jr., *Americans with Disabilities Act: Overview of the Employment and Public Accommodation Provisions*, C742 A.B.A. 535, 562 (indicating priority of Architectural and Transportation Barriers Compliance Board's guidelines is creation of barrier-free access to buildings and equipment therein).

¹⁶ Cf. MacKenzie, *supra* note 2. Prior to the passage of the ADA it was the tenant's responsibility to provide barrier free access in the place he/she was leasing. *Id.* Now, however, the responsibility is determined by the lease or contractual relationship between the parties. *Id.*

¹⁷ Ron Ruggless, *Small Operators Grapple with Federal Regulations*, NATION'S RESTAURANT NEWS, Nov. 14, 1994, at 1. Blair Taylor, owner of Northern Italian Barolo Grill in Denver, Colorado, was cited for infringements of the ADA after extensive efforts to comply with the Act. *Id.*

that point.¹⁸ This illustrates the need for alternative dispute resolution.

The Department of Justice targeted his facility to send a message to the other 1,999 restaurateurs in the city with these unreasonable requests. The owner settled out of court for business reasons.¹⁹ Court costs would have been triple the amount to settle. According to the owner, the litigation price tag was about \$50,000 and he settled for \$16,000.²⁰ And this was a defendant trying to comply with the ADA.

In the United States District Court for the Northern District of Texas, a federal judge ruled against two women with respiratory problems, who sought an order banning smoking at a Texas bar. The women alleged discrimination under the ADA.²¹ United States District Court Judge Sanders denied their request, but noted that the claim should have been brought under the ADA's reasonable accommodation provision.²²

One of the plaintiffs suffered from cystic fibrosis, and the other was an asthmatic. They could not go into the bar because of the smoke.²³ It was the first lawsuit using the ADA to gain access to a bar. The decision should assist both sides of the smoking issue by beginning to define for clubs where to draw the line and where they have to meet individual demands.²⁴

An issue was raised concerning a movie theater in the newly renovated Union Station in Washington, D.C. Plaintiffs argued that since the movie theater had more than 300 seats, there should be dispersed seating requirements for the disabled.²⁵ One issue raised was whether improving the line of sight required the whole theater to be torn down and rebuilt.²⁶ Safety was also an issue, specifically evacuation procedures.²⁷ This could not apply to

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See* Emery v. Caravan of Dreams, Inc., 879 F. Supp. 640, 643 (N.D. Tex. 1995) (holding that asthmatic plaintiff, Young, was not disabled while other plaintiff, Emery, was disabled due to Emery's genetic disease, cystic fibrosis).

²² *Emery*, 879 F. Supp. at 649-50.

²³ *Id.* at 642-44. The court found plaintiff Emery to be substantially impaired in the major life function of breathing, due to cystic fibrosis. *Id.* at 642. On the other hand, plaintiff Young, led a normal life despite his asthma. *Id.*

²⁴ *Id.* at 647-50.

²⁵ *See* Fiedler v. American Multi-Cinema, 871 F. Supp. 35, 43 (D.D.C. 1994) (denying defendant's motion for summary judgment).

²⁶ *Id.* at 38.

²⁷ *Id.* at 39-40.

private clubs as they are exempt from the ADA requirements²⁸ as are religious and public entities.²⁹

There are twenty-one requirements under the Act's removal of barriers provision.³⁰ Employers have certain priorities within the Act, one of which is to make a place of public accommodation accessible from a public sidewalk.³¹ Accordingly, one starts out with access to public sidewalks, and then access to where goods and services are made available, and finally accommodation in restroom facilities.³²

Is the Justice Department actually enforcing the Act and trying to enforce it properly? Many in the business community think they might be going beyond what was intended.

²⁸ 42 U.S.C. § 12187 (Supp. V 1993).

²⁹ 42 U.S.C. § 12187.

³⁰ 42 U.S.C. § 12101.

³¹ 42 U.S.C. § 12188.

³² See 42 U.S.C. §§ 12101, 12188.

