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LAWYER

Title III
of the ADA
More than an Employment Statute



Title III of the ADA: More than an Employment Statute

By Molly Hughes

July 26, 2000, marked the tenth anniversary of the Americans with Disabilities Act (ADA) of 1990, which was enacted to recognize and protect the civil rights of people with disabilities. To commemorate the anniversary, the U.S. Equal Employment Opportunity Commission (EEOC) issued on July 27 two major guidances and a status report addressing genetic discrimination in the federal workplace, disability-related inquiries and medical exams, and EEOC enforcement of the ADA's employment provisions. These documents deal with employment related issues under Title I of the ADA, which tends to receive the most attention in our legal system and by the general public. Indeed, many people view the ADA as an employment statute.

However, the ADA is much more comprehensive and addresses physical access for the disabled to public programs and activities such as state and local government activities (Title II) and to private facilities or public accommodations (Title III). 28 C.F.R. §§ 36.101-36.103; ADA Title III Technical Assistance Manual, III-1.100. The purpose of Titles II and III is to ensure that people with disabilities have access to buildings, goods and services provided by public and private entities.

Title III has recently received much publicity in part as the result of a lawsuit filed against Clint Eastwood's Mission Ranch Hotel in Carmel, Ca. The hotel was sued by a disabled individual for alleged violations of Title III and a similar California law because various doors and bathrooms at the historic 32-room hotel and restaurant were allegedly not accessible to her.

On September 29, a jury reached a verdict in the case determining there were two minor violations at the hotel—not enough signs to the restroom and no ramp access to the hotel office. The purpose of this article is to highlight some of the provisions of Title III and some of the accessibility issues with which private entities, such as the Mission Ranch Hotel, are faced under Title III.

THE GENERAL RULE

The overriding prohibition of Title III is 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." 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201.

Title III of the ADA, 42 U.S.C. §§ 12181-12213, covers (1) places of public accommodation; (2) commercial facilities; and (3) examinations and courses related to applications, licensing, certification or credentialing for secondary and postsecondary education, professional or trade purposes. 28 C.F.R. § 36.102. This article only highlights certain issues with respect to places of public accommodation. The Department of Justice has established

detailed regulations defining a "public accommodation" and what constitutes discrimination on their part. See 28 C.F.R. Part 36 and 49 C.F.R. Parts 27,37 and 38 (setting forth the ADA Accessibility Guidelines (ADAAG), which are enforced by the Departments of Justice and Transportation.)

PUBLIC ACCOMMODATION

A public accommodation is a facility whose operations "affect commerce" and which fall within at least one of 12 categories including:

1. Places of lodging;
2. Establishments serving food or drink;
3. Places of exhibition or entertainment;
4. Places of public gathering;
5. Sales or rental establishments;
6. Service establishments such as a law office;
7. Stations used for specified public transportation;
8. Places of public display such as a museum or library;
9. Parks or zoos;
10. Places of education including nurseries;
11. Homeless shelters or other social service center establishment;
12. Places of exercise or recreation such as a gymnasium, health spa, or bowling alley.

42 U.S.C. § 12181(7); 28 C.F.R. § 36.104; ADA Title III Technical Assistance Manual III-1.2000. Therefore, hotels, bars, restaurants, movie theaters, grocery stores and private schools are all affected by Title III.

However, the categories listed simply provide illustrations of the facilities covered and, in actuality, encompass a much wider range than the examples given. For example, even private Web sites on the Internet may be considered public accommo-

dations covered by the ADA. See Walter Olson, Statement to House Judiciary Committee, Subcommittee on Courts and the Constitution, "The ADA and its application to World Wide Web sites" (February 9, 2000), *National Federation of the Blind v. American Online*, C.A. No. 99-12303-EFH (D. Mass. 1999) (plaintiff charging that, under the ADA, AOL had not moved with sufficient vigor to make its services fully available to sightless users) (case settled in August of 2000).

DISCRIMINATION

Title III defines discrimination and lists a number of specific prohibitions. 42 U.S.C. § 12182(b)(2)(A). It is not possible to address all of the prohibitions and the intricacies thereof within the scope of this article. However, the following provisions most directly affect physical access to public accommodations: (1) failure to make modifications in policies or practices; (2) failure to remove architectural barriers in existing buildings when readily achievable; and (3) when not readily achievable to remove such barriers, failure to make alternate accommodations. *Id.* at § 12181(b)(2)(A)(ii), (iv) and (v); 28 C.F.R. §§ 36.302, 36.304 and 36.305.

Failure to Make Modifications.

Title III includes in its definition of discrimination the failure by a public accommodation to make reasonable modifications in policies, practices and procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modification would fundamentally alter the nature of the same. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302.

Most recently, the issue has been addressed in two cases involving the use of golf carts by disabled golfers at professional tournaments. In *Martin v. PGA Tour, Inc.*, Casey Martin, who suffers from a disorder causing severe pain and atrophy in his lower leg rendering him unable to walk for extended periods of time, sued the PGA Tour under 42 U.S.C. § 12182(b)(2)(A)(ii) for not making an exception

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to its "walking rule" to permit him to ride in a golf cart during PGA competitions. *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000), cert. granted ___ S.Ct. ___, 69 U.S.L.W. 3023, 2000 WL 948978 (September 26, 2000).

Despite arguments by the PGA that it was not a place of public accommodation because the "public" could not enter the playing course during a tournament, the Ninth Circuit determined that golf courses are places of public accommodation and, thus, professional golf tournaments are covered under Title III of the ADA. *Id.*, 204 F.3d at 998. The *Martin* court also determined that the use of a golf cart would not "fundamentally alter" the nature of the PGA tour competitions because the central competition in shot-making would be unaffected. *Id.*, 204 F.3d at 1000. Thus, the PGA was required to make an exception to its "walking rule" to allow disabled golfers to use a golf cart during PGA competitions.

Interestingly, however, when faced with a similar question, the Seventh Circuit Court of Appeals made the opposite determination. In *Olinger v. United States Golf Association*, Ford Olinger, who also suffers from a degenerative condition that affects his ability to walk, sued the USGA under the ADA seeking an order allowing him to use a golf cart at the U.S. Open golf tournament. *Olinger v. United States Golf Association*, 205 F.3d 1001 (7th Cir. 2000), petition for cert. filed September 20, 2000.

Unlike the Ninth Circuit, the Seventh Circuit acknowledged the viability of the argument that the USGA tournament is not open to the general public and, thus, not subject to the requirements for a public accommodation. *Id.*, 205 F.3d at 1004. The *Olinger* court, however, avoided the issue by determining that the use of a golf cart would fundamentally alter the nature of the competition because it would remove stamina from the set of qualities designed to be tested in the golf competition. *Id.*, 205 F.3d at 1006. Accordingly, the USGA was not required to modify its walking only rule.

Failure to Remove Architectural Barriers. The ADA also states that it is discriminatory to fail to remove "architectural barriers, and communication

barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304 (emphasis added). The ADA has different standards for buildings that existed prior to a certain date. The overall policy of the ADA is to require relatively few changes to existing buildings, but to impose extensive design requirements when buildings are constructed, modified or replaced. See *Coalition of Montanas Concerned with Disabilities, Inc. v. Gallatin Airport Authority*, 957 F. Supp. 1166 (D. Mont. 1997); see also *U.S. of America v. Days Inns of America, Inc.*, 1998 U.S. Dist. Lexis 21945, *4 n.2 (E.D.Cal. 1998).

New Construction/Alterations. The ADA censures the failure to design and construct facilities that are readily accessible to and usable by individuals with disabilities. *Small v. Dellis*, 1997 WL 853515 (D.Md. 1997), *aff'd* 211 F.3d 1265 (4th Cir. 2000); U.S. Department of Justice, Civil Rights Division, *Enforcing the ADA: Looking Back on a Decade of Progress*, www.usdoj.gov/crt/ada/pubs/10thrpt.htm.

The new construction requirements apply to any facility first occupied after January 26, 1993, for which the last application for a building permit or permit extension is certified as complete after January 26, 1992. 28 C.F.R. § 36.401. The provisions for alterations apply to any alteration to a place of public accommodation after January 26, 1992. Therefore, any new construction or any alteration to an existing building after the above dates must comply with the provisions of Title III for new construction.

All newly constructed places of public accommodation must be readily accessible to and usable by individuals with disabilities to the extent that it is not "structurally impracticable." 42 U.S.C. § 12183(a)(1). Structurally impracticable means that unique characteristics of the land prevent the

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incorporation of accessibility features in a facility. 42 U.S.C. § 12183(a)(2); 28 C.F.R. § 36.401. The standards for new construction and alterations are found at 28 C.F.R. §§ 36.401 - 36.406, and the Appendix thereto.

Existing Structures. The requirements for removing architectural barriers in existing buildings are not as onerous in some instances as the construction requirements for new construction and alterations. While existing buildings are not required to undertake major renovations, they are required to remove architectural barriers when "readily achievable" to do so. 42 U.S.C. § 12182(2)(A)(iv). An architectural barrier is a physical element of a facility that impedes access to people with disabilities. ADA Title III Technical Assistance Manual, III-4.4100. While it includes obvious impediments such as steps and curbs that prevent access by people who use wheelchairs, it also includes telephones, drinking fountains, mirrors and paper towel dispensers that are mounted at a height that makes them inaccessible to people who use wheelchairs. ADA Title III Technical Assistance Manual, III-4.4100.

The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9); 28 C.F.R. § 36.104. In determining whether an action is readily achievable, the ADA enumerates several factors to be considered:

- A. the nature and cost of the action needed under this Chapter;
- B. the overall financial resources of the facility or facilities involved in the action . . . or the impact otherwise of such action upon the operation of the facility;

C. the overall financial resources of the covered entity. . . ; and

D. the type of operation or operations of the covered entity . . . the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

Id. The primary focus is generally on the financial resources of the entity alone. However, although the text of the ADA does not specifically reference it, the Technical Assistance Manual and the regulations recognize that legitimate safety concerns are also to be considered. 28 C.F.R. § 36.104; ADA Title III Technical Assistance Manual 4.4200.

The Technical Assistance Manual and the regulations provide specific examples of measures which are considered to be readily achievable that include installing ramps, making curb cuts in sidewalks, widening doors and installing flashing alarm lights. ADA Title III Technical Assistance Manual III-4.4200; 28 C.F.R. 36.304. Generally, the ADA does not require a public accommodation to remove a barrier to physical access posed by a flight of steps if removal would require extensive ramping or an elevator. ADA Title III Technical Assistance Manual III-4.4200.

Failure to Provide Alternatives.

Alternatives to barrier removal are permitted when a public accommodation can demonstrate that barrier removal is not readily achievable. 28 C.F.R. § 36.305. In fact, where barrier removal is not readily achievable, the ADA expressly requires a public accommodation to make its goods, services, facilities, privileges, advantages and accommodations available through alternative methods where such methods are readily achievable. 42 U.S.C. § 12182(2)(A)(v). Examples of permissible alternatives include providing curb service or home delivery, retrieving merchandise from inaccessible shelves or racks or relocating activities to an accessible location. 28 C.F.R. § 36.305.

Exceptions. There are exceptions to the access and barrier removal provisions for public accommodations. For example, no entity shall be required to

permit disabled individuals to participate in or benefit from public accommodations where such an individual poses a direct threat to the health and safety of others. 42 U.S.C. § 12182(b)(3).

The ADA also has an "elevator exemption." For new and existing buildings, elevators are not required in buildings under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center or mall, professional office of a health care provider, public transit station or airport passenger terminal. 28 C.F.R. § 36.404. This exemption is a "vertical access" exemption. Thus, no access by any means need be provided to the second floor when the facility falls under this exception. ADA Title III Technical Assistance Manual III-5.400.

The ADA also takes into account the national interest in preserving significant historic structures. Barrier removal would not be considered "readily achievable" if it would threaten or destroy the historic significance of a building or facility that is eligible for listing in the National Register of Historic Places under the National Historic Preservation Act or that is designated as historic under state or local law. 28 C.F.R. § 36.405. The regulations establish very specific requirements for establishing this exception.

LAWSUITS UNDER TITLE III

In addition to permitting suits by the U.S. Attorney General, the ADA allows any person who is "being subjected to discrimination on the basis of disability" in violation of the ADA to bring a private suit for injunctive relief. 42 U.S.C. § 12188(a)(1); 28 C.F.R. § 36.501(a). Although district courts are divided on the issue, one circuit court of appeals has determined that, unlike the civil rights provisions of Title VII, Title III does not require the individual to notify any state or local agency as a prerequisite to filing a private lawsuit. *Botoson v. Paul McNally Realty*, 216 F.3d 827, 831 (9th Cir. 2000)(listing split of district court decisions on the issue).

ADA claims do, however, undergo a burden shifting analysis similar to some Title VII claims. A Title III claimant bears the initial burden of

suggesting a method of barrier removal and proffering evidence that the method is readily achievable. *Pascutti v. New York Yankees*, 108 F. Supp.2d 258 (S.D.N.Y. 2000). The public accommodation has the ultimate burden of proving that the suggested method of removal is not readily achievable. *Id.*

Although only injunctive relief is permitted, the incentive for a lawyer to take a plaintiff's case is increased by the potential for an award of attorney's fees. 28 C.F.R. § 36.505. However, the attorney's fees provision is also subject to abuse and has caused many complaints. For example, in *Clint Eastwood's* case, the plaintiff's attorney claimed that he had expended \$577,000 in legal fees. And, in the early part of 2000, more than 600 large and small businesses in several Florida counties had been faced with ADA suits demanding better access, most of which were brought by two lawyers on behalf of a neighbor's disabled daughter and often settled quickly with legal fees in the range from \$5,000 to \$20,000. *Miami Daily Business Review*, "Congressmen Rein in 'Rogue' Disabled Access Suits" (February 8, 2000 Dan Christensen).

CONCLUSION

Title III of the ADA contains comprehensive provisions concerning access to public accommodations. Although Attorney General Janet Reno recently stated that the ADA is a simple law, there are many questions that may arise from the numerous regulations designed to implement Title III. "Spirit of ADA Torch Relay Demonstration," speech by Attorney General Janet Reno, www.usdoj.gov/crt/ada/10ththspjr.htm.

Anyone faced with accessibility issues should consult the regulations, assistance manuals and contact centers as good resources for answering questions that may arise.

Molly Hughes is a lawyer with Nexsen, Pruet, Jacobs, Pollard & Robinson, LLP in Charleston.