

June 2015

THE IMPORTANCE OF ADA COMPLIANCE FOR COMMERCIAL PROPERTY OWNERS

By Daniel Nevis and Carrie A. MacIntosh



Nevis



MacIntosh

Touted as the “Twentieth Century Emancipation Proclamation for all persons with disabilities,”¹ the Americans with Disabilities Act (ADA) is targeted at ensuring that persons with disabilities may participate in society absent restrictions. The ADA was passed in 1990 with the noble intention of eradicating, or at least minimizing, discrimination based on disabilities.²

The ADA is divided into five sections, or Titles. Title III, which focuses on access to public accommodations, is most relevant to commercial property owners, and is the topic of this article.³ Briefly, Title III of the ADA requires that places of public accommodation be physically accessible to individuals with disabilities. The ADA defines a place of public accommodation as private entities affecting commerce.⁴ Title III prohibits denying an individual full and equal enjoyment of a public accommodation based upon existing architectural barriers. Specifically, in instances where removal of architectural barriers is readily achievable, a defendant’s failure to remove said barriers is violative of Title III.⁵

Rise in Litigation

The ADA, like most civil rights statutes, is primarily enforced through private litigation — and a lot of it. A dramatic increase in ADA lawsuits over the past three years has led many commercial property owners to feel that the ADA is abused and unfairly

burdens small business owners.⁶ The number of suits rose by 9 percent in 2013 when compared to 2012. It jumped by 63 percent in 2014. It is, perhaps, unsurprising that a whopping 42 percent of Title III accessibility suits are filed in California.⁷ This is largely due to California’s anti-discrimination statutes. Importantly, any violation of the ADA is also a violation of California’s Unruh Civil Rights Act.⁸ While remedies under the ADA are limited to injunctive relief (court order directing correction of the problem) and attorneys’ fees, California’s Unruh Civil Rights Act provides for statutory minimum damages of \$4,000.⁹

Litigation of accessibility lawsuits is incentivized by the scope of remedies afforded by California law. Given the trend toward increased litigation, and the potential liability associated with accessibility lawsuits, commercial property owners should develop a working familiarity with the ADA in order to make informed business decisions related to compliance.

Standards and Application

It should be noted that both property owners/landlords and tenants are responsible for complying with the obligations of the ADA.¹⁰ Additionally, while the ADA was enacted in 1990, buildings constructed prior to 1990 are not immune from the ADA’s requirements. On the contrary, many older buildings present the most significant ADA violations as they were likely constructed without consideration for accessibility standards and, thus, are prime targets for accessibility lawsuits.

The Congressionally created Access Board has promulgated non-binding guidelines in an effort to increase compliance with the ADA. The Americans with Disabilities Act Accessibility Guidelines (ADAAG) can be

accessed at the United States Access Board website. It provides helpful information for property owners and landlords.

The ADAAG, coupled with the California Building Code Chapter 11B, articulates specific building standards aimed at increasing accessibility. For example, California Building Code 11B-303.4 requires that a place of public accommodation presenting a change in level of a path of travel of greater than ½ inch (12.7 mm) high shall be ramped in accordance with other provisions of the Building Code. Additionally, section 11B-208.2 provides the minimum number of required accessible parking spaces, as determined by the total number of parking spaces existing at a place of public accommodation.

The Rise of the Serial Plaintiff

Perhaps due in part to the multitude of technical accessibility requirements contained in the California Building Code, litigation arising out of ADA violations is tremendously common and provides plaintiffs and their attorneys with a relatively easy manner of collecting damages and fees. In fact, it has become commonplace for plaintiffs’ attorneys to utilize so-called “serial plaintiffs.” Serial plaintiffs are dispatched to places of public accommodation for the discrete purpose of encountering a known barrier, establishing standing to sue for ADA violations. For example, over one weekend in 2012, serial plaintiff John Ho entered nearly 80 business establishments in San Jose and the surrounding area. He subsequently sued nearly each establishment he’d visited for ADA violations.¹¹

Typically, ADA lawsuits are settled after filing, resulting in correction of the existing barriers, payment to plaintiff of damages, and payment to

plaintiffs’ attorney of their fees and costs. However, even absent trial, litigation of ADA claims can be costly.

Protecting Yourself and Your Property

Resorting to full-fledged litigation in connection with technical ADA violations may seem wasteful and abusive, especially when many defendants have unknowingly violated the ADA. A recent law aimed at reforming the ADA and limiting the number of Title III lawsuits prohibited attorneys from demanding money in letters sent to businesses before filing suit.¹² Rather than reduce litigation, this prohibition has led lawyers to simply file suit, rather than engage in meet and confer efforts before initiating litigation.

Based on current litigation trends and decisions by California’s Legislature, it does not appear that rampant ADA litigation will slow down in the near future. To that end, property owners should consider having their facilities inspected for access compliance by a Certified Access Specialist (CASp).¹³ A CASp inspection (1) protects against meritless ADA lawsuits, (2) insures compliance with state and federal accessibility requirements, (3) identifies what is “readily achievable” in terms of implementing facility modifications, and (4) provides reasonable time frames to make required corrections.¹⁴ A CASp inspection may preempt potential ADA lawsuits, allowing owners to avoid the costs of litigation. While CASp reports are not inexpensive,¹⁵ they provide a less-expensive and more flexible alternative to being named as a defendant in an ADA Title III lawsuit.

Daniel Nevis, Partner, and Carrie A. MacIntosh, Associate, Miller, Morton, Caillat & Nevis, LLP in San Jose, Calif., Nevis and MacIntosh are both experienced in representing clients in ADA disputes.

¹136 Cong. Rec. 17,369 (1990) (Statement of Sen. Tom Harkin).

²See 42 U.S.C. § 12101: Findings and Purpose, stating that the ADA's purpose is to, among other things, "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. . . ." (12 U.S.C. § 12101(b)(1).)

³See 42 U.S.C. § 12181 et seq., Title III of the ADA.

⁴42 U.S.C. § 12181(7), providing a list of entities considered "public accommodation," including "inns, motels, places of lodging, restaurants, bars, places of entertainment, places of public gathering, rental establishments, service establishments, stations used for public transportation, places of public display or collection, places of recreation, social services centers, and places of recreation."

⁵42 U.S.C. § 12182(b)(2)(A)(iv).

⁶De Atley, Richard, "Access Lawsuits Aren't Stopping," *Orange County Register*, September 28, 2014.

⁷*Id.*

⁸California Civil Code § 51(f).

⁹California Civil Code § 52.

¹⁰See 28 Code of Federal Regulation, Regulation 36.201(b).

¹¹Patrick May, "Disabled 'Serial Plaintiffs' do Legal Battle with Small Businesses Over Access Issues," *San Jose Mercury News*, February 18, 2014.

¹²De Atley, Richard, "State Reforms Aren't Stopping Access Lawsuits," *Orange County Register*, September 28, 2014.

¹³See California Senate Bill 1608, which enable business and property owners to have their facilities inspected for access compliance by a Certified Access Specialist.

¹⁴See Cal. Civ. Code §§ 55.52 et seq.; see also California ADA Compliance, Ashdown Architecture, Inc. (accessed on May 4, 2015, at http://ada.ashdownarch.com/?page_id=428.)

¹⁵Voluntary inspections commonly cost between \$800 and \$2,400, according to several providers, including CalAccessibility and CalCasp.