The Americans with Disabilities Act — Defending Title II City Sidewalk Litigation

by Denise V. Wilkerson



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The plaintiff, Paul Payne, sues your City, alleging that it has discriminated against him in violation of the Americans with Disabilities Act by failing to properly install and maintain curb ramps where sidewalks intersect with streets. He further alleges that many sidewalks contain abrupt vertical changes, excessive cross slopes, cracks, and protruding objects that make travel dangerous for the mobility impaired.

Deteriorating municipal infrastructure invites the challenge of the Americans with Disabilities Act (ADA)[1] litigation over limited sidewalk access for the mobility impaired. ADA regulations require all newly-constructed or altered streets to include curb ramps at any intersection with barriers blocking entry to a sidewalk.[2] However, curb ramps and sidewalks installed in response to the original passage of Title II in 1990 may no longer meet current regulations, whether due to deterioration, settling, or a change in specifications.[3] Under Title II, a city shall not deny the benefits of its services or programs to the disabled, or discriminate against a qualified individual with a disability.[4] To some attorneys, each missing curb ramp, or cracked or broken sidewalk, suggests a cause of action.

Two aspects of the ADA foster lawsuits against municipalities. First, the ADA's lack of a notice provision allows a plaintiff to file a lawsuit without first notifying the defendant of any alleged ADA violations. Prior bills—attempting to remedy this "see you in court" mentality—required a prospective plaintiff to provide a 90-day notice to a defendant, prior to filing a lawsuit for alleged ADA violations. However, to date, Congress cannot get over the hump.[5] Supporters of this pre-suit notice believe that advance warning reasonably provides property owners with the opportunity to remove the alleged barriers before defending a lawsuit, but accessibility rights activists protest that the bills impede the disabled public's access to the courts.

Second, the ADA's authorization for a plaintiff to recover attorney's fees after a settlement *promotes* lawsuits.[6] Since most cases settle before trial, the defendants bear the cost of all legal fees, which may equal or exceed the cost of removing alleged barriers. After settling ADA litigation over sidewalks, Miami, Florida and Sacramento, California each paid hundreds of thousands of dollars in plaintiffs' attorneys' fees.[7] One federal judge, after reviewing several cases, expressed his frustration at the distortion of the ADA into a "cottage industry" for lawyers.[8]

A Panoply of Defenses

When your municipality receives a federal complaint regarding the condition of city sidewalks, consider these defenses:

The plaintiff lacks standing. Is the plaintiff an individual or an advocacy group? The first element of legal standing is an injury personal to the plaintiff. The court should dismiss general claims, absent allegations of harm that is concrete and particularized, actual or imminent.[9] General allegations of a disparate impact on disabled persons, absent allegations of specific acts of intentional discrimination against the plaintiffs, are insufficient.[10] The plaintiff must identify a particular street, intersection, parking lot, or facility that impeded his or her access to a program, and must indicate an intent to return.[11] If the advocacy group does not have a member in your city, they may lack associational standing.[12]

The plaintiff has no private right of action to enforce the transition plan and self-evaluation plan regulations. Because they impose obligations beyond those imposed by the ADA statutory mandate, courts have declined to allow plaintiffs a private cause of action for violations of technical regulations, such as 28 C.F.R. § 35.150(d).[13] This authority may be used to support the argument that violations of the technical construction specifications of the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) are also not privately enforceable without a showing that access was denied to a program.[14]

There is insufficient alteration to trigger the duty to repair or replace the sidewalk. Newly constructed or altered street-level pedestrian walkways must contain curb ramps or other sloped areas at intersections or streets, roads, or highways.[15] Alterations must involve more than minor repairs or maintenance, and "[a]t a minimum, it requires the laying of a new asphalt bed spanning the length and width of a city block" to trigger a municipality's duty under the regulation.[16] Routine maintenance, such as filling potholes, does not trigger curb ramp requirements.[17]

The plaintiff requests a fundamental alteration of the program. A city need not take action resulting in a fundamental alteration in the nature of its program.[18] For example, a one-hour limit on down-town parking is facially neutral as it applies to all individuals. Similarly, the absence of free all-day parking within the immediate downtown area requires both disabled and able-bodied persons to park farther away.[19] However, when a city claimed that it currently provided no sidewalk construction and maintenance, the court did not accept that at face value.[20]

It creates an undue burden on the municipality. A public entity need not incur undue financial and administrative burdens.[21] The head of the municipality or its designee must make this determination, with an accompanying written statement of the reasons for reaching that conclusion.[22] All resources available for use in a program, including the availability of federal funds, must be the basis for the "undue burden" determination.[23] When an alteration to existing improvements or new construction triggers the duty to install a curb ramp, the "undue burden" defense is unavailable.[24] A court will limit the applicability of the "undue burden" defense to existing facilities and programs,[25] and courts have been unsympathetic to municipalities'

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budget concerns, even when the sidewalk repair and maintenance budget would exceed the entire annual operating budget.[26]

The program is accessible when viewed in its entirety. Consistent with Title II's emphasis on "program accessibility," the regulatory scheme generally does not require public entities to retrofit all existing facilities.[27] Rather, the regulations permit a public entity to choose from a number of alternatives, including the relocation of services, reassignment of personnel, and the structural modification of existing facilities, to accomplish program accessibility.[28] For example, the U.S. Court of Appeals for the First Circuit held that a university was required to provide at least one route that a person in a wheelchair could safely use to reach its botanical garden.[29] Thus, even if sidewalks are a "program," the ADA's program and reasonable access requirement may be satisfied if some, but not all, routes are accessible.[30]

Sidewalks are a "facility," not a "program." Both the regulations and precedents in the First, Third and Sixth Circuit Courts of Appeal explicitly refer to walks and roadways as "facilities" rather than activities, programs, or services.[31] The distinction between a facility and a program is important because it directs the public entity's obligation of guaranteeing accessibility. While entities may not exclude a "qualified individual with disabilities from participation in or benefits of services, programs, or activities," the regulations do not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities."[32] However, the U.S. Court of Appeals for the Ninth Circuit has ruled that public sidewalks are subject to the program accessibility requirements of the ADA.[33] The focus of its inquiry was whether a particular public function was a normal function of a governmental entity.[34] This expansive view conflicts with previous decisions of the Fifth and Ninth Circuits.[35] Certainly, it is a "normal function" of a government to employ people[36] and make arrests,[37] yet these courts have held that such functions are not covered by Title II because they are not "programs," "services," or "activities." The issue of whether sidewalks are a "program" is currently pending a motion for rehearing in the Fifth Circuit.[38]

Any violations occurred prior to the applicable statute of limitations. If sidewalks are a "facility," the fact that the curb ramps in question might be in undisputed violation of the ADA and that disabled individuals still face the ramifications of having noncompliant ramps does not create a present violation if the ramps were completely constructed and in plain view two years prior to the commencement of the lawsuit.[39] If sidewalks are a "program," the date the disabled person encounters the barrier may become the relevant date for limitation purposes.[40] The continuing violations doctrine may overcome a limitations defense if the plaintiff alleges a systematic policy or practice of discrimination that operated, in part, within the limitations period.[41]

Repair prior to a final decision moots claims. Upon notice of a lawsuit, get underway with an ADA compliance plan as quickly as possible (if you have not already). Consider making a comprehensive Rule 68 Offer of Judgment to shift the attorney's fee burden.[42] Being underway with barrier removal provides several other potential defenses, including:

- There are no barriers to access.
- The defendant entity complied with the regulations regarding the removal of barriers.
- Even if the defendant has not yet completed the barrier removal plan, an injunction would not be appropriate where the defendant is affirmatively taking action.

If a defendant comes into compliance with the ADA during the pendency of the lawsuit and prior to the court granting the plaintiff relief, the court loses subject matter jurisdiction based on mootness, and the plaintiff will not be a prevailing party.[43]

Mere difficulty is insufficient to state a violation. A parent and child sued an airport agency for failing to make terminals accessible to disabled people, as having to use a stroller for the disabled child made it very difficult for them to get into a busy elevator, and prevented them from using an escalator. Dealing with the argument that the terminal was not readily accessible to disabled people, the court found that 28 C.F.R. § 35.150 governed the ADA claim, and that no reasonable jury applying that regulation could conclude, on those facts, that the airport terminal failed to be readily accessible to the disabled.[44]

The ADA requires construction, maintenance and retrofitting of sidewalks that is unconstitutional because it exceeds the Congressional enforcement power under Section 5 of the Fourteenth Amendment. Congressional authority to pass remedial legislation is limited.[45] Legislation that reaches beyond the scope of actual constitutional guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[46] No support exists in the ADA for the expansive obligations some plaintiffs would impose on cities—to have only wide, level, and unobstructed sidewalks and curb ramps.[47] This has nothing to do with discrimination; rather, it creates "an affirmative accommodation obligation on the part of public entities that far exceeds the constitutional boundaries."[48] Moreover, in *Tennessee v. Lane*, the U.S. Supreme Court held implicitly that the



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onerous provisions of Title II of the ADA were valid only when a deprivation of a fundamental right would result from a lack of accommodation (in that case, a right of access to judicial services).[49] While the use of public sidewalks and curb ramps is beneficial to all residents, there is no authority establishing this benefit as a fundamental right.[50]

Other Defenses

There are, of course, other defenses that may be available—that persons with disabilities are afforded an equally effective opportunity to participate in or benefit from a public entity's aids, benefits, and services through public transportation or other alternatives;[51] that there are no duties or regulations regarding the alleged violation;[52] that it would threaten or destroy the historic significance of an historic property;[53] that the claimed accommodation is a threat to health and safety or would compromise the essential eligibility criteria for the program;[54] or that public entities are not required to retrofit all existing facilities.[55]

The Best Defense is a Good Offense

The best way to protect your municipality from ADA litigation costs is to identify and redress compliance problems prior to litigation. Study the federal Department of Justice settlement agreements posted online to become familiar with the requirements.[56] Confirm that your locality has an ADA coordinator who understands the need to coordinate the locality's efforts to comply with and carry out the ADA mandates.[57] Ensure that your municipality has established a grievance procedure for resolving complaints of violations of Title II,[58] and has conducted a self-evaluation regarding programs, services, and facilities.[59] Finally, verify the implementation of a transition plan and substantial compliance with the plan.[60]

Although no amount of risk prevention can completely eliminate the prospect of ADA litigation, the first step in prevention is to understand both the existing accessibility issues and your municipality's requirements under the ADA and the ADAAG, proactively. The intent of the ADA is to enable the disabled to participate in society without discrimination. Recent judicial attempts to increase the scope of the ADA vis-à-vis local governments indicate a growing trend in this area of litigation, one that many localities have experienced. This relatively new area of municipal litigation can lead to serious financial consequences. With the examples provided in this article, you will, hopefully, not be caught off guard if this type of lawsuit arrives in your city.

Notes

1. 42 U.S.C. §§ 12131-12134 (2009).
2. 28 C.F.R. § 35.151 (2009).
3. Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (hereinafter "ADAAG"), 28 C.F.R. pt. 36, App. A (2009).
4. 42 U.S.C. § 12132 (2009).
5. *See, e.g.*, ADA Notification Act of 2009, H.R. 2397, 111th Cong. (2009); died in committee. 6. 42 U.S.C. § 12205 (2009).
7. Details regarding the settlement in *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (9th Cir. 2003) ($745,000) can be viewed at: http://www.dralegal.org/downloads/cases/barden/settlement.pdf. Details regarding the settlement in *Access Now v. City of Miami* (no opinion), ($300,000) can be found at http://www.ci.miami.fl.us/Agendas/Commission/05-07-28.pdf.
8. Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1280-82 (M.D. Fla. 2004) ("The current ADA lawsuit binge is ... essentially driven by economics — that is, the economics of attorney's fees.").
9. Dillery v. City of Sandusky, 398 F.3d 562, 568 (6th Cir. 2005); Ross v. City of Gatlinburg, 113 F. App'x 113 (6th Cir. 2004).
10. Tyler v. City of Manhattan, 118 F.3d 1400 (10th Cir. 1997).
11. *See also Rodriguez*, 305 F. Supp. 2d at 1285; Adam A. Milani, *Wheelchair Users who Lack Standing, Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 Wake Forest L. Rev. 69 (2004).
12. Lamb v. Charlotte County, 429 F. Supp. 2d 1302, 1311 (M.D. Fla. 2006). *See also* Procurador De Personas Con Impedimentos v. Municipality of San Juan, 541 F. Supp. 2d 468, 472 (D.P.R. 2008).
13. *See* Iverson v. City of Boston, 452 F.3d 94 (1st Cir. 2006); Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 914 (6th Cir. 2004).
14. *See* Alford v. City of Cannon Beach, No. CV-00-303-HU, 2000 WL 33200554, 2000 U.S. Dist. LEXIS 20730, at *4 (D. Or. Jan. 17, 2000) (no duty under the ADA to construct new sidewalks.). Also, for example, in 36 C.F.R. 1191 (2009) (Final Rule), the technical standards for the public

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Government Use of Internet

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14. Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Serv., Inc. 351 F. 3d 1229, 1236 (D.C. Cir. 2003); Perfect 10, Inc. v. CCBill, LLC, 488 F. 3d 1102, 1112 (9th Cir. 2007).
15. *See* Rossi v. Motion Picture Ass'n of Am., Inc., 391 F. 3d 1000, 1004 (9th Cir. 2004).
16. *See* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (copyright owner is required to consider any fair use doctrine defenses prior to issuing DMCA notice).
17. Io Group , Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1150 (N.D. Cal. 2008) (company's policy of removing content within days of receiving DMCA complaint protected it from liability for publishing copyrighted material).
18. 17 U.S.C. § 512(g) (West 2009).
19. 521 U.S. 844 (1997).
20. Until recently, immunity was thought to be limited to torts, specifically defamation and libel, but the Ninth Circuit, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921 (9th Cir. 2007) *aff'd en banc,* 521 F. 3d 1157 (9th Cir 2008), closely examined the language of the statue and determined that immunity was absolute.
21. 47 U.S.C. §§ 230 (c)(1) - (2) (West 2009).
22. 47 U.S.C. § 230(e)(3).
23. 502 F. Supp. 2d 719 (N.D. Ohio 2007).
24. *Id.* at 723-24 (plaintiff alleged 14 claims in tort and contract).
25. *Id.* at 725, quoting *Anthony v. Yahoo! Inc.*, 421 F. Supp.2d 1257 (N.D. Cal. 2006).
26. *Id.* at 727-285.
27. 570 F.3d 1096 (9th Cir. 2009).
28. This occurred just before a local news program was to broadcast a report on the incident. The posts were not removed until after Barnes had filed her lawsuit. *Id.* at 1098-99.
29. *Id.* at 1102-03.
30. *Id.* at 1103 ("the duty that Barnes claims Yahoo violated derives from Yahoo's conduct as a publisher—the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles").
31. *Id.* at 1109. Because that issue had not been fully considered by the district court, the Ninth Circuit remanded.
32. 18 U.S.C. §§ 2701-2711 (1986).
33. 560 F. 3d 199 (4th Cir. 2009).
34. U.S. v. Steiger, 318 F.3d 1039, 1049 (11th Cir. 2003).
35. 18 U.S.C. § 2707.
36. 560 F. 3d at 208.
37. *Id.* at 209.
38. 42 U.S.C. § 12101 *et seq*. (1990).
39. 29 U.S.C.A. § 794d (electronic and information technology accessibility guidelines).
40. 28 C.F.R. § 36.104. This defines "undue burden" in part, as meaning "significant difficulty or expense."
41. U.S. Dept. of Justice, Civil Rights Division, *Accessibility of State and Local Government Websites to People with Disabilities* (June 2003) at http://www.ada.gov/websites2.htm (providing local government IT specialists with information about making government Web sites comply with the ADA). *See* the website for information on the DOJ's toll-free ADA Information Line that provides access to ADA specialists during business hours. ML

The Fourth Amendment

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30. By contrast, apprehension by the use of deadly force would constitute a seizure, as established by *Tennessee v. Garner,* 471 U.S. 1, 7 (1985) ("[A] pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment"). *See also* Carr v. Tatangelo, 338 F.3d 1259, 1268 (11th Cir. 2003) ("Officer Fortson had shot to kill to save the life of Officer Tatangelo, and it is his intent and the physical contact of the bullet from his gun that governs our Fourth Amendment, seizure analysis. Although Carr was not immediately stopped ... by the bullet from Officer Fortson's gun, he nevertheless was seized within the meaning of the Fourth Amendment when the bullet struck or contacted him").
31. 240 Fed. Appx. 104 (7th Cir. 2007).
32. *Id.* at 111.
33. *Id.* at 127.
34. 341 F.3d 600 (7th Cir. 2003).
35. *Id.* at 603.
36. *Id.* at 605. In *Croal v. United HealthCare of Wisconsin, Inc.*, No. 07-CV-837, 2009 WL 913641, *15 (E.D. Wis. Mar. 31, 2009), police responding to a domestic violence complaint used a taser on a family member. Other relatives came outside to protest, and were knocked down by the officers trying to arrest a different individual. The court ruled that the alleged intentional conduct of a police officer arresting a different individual was not a seizure of the plaintiffs under the Fourth Amendment. *Compare Acevedo v. Canterbury*, 457 F.3d 721, 725 (7th Cir. 2006) (distinguishing *McCoy* where officer responded to call of a disturbance and punched plaintiff in the face, causing him to fall to the ground; after plaintiff was treated at hospital, he was brought to police station where he was arrested for assault. "Not only did [the officer] knock him to the ground in a location far away from his home under the general control of the police (the auto pound); the force of that blow caused Acevedo to black out momentarily. Even after he regained consciousness, he claims that he remained in a daze for a time[.]").
37. 50 Fed. Appx. 300 (6th Cir. 2002).
38. *Id.* at 302.
39. No. 05-73244, 2007 WL 1768767, *3 (E.D. Mich. June 15, 2007).
40. *Id.*
41. No. 02 C 6248, 2005 WL 3359124, *3 (N.D. Ill. Dec. 08, 2005).
42. *Id.*
43. *See* County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) (where there is no search or seizure, the use of force is unconstitutional only if it shocks the conscience under the Fourteenth Amendment). Excessive force claims under the Fourth Amendment are analyzed under a "reasonableness" standard. *See* Graham v. Connor, 490 U.S. 386, 395 (1989). ML

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rights-of-way are reserved.
15. 28 C.F.R. § 35.151.
16. Kinney v. Yerusalim, 9 F.3d 1067, 1073 (3d Cir. 1993). *See also* Reichenbach v. City of Columbus, No. 2:03-CV-1132,