Americans With Disabilities Act: Proceed With Caution

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Notes:

LEAGUE OF CITIES: PRESENTATION PAPER

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I. INTRODUCTION

The Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101, *et seq.*, (the "ADA") was enacted to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage. Unfortunately, it has also created an often misused avenue for litigation against state and local government. This paper is intended to provide the reader with a general overview of the legal standard for compliance, as well as give some examples of the potential for its abuse by misguided or unscrupulous individuals.

II. LEGAL STANDARD

A. Protected Individuals and Application to State & Local Government

The ADA applies to anyone who qualifies as an individual with a disability. An individual with a disability is a person who:

1. has a physical or mental impairment that substantially limits or more major life activities;

2. has a record of such an impairment; or

3. is regarded as having such an impairment.

A major life activity includes, but is not limited to, caring for oneself, performing manual tasks, seeing hearing, eating, sleeping, walking, standing, lifting, bending, speaking breathing, learning, reading, concentrating, thinking, communicating, and working. A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The ADA contains four sub-parts. The first three sections of the statute, Titles I, II and III, bar discrimination of the basis of disability in different areas of public life. Title II of the ADA prohibits discrimination on the basis of disability by "public entities," which results in the denial of access to programs, services and activities operated by state and local governments. 42 U.S.C. §§ 12131(1), 12132.[1] Title II is an outgrowth of the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973 ("RA"). However, the potential application of Title II is even broader than the RA, as it imposes federal mandates on the day-to-day operations of local

[1] Title I bars disability discrimination by an "employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. §§ 12111(2), 12112. Title III bars disability discrimination in public accommodations, defined to include places of education including post-graduate private schools, and bars disability discrimination by "any person who owns, leases (or leases to), or operates a place of public accommodation." §§ 12181(7)(J), 12182. Title IV forbids retaliation against anyone for opposing actions made unlawful under the ADA or for participating in a charge under the ADA. § 12203(a). It also forbids coercion or intimidation against anyone exercising his or her rights under the statute. § 12203(b).

governments, regardless of whether the entity is a recipient of federal funds, and regardless of the size of the entity. [2]

Title II requires that all programs, services and activities available through public entities are accessible to individuals with disabilities. Title II also outlines the requirements for self-evaluation and planning; making reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination; identifying architectural barriers; and communicating effectively with people with hearing, vision and speech disabilities. (*Id.*)[3] The regulation and enforcement of state and local government's compliance with Title II is overseen by the U.S. Department of Justice. Typically, an investigation by the DOJ is initiated after receipt of a discrimination complaint, which can be submitted by or on behalf of anyone alleging the discrimination within 180 days of the alleged violation. Upon receipt, the DOJ has broad latitude to investigate and resolve the claim, including through mediation and court order. However, a private citizen is also entitled to file suit in federal court for discrimination in violation of the ADA.

In California, a private citizen typically must first comply with the Government Tort Claims Act before filing a civil suit against a public agency (or public employees based on claims arising from the performance of their official duties).[4] All claims for money or damages against a public entity must be presented in writing to the public entity prior to filing suit. The procedure gives cities and other public entities an opportunity to investigate claims and to negotiate with those potential plaintiffs who have meritorious claims. Noncompliance with the procedural requirements for making a tort claim against a government entity is also a powerful defense against most claims for money damages. However, this procedural safeguard does not apply to claims that only seek other forms of relief, i.e., declaratory or prospective injunctive relief. Thus, the type of relief sought in a a civil suit alleging a violation of the ADA will determine whether the plaintiff must first comply with these procedural mechanisms.

Typically, civil suits filed by private citizens alleging discrimination that violates Title II of the ADA can be broken into three categories, denial of access, failure to provide reasonable accommodation, and retaliation. Most disability discrimination lawsuits typically allege denial of access. For example, a building has no wheelchair access or, more likely, the access is inadequate to allow use. However, access can take other forms, such as a person who is deaf is being denied access because no auxiliary hearing aids or other options are available to insure effective communication. A denial of access claim can also be created when a person is subjected to some type of additional requirement due solely to their disability, e.g., a charge by a government entity to recover costs associated with providing an interpreter to a deaf person. Other types of disability discrimination suits can be based on allegations that a public entity either (a) failed to provide a requested accommodation (e.g., a juror who asks for the use of a hearing aid while serving jury duty), and/or (b)

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[2] "The ADA and the RA are "similar in substance" and, with the exception of the RA's federal funding requirement, "cases interpreting either are applicable and interchangeable." 42 U.S.C.§ 1211(5)(A); *see also Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999). The elements of ADA and RA claims do not differ in any material respect. (*See e.g.*, *Zukle v. Regents of the University of California*, 166 F.3d 1041, 1045 n. 11(9th Cir. 1999).)

[3] Title I of the ADA applies to disability discrimination in employment, and Title III applies to commercial facilities and places of public accommodation.

[4] *See* Cal. Gov't Code § 905 (requiring presentation of a claim against a local public entity); § 915(c) § 950.2 (providing that "a cause of action against a public employee . . .for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 . . . of this division or under Chapter 2 . . . of Part 4 of this division").

acted in retaliation (e.g., a student who complains of disability discrimination on behalf of him/herself or another individual is subsequently expelled from a college).[5]

California has also enacted legislation that follows the ADA and provides additional avenues for civil suit by private citizens. For Example, California Civil Code § 54 states in part that individuals with disabilities have the same rights as the general public to the full and free use of the streets, sidewalks, walkways, public buildings and facilities, and other public places. Civil Code § 54.1 states in part that individuals with disabilities shall be entitled to full and equal access to accommodations, facilities, telephone facilities, places of public accommodation, and other places to which the general public is invited. Similarly, the Unruh Act states in part that all persons within the jurisdiction of the State of California are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[6] Each of these state laws are routinely relied upon by plaintiffs claiming discrimination or denial of access due to disability.

B. <u>The Standard Of Review Under The ADA</u>

Title II of the ADA, 42 U.S.C. §12132 provides that:

> ... No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

A "disability" under the ADA includes "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Under Title II, the the U.S. Court of Appeals, Ninth Circuit, which covers California, has explained that a plaintiff must prove the following:

> To prove a public program or service violates Title II of the ADA, a plaintiff must show: (1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.

Weinreich v. Los Angeles Cty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997). Applicable regulations require public entities to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (2012). "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the

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[5] Unlawful retaliation includes any discrimination against a person with a disability because the person opposed any act or practice unlawful under the ADA or because the person made a complaint of discrimination, testified or assisted in any way in the investigation or trial regarding a complaint of discrimination. Individuals are typically immune from personal liability involving claims alleging retaliation. However, an individual can be sued in his or her official capacity for prospective injunctive relief (i.e., an order from the court that an official take actions in the future to provide the plaintiff with a specific relief). *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 413-414 (5th Cir. 2004).

[6] The Unruh Act also states in part that no business establishment of any kind shall discriminate against any person in California because of the disability of that person. The Unruh Act specifically incorporates by reference an individual's rights under the ADA. See also California Civil Code § 51, which provides that "[a] violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (P.L. 101-336) shall also constitute a violation of this section." Cal. Civ. Code § 51(f).

basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (2011).

Because a plaintiff bears the burden of establishing an ADA violation, "she must establish the existence of specific reasonable accommodations that [the defendant] failed to provide." *Memmer v. Marin Cty. Courts*, 169 F.3d 630, 633 (9th Cir. 1999). Moreover, when a public agency offers an accommodation, the plaintiff "must show that the accommodations offered by the [defendant] were not reasonable, and that he was unable to participate equally in the proceedings at issue." *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1137 (9th Cir. 2001) (finding that hearing-impaired plaintiff presented a material issue of fact as to whether the refusal to provide videotext display prevented him from participating equally in court).

It is only after a plaintiff demonstrates that an accommodation offered by a defendant is unreasonable that the burden shifts to the defendant to show that a plaintiff's requested accommodation would fundamentally alter the nature of the program. If a plaintiff is able to meet this standard, the remedies available include injunctive and declaratory relief, e.g., an order from a state or federal court directing the public agency to take certain actions. A plaintiff is also entitled to recover the costs and attorneys' fees included in the civil suit. Additionally, money damages may also be available (but as noted above, a claim for money damages also raises the procedural requirement of compliance with the Government Tort Claims Act). Thankfully though, the money damages are limited to compensatory damages, and a plaintiff may not recover punitive damages for any claim based on Title II of the ADA. *Barnes v. Gorman*, 536 U.S. 181 (2002). Compensatory damages are awarded to make a person whole for a particular loss or injury. These damages require a concrete showing and are not intended to replace anything beyond what was lost by a plaintiff. That does not mean though that the damages cannot be significant. To recover money damages under Title II of the ADA, a plaintiff must prove intentional discrimination on the part of the defendant under a "deliberate indifference" standard. *Duvall v. Cty. of Kitsap*, *supra*, 260 F.3d at 1138. "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that the likelihood." *Id.* at 1139.

In application, a plaintiff may only need to establish that a public agency had knowledge that individuals with disabilities were being denied equal access/use of a public service or program. This bar of "deliberate indifference" means that a party need not show actual knowledge of the alleged discriminatory acts in order to recover money damages. Rather, the party merely needs to show that the public agency had "some form of notice . . . and the opportunity to conform to statutory dictates. . . " *City of Canton v. Harris* 489 U.S. 378, 389 (1988) In fact, some courts have found that as little as "benign neglect" of a city's statutory duty to monitor private contractors is sufficient to state an ADA claim. *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 895 (N.D. Ohio 1999). "When the plaintiff has alerted the . . . entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the . . . entity is on notice that an accommodation is required."). *Duvall*, 260 F.3d at 1139.

It is also important to note that a public entity that contracts with a private company to provide services to the public may still face legal liability if the private company is found to have violated the ADA. (*See Armstrong v. Schwarzenegger* (9th Cir. 2010) 622 F.3d 1058, 1065-66 [Holding that public entities may not contract away their liability by partnering with private entities to perform certain services.].) Indeed, as the current prevailing authority holds that a private contractor cannot be held liable under Title II of the ADA, it is almost certain that the saavy plaintiff will seek to recover from the contracting public agency for any alleged violations. Thus, it is critical that public entities are (a) proactive in the review of programs and services for compliance with Title II before making them

available to the general public, (b) continue to actively monitor these programs and services for compliance, and (c) have solid procedures in place to receive and respond to complaints and requests for accommodation.

C. Examples of The Potential Cost of Litigation

As set forth above, the intent of the AD (and similarly the Rehabilitation Act, and California's Unruh Act) is to create legal protection and recourse for persons denied access to public services due to their disability(ies). Through this discussion, it is not our intent to suggest that these legal protections are not necessary or proper. However, what we have seen is that like many landmark legislative acts, the wide-ranging application of these laws are often abused by unscrupulous litigants (or by attorneys seeking to take advantage of the fee shifting provisions in their favor). In particular, individuals – often serial or "vexatious" litigants – abuse these protections in an effort to extort improper accommodation and/or clear the initial procedural hurdles that would otherwise bar their frivolous lawsuits. The following are a few examples based on real-world litigation to highlight the dangers of same.

1. John Doe v. Superior Court

For the last three years, a self-represented plaintiff has attempted to sue multiple state and local agencies, and numerous employees and officers of same, in an attempt to challenge various adverse decisions issued in his underlying divorce and custody proceedings.[7] This individual's frivolous and harassing filings in the underlying proceedings led to him being declared a "vexatious litigant" subject to a pre-filing order.[8] Despite these sanctions, the plaintiff continued to attempt to file dozens of lawsuits against his former spouse, her attorneys, his former attorneys, and persons from nearly every local agency involved in his family law proceedings (e.g., judges, court employees, and various law enforcement personnel). During the course of these state court proceedings he also routinely requested accommodation for his claimed disabilities. His requests were often procedurally defective and almost always overreaching (i.e., requesting accommodation that went beyond his needs or that was impractical or impossible to provide). He also often failed to comply with the rules created by the local agencies for submitting these requests, and/or failed to respond to their requests for additional supporting documentation. Further, his requests were clearly intended to avoid certain procedural obstacles that would otherwise deter or impede his frivolous filings. As such, the responding state court agencies correctly denied these requests as improper and unnecessary. Their response was used by this plaintiff as fodder for a new lawsuit though, which he subsequently filed in federal court.

In a 300+ page complaint, the plaintiff sued numerous state and local agencies (and their employees) as defendants, alleging dozens of disparate legal theories. He alleged that the denial of his dozens of requested accommodations was unlawful discrimination under the ADA.[9] As the plaintiff was allowed to proceed with this claim, he was able to engage in discovery with the responding public entity. As you may guess by now, the plaintiff continued to engage in the same abusive filing practices

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[7] In order to avoid disclosure of confidential information, all names of the relevant parties are omitted from this discussion.

[8] In California, the state court may find under certain explicit circumstances that self-represented individuals who file multiple frivolous lawsuits are "vexatious" and issue an order that limits their ability to file future lawsuits. *See* Code Civ. Proc. § 391(b). Federal courts can make similar findings and rulings as well. F.R.C.P. Rule 11.

[9] As the plaintiff was self-represented, the federal court was required to review and test each of his claims to see if they could meet the minimum standards. Despite multiple amendments, almost all of the plaintiff's claims were dismissed after this initial review. One of the few claims that did survive though, was his claim for disability discrimination.

that he had previously used in his state court matters. Eventually, the public entity and other defendants (other state agencies and employees) were all exonerated, and the plaintiff was subsequently declared a vexatious litigant by the federal court as well. However, this outcome was by no means certain, and the local agencies spent tens of thousands of dollars and hundreds of hours defending his claims. Indeed, even though the federal court ultimately dismissed his ADA claims as frivolous and unfounded, the public entity continues to incur costs from this lawsuit as the plaintiff has appealed this judgment. Further, the practical recourse for the public entity is limited, as the plaintiff claims to be insolvent and is effectively judgment-proof. Thus, even though the federal court awarded significant costs, there is little likelihood that the public entity will be able to recover them from this plaintiff.

2. Lessons learned and recommendations

The cost to our client in defending the single lawsuit described above was enormous. Further, that cost continues to grow as the plaintiff's appeal is an inherently expensive and time-consuming process. Further, there is always a risk – even if minimal – that the appellate court may find in his favor on some of the issues raised in his appeal. Such a ruling would necessarily lead to substantial additional costs in defending his claim. The following are helpful guidelines for agencies to minimize the risk of similar claims:

- Create written procedures for receiving and responding to requests for disability accommodation and/or complaints re denial of access;
- Prepare and publish guidelines for submitting complaints and/or requests for accommodation;
- Perform regular reviews of all services and facilities for compliance with access requirements, and independent review for new construction/renovation;
- Provide all employees who are in contact with the public with (at least) annual instruction on compliance with these written procedures, and maintain records documenting same;
- Designate and train an employee with responsibility for overseeing administration of these programs (i.e., an ADA Coordinator); and
- Insure that all applicable private contractors are complying with the ADA guidelines (and/or have an agreement in place through which the contractor expressly agrees to defend and indemnify the agency for any such alleged violations).

It is critical that the above policies and procedures are created and implemented in a fashion that insures compliance with all applicable state and federal policies. The failure to do so may open the responding agency up to review and corrective action as a result of an investigation by the Department of Justice. Also, compliance with all these points may not be enough to dissuade the determined litigant, especially with potential attorney fees available to attorneys who take on such litigation.. However, proactive, documented policies and good faith efforts at compliance are much better defenses to a lawsuit than a record of non-compliance and failure to take any affirmative steps towards compliance.