



Weekly Law Resume

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Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

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Americans with Disabilities Act—Pleading Barriers—Plaintiffs Must Plead Alleged Architectural Barriers in Complaint

A.J. Oliver v. Ralphs Grocery Company, et al.

Ninth Circuit Court of Appeals (August 17, 2011)

Under Title III of the Americans with Disabilities Act, 28 U.S.C. §§ 12181 et seq. ("ADA"), an individual with disabilities can sue a place of "public accommodation"—a business establishment—to force the removal of architectural barriers that prevent that individual's full and equal enjoyment of the premises. In this case, the Ninth Circuit addressed the question of how a plaintiff must notify the defendant establishment of the specific barriers sought to be removed.

Plaintiff A.J. Oliver, a disabled individual who requires the use of a motorized wheelchair, brought suit in federal court against Ralphs Grocery Company ("Ralphs") on December 7, 2007, alleging that its Food 4 Less grocery store in Chula Vista, California, did not comply with the ADA. Oliver's complaint stated that he had encountered barriers at the Food 4 Less store and listed 18 architectural features alleged to violate the ADA.

In his ADA claim, Oliver was able to sue only for injunctive relief, i.e., removal of the barriers, not money damages. However, the ADA also provides for the award of the costs and attorney's fees incurred in prosecuting the suit. In addition, Oliver brought related state-law claims that did permit the recovery of money damages.

Shortly after receiving Oliver's complaint, Ralphs began renovations at the store, removing several of the barriers the complaint had identified. Oliver did not file an amended complaint but, as the trial date approached, he filed an expert report identifying approximately 20 architectural barriers at the Food 4 Less store. The expert report listed several additional barriers that had not been listed in the complaint. Oliver's attorney later explained that his delay in identifying

San Francisco Office

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

Monterey Office

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

Web: www.lowball.com



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the barriers was part of his legal strategy: he purposely forced the defense to wait until expert disclosures before revealing a complete list of barriers, because otherwise the defendant could remove all barriers prior to trial and thus moot the entire case.

The parties filed cross-motions for summary judgment, and the district court granted Ralphs' motion. It found that the architectural features at issue had either been removed or did not actually constitute barriers. In doing so, the court ruled that it would not consider the barriers listed in Oliver's expert report, because they were not properly before the court. The district court also dismissed the state-law claims without prejudice to Oliver's re filing them in state court. Oliver appealed, contending that the district court erred in refusing to consider the allegations in his expert report.

The Ninth Circuit affirmed. It first addressed the issue of standing, a constitutional issue the parties had not raised but was essential to the court's exercise of jurisdiction. Citing U.S. Supreme Court and Ninth Circuit precedent, the court stated that, in the ADA context, standing requires an allegation that the plaintiff encountered a barrier that deprived him of full and equal enjoyment of the premises due to his particular disability. Oliver's complaint did not satisfy this requirement because it stated only that he had encountered barriers and listed various barriers, but did not specify which barrier he encountered personally and how it affected his particular disability so as to deny him access. However, the court found this defect cured by Oliver's summary judgment declaration, which specified the barriers he personally encountered and how they affected his access to the store.

The Ninth Circuit then turned to Oliver's argument that the district court should have considered the barriers identified in his expert report but not in his complaint. It based its analysis on Federal Rule of Civil Procedure 8, which states that a civil complaint "must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." The short and plain statement must provide the defendant with "fair notice" of what the claim is and the "grounds upon which it rests." In the ADA context, the grounds for a claim are the non compliant architectural features. The court thus concluded that, in order for the complaint to provide fair notice to the defendant of the specific barriers for which the plaintiff seeks injunctive relief, each barrier must be alleged in the complaint.

Applying these principles, the court found that Oliver did not give Ralphs fair notice that the barriers listed for the first time in the expert report were grounds for his ADA claim. An expert report would rarely be an adequate substitute for providing fair notice, especially because such reports are usually filed later in the litigation process, after the defendant has taken steps to investigate and defend against the allegations in the complaint. Moreover, in this case Oliver's expert

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report included an allegation that the store's exterior public telephone lacked an International Symbol of Accessibility, but Oliver did not seek summary judgment regarding this alleged barrier. Ralphs would thus have to guess which of the alleged barriers in the expert report really formed the basis for his ADA claim. The Ninth Circuit also affirmed the district court's dismissal of Oliver's state-law claims, finding that the balance of the factors of judicial economy, convenience, fairness, and comity did not tip in favor of retaining those claims after dismissal of the ADA claim.

COMMENT

Under the rule set forth in *Oliver*, an ADA plaintiff cannot rely on an expert's report to allege ADA violations not alleged in the complaint. Given the federal courts' strict time limitations on amended complaints, plaintiffs will need to move quickly to ensure that they have identified and alleged all relevant violations. Moreover, while the Ninth Circuit does not state as much, it is difficult to escape the conclusion that the gamesmanship exhibited by Oliver's attorney influenced the result in this case, as his conduct served only to protract the litigation, enrich himself and frustrate the purpose of the ADA: full and equal access as expeditiously as possible.

For a copy of the complete decision see:

[HTTP://WWW.LOWBALL.COM/WWW.CA9.USCOURTS.GOV/DATASTORE/OPINIONS/2011/08/17/09-56447.PDF](http://www.lowball.com/www.ca9.uscourts.gov/datastore/opinions/2011/08/17/09-56447.pdf)

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