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Handicap Legislation

by Todd J. Sanders*

I. INTRODUCTION

On July 26, 1990, amid both a great deal of celebration and predictions of disaster, President Bush signed into law the Americans with Disabilities Act of 1990 ("ADA").¹ Although many commentators have written about the ADA's employment discrimination provisions,² they have given relatively little attention to Title III of the ADA.³ Title III concerns public accommodations and transportation systems such as railroads, buses, and demand responsive forms of transportation.⁴ The ADA's purpose is to make public accommodations more accessible to persons whom the ADA defines as disabled.⁵ Title III requires more than reserving handicapped parking spaces and building ramps for wheelchair users. Anyone planning to build or alter any structure that will be open to the public should pay careful attention to Title III of the ADA.⁶

This Article will inform the reader briefly about the public accommodations provisions of the ADA. Further, this Article will alert the attorney with business clients to the effects the ADA may have on those clients

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1. 42 U.S.C.S. §§ 12101-12213 (Supp. 1991).

2. *Id.* §§ 12111-12117.

3. *Id.* §§ 12181-12189.

4. *Id.* § 12184.

5. The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* §§ 12102(2)(A)-(C). This definition, and its interpretation, acquires more importance within the context of the ADA's employment discrimination provisions. For guidance concerning what constitutes a disability, see H.R. REP. NO. 101-485(I), 101st Cong., 2d Sess. 1, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 267; see also 29 U.S.C. § 706 (1988).

6. States are not "immune under the eleventh amendment to the Constitution . . . from an action in Federal or State court of competent jurisdiction for a violation of [the] Act." 42 U.S.C.S. § 12202 (Supp. 1991).

and their businesses. Interestingly, the ADA's public accommodations provisions also apply specifically to lawyers' offices.⁷

II. GENERAL SCOPE OF THE ADA'S PUBLIC ACCOMMODATIONS SECTION

A. Purpose of the ADA

Section 12101 of the ADA sets forth Congress' findings and its purposes for passing the ADA.⁸ Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."⁹ Congress also noted that "historically, society has tended to isolate and segregate individuals with disabilities" and that discrimination "continue[s] to be a serious and pervasive social problem."¹⁰ One of the critical areas in which discrimination persists is public accommodations.¹¹

Congress noted that persons discriminated against because they are disabled "have often had no legal recourse to redress such discrimination," unlike persons discriminated against on the basis of race, sex, color, national origin, or age.¹² Disabled persons suffer from the "discriminatory effects of architectural . . . barriers" and the "failure to make modifications to existing facilities."¹³ To eliminate such discrimination, Congress enacted the ADA to "ensure that the [f]ederal [g]overnment plays a central role in enforcing" the ADA's provisions by "invok[ing] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce."¹⁴

B. Scope of the ADA's Public Accommodations Provisions

Title III of the ADA sets forth the general rule that "[n]o 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

7. *Id.* § 12181(7)(F).

8. *Id.* § 12101(a), (b).

9. *Id.* § 12101(a)(1).

10. *Id.* § 12101(a)(2).

11. *Id.* § 12101(a)(3). Other areas include "employment, housing, . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.*

12. *Id.* § 12101(a)(4). Section 12188 of the Act concerns the enforcement procedures, both private and governmental, for discrimination claims arising under Title III. *Id.*

13. *Id.* § 12101(a)(5).

14. *Id.* § 12101(b)(3), (4).

who owns, leases (or leases to), or operates a place of public accommodation."¹⁵

The ADA's extensive definition of public accommodation is separated into twelve categories.¹⁶ It includes facilities such as hotels, theaters, grocery stores, shopping centers, banks, funeral parlors, gas stations, museums, amusement parks, nurseries, schools, bowling alleys, and golf courses.¹⁷ It does not include, however, certain private clubs or establishments, religious institutions, or entities controlled by religious institutions.¹⁸ The ADA's provisions also apply to commercial facilities that are intended for nonresidential use and "whose operations will affect commerce."¹⁹ "This provision appears to extend to workplaces and business facilities that are outside the definition of 'public accommodation.'"²⁰ The ADA defines "commerce" as "travel, trade, traffic, commerce, transportation, or communication . . . among the several States; . . . between any foreign country or any territory or possession and any State; or . . . between points in the same State but through another State or foreign country."²¹

III. DISCRIMINATION UNDER THE PUBLIC ACCOMMODATIONS PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

A. General Prohibitions

The public accommodations portion of the ADA applies to goods, services, facilities, privileges, and advantages ("accommodations").²² It prohibits denying persons, on the basis of their disability, "the opportunity . . . to participate in or benefit from" any public accommodations provided by an entity.²³ It also prohibits affording an individual or class of individuals, on the basis of a disability, "the opportunity to participate in

15. *Id.* § 12182(a).

16. *Id.* § 12181(7)(A)-(L).

17. *Id.* The ADA's legislative history states that these 12 categories "should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available" to those without disabilities. H.R. REP. NO. 101-485(II), 101st Cong., 2d Sess. 100, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 267, 383.

18. 42 U.S.C.S. § 12187 (Supp. 1991). The private clubs or establishments exempted are those exempted from coverage under Title II of the Civil Rights Act of 1964. *Id.*; 42 U.S.C.S. § 2000-a(e) (1989).

19. *Id.* 12181(2)(A), (B).

20. Peter A. Susser, *The ADA: Dramatically Expanded Federal Rights for Disabled Americans*, 16 EMPLOYEE RELATIONS L.J. 157, 171-72 (1990).

21. 42 U.S.C.S. §§ 12181(1)(A), (B), (C) (Supp. 1991).

22. *Id.* §§ 12181-12189.

23. *Id.* § 12182(b)(1)(A)(i).

or benefit from" accommodations in a manner that "is not equal to that afforded to other individuals" or provide an accommodation "that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a[n] . . . accommodation, or other opportunity that is as effective as that provided to others."²⁴

Disabled persons must be afforded these benefits "in the most integrated setting appropriate to the needs of the individual."²⁵ Furthermore, despite the existence of "separate or different programs or activities provided in accordance with" the ADA, denying a disabled person an opportunity to participate in programs or activities that are not separate is also prohibited.²⁶ The ADA prohibits discrimination by administrative methods such as utilizing standards or criteria which have a discriminatory effect on the basis of a disability or which perpetuate "the discrimination of others who are subject to common administrative control."²⁷ Finally, the ADA generally prohibits discriminating against a person or an entity because of the individual or entity's relationship or association with a disabled person.²⁸

B. *Specific Prohibitions*

A more specific list of forbidden activities follows the ADA's general prohibitions and describes what is discrimination for purposes of the ADA.²⁹ This is an essential part of the public accommodations provisions of the ADA and should be read carefully by itself and in conjunction with the ADA's legislative history³⁰ and the regulations issued by the Attorney General and the Architectural and Transportation Barriers Compliance Board ("ATBCB").³¹

24. *Id.* §§ 12182(b)(1)(A)(ii), (iii).

25. *Id.* § 12182(b)(1)(B).

26. *Id.* § 12182(b)(1)(C).

27. *Id.* § 12182(b)(1)(D).

28. *Id.* § 12182(b)(1)(E).

29. *Id.* § 12182(b)(2)(A).

30. H.R. REP. No. 101-485(I), 101st Cong., 2d Sess. 1, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 267.

31. 42 U.S.C.S. § 12204 (Supp. 1991). These regulations are mandated by the ADA at section 12186(b) and (c). Furthermore, section 12204(a) requires the ATBCB to issue minimum guidelines "that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of title [] . . . III" of the ADA. See 36 C.F.R. §§ 1190.01-1190.60 (1990).

The ATBCB is an independent federal agency that was established by the Rehabilitation Act of 1973. 29 U.S.C. § 706 (1988). Its purpose is to ensure that the requirements of the Architectural Barriers Act of 1968 are met and propose alternative solutions to architectural, transportation, communication, and attitudinal barriers facing disabled persons. See

Section 12182 of the ADA lists and elaborates on five broad groupings of discrimination. Under this section, discriminatory acts include: (1) "impos[ing] or appl[y]ing . . . eligibility criteria that screen out or tend to screen out" disabled individuals or classes of individuals "from fully and equally enjoying any" public accommodations "unless such criteria can be shown to be necessary for the provision of the . . . accommodations being offered"; (2) failing to "make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such . . . accommodations" to disabled persons "unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . accommodations"; (3) failing "to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals *because of the absence of auxiliary aids and services*, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the . . . accommodation being offered or would result in an undue burden"; (4) failing "to remove architectural barriers, and *communication* barriers that are structural in nature, in *existing facilities* . . . where such removal is *readily achievable*"; and, (5) failing to make accommodations available through alternative methods if such methods are readily achievable when "an entity can demonstrate that the removal of a barrier under clause (iv) is not *readily achievable*."³²

The ADA defines the term "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense."³³ It lists several factors which determine whether an action is "readily achievable."³⁴ These factors include: the "nature and cost of the action"; the "overall financial resources" of the facility and the number of persons

42 U.S.C. §§ 4151-4157 (1988); 56 Fed. Reg. 2296 (1991) (to be codified at 36 C.F.R. pt. 1191) (proposed Jan. 22, 1991).

In formulating its guidelines, the ATBCB used the American National Standard Institute A117.1 standard as the basis for the technical specifications. Builders, manufacturers, designers, and others use this standard. The Board's proposed guidelines, as well as the standard, are quite detailed and extensive, including precise measurements for counter-top heights and door widths and the typeface of signs. 42 U.S.C.S. § 12204(b).

32. 42 U.S.C.S. § 12182(b)(2)(A)(i)-(iii) (emphasis added). This requirement is significant because it could, in some cases, require the installation of devices for the hearing or sight impaired. Indeed, the ADA defines "Auxiliary Aids and Services" to include "qualified interpreters . . .; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; . . . acquisition or modification of equipment or devices; and . . . other similar services and actions." *Id.* § 12102 (1)(A)-(D). This is an example of the ADA requiring more than just the installation of handicapped parking spaces and ramps.

33. *Id.* § 12181(9).

34. *Id.*

employed by the facility, the effect of the action on its expenses and resources, or any other impact of the action on the facility's operation; "the overall financial resources of the covered entity" and "the overall size of the business of a covered entity with respect to the number of its employees" and the "number, type, and location of its facilities"; and the type of the entity's operation or operations.³⁵

C. *Discrimination, New Construction, and Alterations*

Title III of the ADA becomes effective on January 26, 1992.³⁶ Section 12183 defines discrimination in two areas of concern, namely, new construction of public accommodations and commercial facilities, and alterations of public accommodations and commercial facilities that occur on or after the effective date.³⁷

According to section 12183 of the ADA, discrimination includes failing "to design and construct facilities for first occupancy [on or after the effective date] that are readily accessible to and usable by" disabled persons.³⁸ An exception to this type of discrimination exists when "an entity can demonstrate that it is structurally impracticable to meet the requirements of [section 12182(a)] in accordance with standards set forth or incorporated by reference in regulations issued under [Title III]."³⁹

The ADA also applies to alterations of facilities or parts of a facility if the alterations "affect[] or could affect the usability of the facility or part thereof."⁴⁰ The ADA deems it discriminatory not to make alterations "in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by [disabled persons], including individuals who use wheelchairs."⁴¹ If the alteration "affects or could affect usability of or access to an area of the facility containing a *primary function*," then, "to the maximum extent feasible, the path of

35. *Id.* §§ 12181(9)(A)-(D). This includes "the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity." *Id.* § 12181(9)(D).

36. *Id.* § 12183(a)(1). Although one can bring a civil action for violations of the new construction and alterations portion of the ADA at this time, actions brought for violations of section 12182, which includes the requirements for alterations of existing facilities, must wait. For facilities employing 25 or fewer persons and having gross receipts of one million dollars or less, one may not bring a civil action during the first six months after the ADA's effective date. This period extends to one year after the effective date for businesses employing ten or fewer persons and having gross receipts of \$500,000 or less. *Id.* § 12190(b).

37. *Id.* § 12183. Section 12182(b)(2)(A)(iv) provides that it is discriminatory not to remove architectural and communication barriers in *existing facilities*. *Id.* § 12182.

38. *Id.* § 12183(a)(1).

39. *Id.*

40. *Id.* § 12183(a)(2).

41. *Id.*

travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, [must be] readily accessible to and usable by" disabled individuals.⁴² This requirement applies only when alterations to the path of travel "are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General)."⁴³

The requirements of section 12183(a) do not mean, however, that covered entities in applicable situations will necessarily have to install an elevator. A covered entity is required to install an elevator only when the facility is three or more stories high, or has three thousand square feet or more per story.⁴⁴ This exception to the elevator rule does not apply, however, to shopping centers, malls or professional offices of health care providers.⁴⁵

IV. THE ADA'S ENFORCEMENT AND REMEDY PROVISIONS

Section 12188 of the ADA provides remedies for private individuals who are discriminated against in violation of the ADA or who anticipate discrimination in violation of section 12183.⁴⁶ Section 12188 also provides the Attorney General with enforcement powers.⁴⁷

For the private individual, the remedies and procedures are the same as those "set forth in section 204(a) of the Civil Rights Act of 1964."⁴⁸ When public accommodations are in violation of the ADA, private individuals can file a private lawsuit or a complaint with the Attorney General.⁴⁹ Injunctive relief is available for failure to remove architectural barriers or structural communication barriers when removal is readily achievable.⁵⁰ Injunctive relief is also available for violations of the new construction and alterations provisions of the ADA.⁵¹ This remedy is also available to force an entity to make its facilities more accessible, provide auxiliary aids or services, or modify its discriminatory policies.⁵² While no provi-

42. *Id.* (emphasis added).

43. *Id.*

44. *Id.* § 12183(b).

45. *Id.*

46. *Id.* § 12188(a)(1). Section 12183 addresses new construction and alterations. *Id.* § 12183.

47. *Id.* § 12188(b).

48. *Id.* (citing 42 U.S.C. 2000a-3(a) (1988)). This section specifically states, however, that a disabled person need not "engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions." *Id.*

49. *Id.* § 12188.

50. *Id.* § 12188(b)(2)(A).

51. *Id.* § 12188(b)(2)(A)(iii).

52. *Id.* § 12188(b)(2)(A)(ii).

sion exists for the recovery of money damages in private suits, reasonable attorney fees, "including litigation expenses[,] and costs," are available.⁵³

The Attorney General may bring a civil action in any federal district court if he has "reasonable cause to believe" that anyone is engaged "in a pattern or practice of discrimination" under the ADA, or that any person or group is being discriminated against "and such discrimination raises an issue of general public importance."⁵⁴ The Attorney General also has an affirmative duty to investigate alleged violations and "undertake periodic reviews of compliance of covered entities."⁵⁵ Furthermore, the Attorney General may, "[o]n application of a State or local government, . . . certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of" the ADA.⁵⁶

The ADA also allows the courts "to vindicate the public interest" by assessing "a civil penalty against the entity."⁵⁷ These penalties range from a maximum of \$50,000 for a first violation to a maximum of \$100,000 for subsequent violations.⁵⁸ No punitive damages, however, are available.⁵⁹ Finally, the ADA instructs the courts to consider "any good faith effort or attempt to comply with" the ADA when determining what civil penalties to impose.⁶⁰

IV. CONCLUSION

This brief glimpse at one portion of the ADA should inform the reader of the incredible scope of the ADA. Although Title III will have a substantial effect on the average owner of a "public accommodation" or com-

53. *Id.* § 12205.

54. *Id.* § 12188(b)(1)(B)(i), (ii).

55. *Id.* § 12188(b)(1)(A)(i).

56. *Id.* § 12188 (b)(1)(A)(ii). Before certification, the ADA requires a consultation with the ATBCB and "a public hearing at which persons, including" disabled individuals "are provided an opportunity to testify against such certification." *Id.* If an enforcement proceeding is brought against an entity, a certification by the Attorney General "shall be rebuttable evidence that such State law or local ordinance" meets or exceeds the ADA's requirements. *Id.*

57. *Id.* § 12188(b)(2)(C).

58. *Id.* § 12188(b)(2)(C)(i), (ii). The ADA clarifies what constitutes a "subsequent violation" by providing that "a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act" constitutes a single violation. *Id.* § 12188(b)(3).

59. *Id.* § 12188(b)(4).

60. *Id.* § 12188(b)(5). In evaluating good faith, the courts are to consider, "among other factors [they] deem[] relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability." *Id.*

mercial facility, fortunately, its requirements should not create too much uncertainty.⁶¹ There is a great deal of case law and commentary on the Rehabilitation Act of 1973, which is somewhat similar to the ADA. Also, section 12206 of the ADA creates an affirmative duty for certain government entities to "develop a plan to assist entities covered under" the ADA.⁶²

While much debate undoubtedly will rage on about the costs and benefits of the employment portions of the ADA, the public accommodations portions, aside from being the right thing to do (*if* the ADA is interpreted and applied *reasonably*), make good business sense. For example, while clerking for a law firm during my third year of law school, the bank building where the firm's offices were located was on the corner of the block. The block sloped downward in front of the building and along the side. Thus, there were stairs going upward in the front, and downward on the only remaining exposed side. While leaving the building one day I encountered a man in a wheelchair who asked which entrance he could use to get in the building. There was none.

61. The financial costs could be considerable in some cases. Therefore, the courts' interpretation of the term "readily achievable" will warrant much attention. The courts provide some guidance through the Rehabilitation Act of 1973.

62. 42 U.S.C.S. § 12206(a) (Supp. 1991). These include the Attorney General, the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the ATBCB, and the Chairman of the Federal Communications Commission. *Id.*

