2016 WL 2350144
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United States District Court,
S.D. New York.

JENNIFER FELTENSTEIN, Plaintiff,
v.
WYKAGYL ASSOCIATES HJ, LLC and STARBUCKS CORPORATION, Defendants.

14-cv-4797 (KBF)
|
Filed 05/04/2016

OPINION & ORDER

KATHERINE B. FORREST United States District Judge

***1** KATHERINE B. FORREST, District Judge:

This is one of the unusual Americans with Disabilities ("**ADA**") access cases which requires a legal ruling. While most judges have a number of **ADA** access cases on their docket at any given time, it is rather rare for one to require more than case management and episodic consideration of attorneys' fees. Most **ADA** access cases settle. For that reason, the case law in this area is relatively underdeveloped given the breadth of the statutory schema and number of suits filed.

This was a rather run of the mill **ADA** access case, until it wasn't. Plaintiff Jennifer Feltenstein, a wheelchair user, commenced suit in June 2014. In her complaint, she alleges that a Starbucks store in a strip mall in Westchester County (the Wykagyl Shopping Center) had a number of structural barriers that prevent and/or restrict access to a person with a disability, such as plaintiff. (See Compl., ECF No. 64.) Plaintiff sued both Starbucks and the owner of the shopping area, Wykagyl Associates HJ, LLC ("Wykagyl"). At a conference on February 17, 2016, the parties indicated that a settlement with Starbucks was forthcoming. (Tr. 7-8.) [1] The Court understands that a settlement with Starbucks is being finalized. Wykagyl also expressed a desire for settlement rather than incurring fees but the parties were unable to agree to terms. Throughout, Wykagyl has maintained that any access violations have been remediated and that the real remaining issue is one of attorneys' fees; for her part, plaintiff maintains that a significant issue relating to accessibility of a sidewalk remains unremediated.

Following further and unsuccessful settlement attempts, plaintiff and Wykagyl have brought cross-motions to resolve a primary legal issue in this action. (See Tr. 14-15, 16-17; ECF Nos. 51, 66; see also Pl.'s Ltr. Br., ECF No. 62, at 1; Def.'s Ltr. Br., ECF No. 60, at 2.) For the reasons set forth below, it is absolutely clear that Wykagyl's position on the legal issue is correct. Accordingly, the Court GRANTS Wykagyl's motion for summary judgment and DENIES plaintiff's. [2]

I. FACTS

***2** At the conference before the Court on February 17, 2016, the parties agreed that the facts necessary to resolution of this motion are undisputed. (Tr. 19-20.)

Plaintiff Feltenstein is a wheelchair user who lives in Westchester County. (Compl. at 6.) She frequents a medical facility in the Shopping Center and alleges that would like to access a Starbucks in the Shopping Center but, due to violations of the **ADA** which render it inaccessible, cannot. (Compl. ¶ 28.) In her complaint, she alleges "[n]umerous architectural barriers." (Compl.

¶ 13.) She recites a litany of issues relating to the overall physical site, and a host of issues which relate to the interior of Starbucks' premises. (Compl. ¶ 21.) [3]

The remaining legal issue between the parties concerns an exterior walkway around the northern boundary of the site. The parties agree that due to the protrusion of a gas meter on one section of the walkway, it is not accessible under the meaning of the **ADA**. It is helpful to illustrate the issue by referring to the diagram which the parties have used in the conference with the Court on February 17, 2016, and in their briefing on this motion: [4]

Tabular or graphical material not displayable at this time.

As is apparent from the diagram, the Shopping Center may be thought of as having a "front" ("Front") and a "back" ("Back"). The Front is the area on the right. A user of the premises may park in the Front parking area and thereby directly access each of the businesses in the Shopping Center: the medical facility, Chase, CVS, a nail salon, a dry cleaners, a pizzeria, a café and Starbucks. There is no contention that the accessible parking spaces or access provided from those parking spaces to the entrances of the shops located in the Front are inaccessible or violate the **ADA** at this time. Plaintiff does not dispute that if she parks her car in the Front, she has full access to all of the **public accommodations** on the site. The remaining dispute between the parties concerns access from the Back.

The Back parking lot is located on the left of the diagram. There are accessible parking spaces located in this area as well. The shops on the far right of the diagram—including the nail salon, cleaners, pizzeria, café and Starbucks—are not directly accessible from the Back. To access those shops, a wheelchair user would have to either park in the Front or park in the Back and walk through the CVS (referred to as the "CVS thoroughfare"). [5] A user able to ambulate without a wheelchair would have an additional option: the walkway that commences at the Back of the medical facility, proceeds north and then comes down and around the Front. The Court refers to this as the "Northern walkway."

***3** It is undisputed that the CVS thoroughfare requires passage through the store itself during business hours. There is no assertion that there is any physical impediment or condition which would interfere with wheelchair accessibility on this route. It is also undisputed that the Northern walkway is longer than the CVS thoroughfare, exposed to the elements, and less safe as it abuts two-way vehicular traffic.

The CVS located in the Shopping Center operates from 8:00 in the morning until 10:00 p.m.; the Starbucks at this location operates from approximately 5:30-6:00 a.m. until 10:00 p.m. (See Def.'s Ltr. Br., Ex. 3, at 4.) Plaintiff has not alleged the record that she has ever sought to access the Starbucks at any time earlier than 8:00 a.m. There is also no evidence in the record the she or anyone else has ever been denied access through the CVS thoroughfare.

II. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party does not bear the ultimate burden on a particular claim or issue, it need only make a showing that the non-moving party lacks evidence from which a reasonable jury could find in the non-moving party's favor at trial. Id. at 322-23.

In making a determination on summary judgment, the court must "construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor." Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010). Once the moving party has discharged its burden, the opposing party must set out specific facts showing a genuine issue of material fact for trial. Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise

exist." Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (internal citations omitted). In addition, "[o]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." Porter v. Quarantillo, 722 F.3d 94, 97 (2d Cir. 2013) (internal quotation marks and citation omitted).

III. APPLICABLE **ADA** STANDARDS

Title III of the **ADA** protects individuals against discrimination "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**." 42 U.S.C. § 12182(a). Following the passage of the **ADA**, all new construction and alterations to existing structures must be "accessible" to individuals with disabilities. Id. § 12183(a)(1), (2). To clarify what constitutes "equal access," Congress directed the Department of Justice ("DOJ") to issue "regulations ... [that] include standards applicable to facilities ..." covered by **Title III**. Id. § 12186(b). Any such standards must be "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board". 42 U.S.C. § 12186(c).

***4** Pursuant to this congressional directive, the DOJ promulgated Accessibility Guidelines ("ADAAG" or "Guidelines") that set forth structural requirements. The first set of Guidelines are those which issued in 1991. 28 C.F.R. Pt. 36, App. D ("1991 Guidelines"). Those Guidelines were revised but not abrogated in 2010. 28 C.F.R. §§ 36.101 et seq. ("2010 Guidelines"). For structures originally built prior to 1991 but altered subsequent to that time, a threshold issue for parties concerns which set of Guidelines applies. With regard to the dispute here, there is no material difference between the two sets of Guidelines.[6] The Court sets forth the relevant provisions of each.

As a general matter, both sets of Guidelines provide for "Equivalent Facilitation." 1991 Guidelines § 2.2; 2010 Guidelines § 103. The 1991 Guidelines state that "[d]epartures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility."[7] 1991 Guidelines § 2.2. Similarly, the 2010 Guidelines provide, "Nothing in these requirements prevents the use of designs, products or technologies as alternatives to those prescribed, provided they result in substantially equivalent or greater accessibility and usability." 2010 Guidelines § 103.

Though set up somewhat differently, both the 1991 and 2010 Guidelines set forth similar definitions for accessible sites and buildings. The 1991 Guidelines provide that an Accessible Site shall meet the following minimum requirements:

> (1) At least one accessible route complying with 4.3 shall be provided within the boundary of the site from public transportation stops, accessible parking spaces, passenger loading zones if provided and public streets or sidewalks, to an accessible building entrance.
>
> (2) At least one accessible route complying with 4.3 shall connect accessible buildings, accessible facilities, accessible elements, and accessible spaces that are on the same site.

1991 Guidelines § 4.1.2. An Accessible Building is defined as:

> (1) At least one accessible route complying with 4.3 shall connect accessible building or facility entrances with all accessible spaces and elements within the building or facility.

1991 Guidelines § 4.1.3. Section 4.3 of the 1991 Guidelines sets forth the definition of Accessible Route. It states that "[a]ll walks, halls, corridors, aisles, skywalks, tunnels or other spaces that are part of an accessible route shall comply with 4.3." 1991 Guidelines § 4.3.1.

Under the 2010 Guidelines provide that an "accessible route" shall be provided at site arrival points as follows:

> At least one accessible route shall be provided from within the site from accessible parking spaces and accessible passenger loading zones; public streets and sidewalks; and public transportation stops to the accessible building or facility entrance that they serve.

2010 Guidelines § 206.2. The Advisory comment to this provision states, "Each site arrival point must be connected by an accessible route to the accessible building entrance or entrances served ... the accessible routes must serve all of the accessible entrances on the site." Id.

***5** The 2010 Guidelines further specify that within a site, "at least one accessible route shall connect accessible buildings, accessible facilities, accessible elements, and accessible spaces that are on the same site." Id. § 206.2.2. A circulation path is defined as "[a]n exterior or interior way of passage provided for pedestrian travel, including but not limited to, walks, hallways, courtyards, elevators, platform lifts, ramps, stairways, and landings." Id. § 106.5; see also 1991 Guidelines § 3.5 (defining "circulation path" as substantially the same as above and "accessible route" as "[a] continuous unobstructed path connecting all accessible elements and spaces of a building or facility").

IV. DISCUSSION

Plaintiff's argument boils down to the following contention: because two routes are available to a non-wheelchair user to access the Front of the Shopping Center from the Back—1) via the Northern walkway and 2) via the CVS—it is a violation of the **ADA** to limit a wheelchair user to only the CVS thoroughfare.[8] Specifically, plaintiff contends that the availability of the Northern walkway to non-wheelchair users provides them with the ability to enjoy the **public accommodation** of Starbucks in a different manner than individuals who use wheelchairs. Plaintiff argues, "Defendant commits unlawful segregation by providing the non-disabled with an exterior pedestrian walkway while, at the same time, refusing to provide an accessible exterior path of travel to the disabled." (Pl.'s Ltr. Br. at 4.) Plaintiff further contends that, "Defendant is therefore required to provide a pedestrian path for the disabled at the same location as the route used by the general public." (Id.) As support for her position, plaintiff points to the overall purpose of the **ADA**, various statutory provisions, and that CVS is a non-party to this action, separately operated, and opens an hour to an hour and a half later than Starbucks.

Defendant Wykagyl has a number of responses. First, defendant notes that the legal issue need not even be addressed by this Court as neither the lack of an exterior access route between the Back and Front of the Shopping Center nor the lack of accessibility of the Northern walkway was alleged in the complaint. (Def.'s Ltr. Br. at 2.) Second, defendant contends that in any event plaintiff misunderstands the requirements of the **ADA**. According to defendant, it has fulfilled its obligations under the **ADA** here at issue by providing accessible paths between the Back and Front of the Shopping Center. (Id.) Defendant points to two ways in which plaintiff can access the Starbucks and other stores in the Front of the Shopping Center: through the CVS thoroughfare or by parking in designated accessible parking in the Front. Defendant argues that the Northern walkway is not the general circulation path – and that indeed it is longer and less safe than any one of the alternative routes. (Def.'s Ltr. Br. at 4.)

Defendant's arguments are substantially and materially correct. First, the lack of accessibility of the Northern walkway is not alleged in the complaint as a basis for any **ADA** violation. All of the allegations regarding access violations are contained in paragraph 21 of the complaint. The first six relate to parking spaces, the seventh and eighth relate to access aisles, the ninth through twelfth relate to curb ramps, and the remainder (13^{th} – 30^{th}) relate specifically to the exterior or interior of the Starbucks. (Compl. ¶ 21.) Put bluntly, plaintiff has not alleged the very claim as to which she now seeks judgment in her favor. This alone provides a sufficient basis for a ruling in favor of defendant. But as the merits are also clear, the Court addresses those as well.

***6** Plaintiff also misreads the statutory scheme as requiring that the Northern walkway be accessible. The statute requires that the Shopping Center have "at least one" accessible route from accessible parking spaces to the facility or building entrance that they serve. 2010 Guidelines § 206.2. Nowhere in the **ADA** guidelines is there the requirement that a plaintiff has the ability to select a specific pathway to make accessible when there is already another accessible route available. Here, there are at least

two accessible routes to various locations in the Shopping Center. First, the accessible building or facility that is at issue and which forms the subject of plaintiff's claim is that in which the Starbucks is located. Plaintiff can access the Starbucks most directly by parking in a designated and accessible parking space in the Front of the Shopping Center. In addition, from the Back parking lot of the Shopping Center, plaintiff can proceed via the CVS thoroughfare to any of the stores in the Front. There are no facts before this Court which indicates that there has been or would be any issue with these methods of access.

The CVS thoroughfare provides a complete accessible route to all of the other stores in the Front. Notably, if plaintiff has chosen to park in the Back, it is likely that she would have immediate business at the CVS or the medical facility; otherwise, parking in such a location makes little sense. If she also wishes to visit stores in the Front, access through the CVS presents no difficulty or inconvenience.

Plaintiff argues that the CVS thoroughfare denies disabled individuals equal access by providing a " 'separate' and 'different' pedestrian pathway[ ] to the non-disabled individuals than what is provided for the disabled," thereby "commit[ing] unlawful segregation." (Pl.'s Ltr. Br. at 4.) However, plaintiff does not dispute that non-disabled customers regularly use the CVS thoroughfare to access various facilities in the Front of the Shopping Center. Therefore, it is difficult to see why the CVS thoroughfare used by disabled and non-disabled visitors alike creates separate—nevermind unequal—access.[9] Plaintiff's reliance on Caruso v. Blockbuster-Sony Music Ent'mt Centre at the Waterfront, 193 F.3d 730, 740 (3d Cir. 1999) is similarly misplaced. In Caruso, the Third Circuit rejected defendant's argument that additional interior seating was an equivalent facilitation to exterior lawn seating at a concert hall because wheelchair users were completely denied access to an entire seating area of 18,000 seats in the lawn facility. There, wheelchair users were clearly restricted from enjoying the concert facility in the same way as those who were able to sit in the lawn area. See id., 193 F.3d at 839. In the instant case, the interior CVS thoroughfare provides both plaintiff and non-disabled visitors alike an accessible route to the enjoyment of the facilities in the Shopping Center.

Plaintiff's argument that the different business hours of CVS and Starbucks renders the CVS thoroughfare legally inaccessible is without merit. It is an argument of convenience—that is, the fact of the differing business hours is being used here as a litigation position when in reality there are no true instances when such a situation would occur. The Starbucks is the first shop to open in the Shopping Center. Why in the world would anyone park in the Back lot—surrounded only by closed businesses—when her purpose at such an early hour could only be to access Starbucks?[10] That plaintiff proposes the Northern walkway as the solution is patently unreasonable, as it would require plaintiff to park her car further away from her destination, then proceed several hundred feet around buildings which are closed at that hour, only to make her way to the sole building open—all potentially before the sun has risen and therefore in the dark. The Court need not assume that such a scenario would ever occur. There is no legal requirement that defendant ever make such an assumption either.

V. CONCLUSION

***7** The Court has considered plaintiff's other arguments and finds that they are without merit. For the above reasons, the Court grants summary judgment in favor of defendant Wykagyl on the issue that is the subject of this motion.

The parties shall confer and inform the court not later than **May 8, 2016** as to whether a final settlement has been reached as to defendant Starbucks.

Not later than May 8, 2016, plaintiff shall inform defendant of which claims specifically remain to be addressed and why. Thereafter, defendant shall move for summary judgment on any remaining issues not later than **May 23, 2016**. Plaintiff shall oppose not later than **June 13, 2016**. Any reply shall be filed not later than **June 20, 2016**.

SO ORDERED.

All Citations

Slip Copy, 2016 WL 2350144

Footnotes

1 "Tr." citations refer to pages of the transcript for the February 17, 2016 status conference.

2 Plaintiff submitted a letter on April 27, 2016 stating that resolution of the legal issue does not dispose of all remaining issues in this case. (ECF No. 67.) Defendant opposed on April 29, 2016, arguing that after resolution of the legal issue, there are no more outstanding issues to litigate because defendants have already offered to remedy all items in plaintiff's expert report. (ECF No. 69.) The Court is uncertain as to plaintiff's specific position regarding what remains of this case following resolution of this motion. It is certain that plaintiff intends to continue to try and litigate various matters. The Court discusses a schedule for bringing any final motions at the conclusion of this decision but warns all counsel of the rules against unnecessary proliferation of litigation. See 28 U.S.C. § 1927 ("Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."); Fed. R. Civ. P. 11(b) ("By presenting to the court a pleading, written motion, or other paper ... an attorney ... certifies that ... it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation[.]").

3 The Complaint filed at the commencement of this case appeared to be missing page 5. On April 20, 2016, the Court ordered the parties to provide the extra page (ECF No. 63), and plaintiff filed another copy of the Complaint that included that page. (ECF No. 64.)

4 See ECF No. 62, Ex. A; ECF No. 61, Ex. 1. The Court has added the text boxes "FRONT" and "BACK" to the appropriate locations in the figure below.

5 Defendant also states that a patient of the medical facility could also pass through that facility to get to the Front. Plaintiff concedes that she is a patient (or that her family members are patients) of the medical facility and would therefore be entitled to pass through the facility on those occasions when she has an appointment. However, the Court in this opinion only focuses on thoroughfares that are open to members of the public.

6 In the dispute before this Court, the parties agree that the defendant Shopping Center made certain alterations to the premises in 2008, including the creation of the Northern walkway. There is no allegation that the structures in which the CVS or Starbucks are located were altered after 1991. Nor have the parties spent any significant time on which Guidelines apply. In fact, there are no material differences that would affect the outcome here.

7 The term "facility" is defined to include walkway. 1991 Guidelines § 3.5.

8 Plaintiff also argues that once she is inside the medical facility, she would be "stranded" as she cannot travel directly into the CVS, and vice versa. (Pl.'s Ltr. Br. at 1.) Plaintiff has never before raised this claim. Nor is there any evidence that she has ever traveled between the CVS and the medical facility on the same trip. Moreover, plaintiff does not contest that from the Back parking lot there are accessible routes to and from both the CVS and the medical facility, indicating that plaintiff can indeed travel from one to the other along accessible routes.

9 Indeed, plaintiff's arguments about failure to meet equivalent facilitation are misplaced, as the CVS thoroughfare is not an equivalent facilitation but rather an accessible route; it does not "depart[ ] from particular technical and scoping requirements" of the **ADA**. 2010 Guidelines § 2.2. Defendant employs the equivalent facilitation argument in the alternative, and in that respect it is correct: the CVS thoroughfare's alternative design of indoor access provides substantially equivalent or greater access to the Starbucks and other Front facilities than the Northern walkway because of its shorter distance, weather control and safety.

10 The Court also notes that plaintiff has never alleged that she was unable to find an accessible parking spot in the Front before 8 a.m. Furthermore, given that defendant has agreed to designate a specific parking spot in the North parking lot for plaintiff's exclusive use, there is no need for her to ever use the Back parking lot. (See Breede Decl., ECF No. 61, ¶ 11.)

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United States District Court,
D. Maryland.

JOHN NANNI
v.
ABERDEEN MARKETPLACE, INC.

Civil Action No. WMN-15-2570
|
05/04/2016

William M. Nickerson, Senior United States District Judge

MEMORANDUM

***1** Plaintiff John Nanni seeks declaratory and injunctive relief against Defendant Aberdeen Marketplace, Inc. for alleged violations of **Title III** of the **Americans** with **Disabilities Act** (**ADA**), 42 U.S.C. § 12181 et seq. Before the Court is Defendant's Motion to Dismiss Plaintiff's First Amended Complaint. [1] ECF No. 7. That motion is ripe. Upon review of the motion and applicable case law, the Court finds that no hearing is necessary, Local Rule 105.6, and that Defendant's Motion to Dismiss will be granted.

Plaintiff, a resident of Middletown, Delaware, is a qualified individual with a disability under the **ADA**. Plaintiff suffers from Post-Polio Syndrome; he is only able to walk and stand a limited amount each day and is otherwise confined to a wheelchair. Defendant is the owner, lessee, lessor, and/or operator of a **public accommodation**, allegedly obligated to comply with the **ADA**, known as Aberdeen Market Place Shopping Center and located at 1010 Beards Hill Road, Aberdeen, Maryland, 21001. The shopping center is near Interstate 95 and Plaintiff travels that corridor "often on his way to Baltimore to attend Baltimore sporting events, to visit with family and relatives in the Baltimore and Washington DC area, and due to traveling to events as a rotary PolioPlus ambassador/District 7630 chair." ECF No. 5 at ¶ 10. Plaintiff has visited the shopping center at least 3-4 times to "stop to rest on drives and to take bathroom breaks" and claims it "provides a perfect place for him." Id.

While visiting the shopping center, Plaintiff experienced difficulty accessing the goods and utilizing the services due to the architectural barriers he encountered and/or observed, including:

A. inaccessible parking designated for disabled use throughout the property due to excessive slopes, pavement in disrepair and lack of proper access aisles, which caused him difficulty exiting and entering his vehicle because of extra care needed to avoid a fall;

B. inaccessible curb ramps due to excessive slopes, steep side flares, failure to provide smooth transitions, and pavement in disrepair, which caused him difficulty due to the extra care needed to traverse the ramps;

C. a dangerous sidewalk ramp due to excessive running slopes which caused him difficulty due to the extra care needed to traverse it; and

D. inaccessible routes throughout the Property due to excessive slopes and pavement in disrepair, which caused him difficulty due to the extra care needed to maneuver throughout the Property.

ECF No. 5 at ¶ 14. Plaintiff alleges Defendant continues to discriminate against him by failing to make the reasonable modifications necessary for Plaintiff to participate in and benefit from the goods, services, facilities, privileges, advantages, and accommodations offered to the general public. Independent of his intent to return as a patron 2-3 times per year, Plaintiff intends to return as an **ADA** tester to determine whether the barriers to access stated herein have been remedied. [2]

***2** Defendant has filed a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 7. Based on the record as a whole, the Court is unable to conclude that Plaintiff has suffered a sufficiently particularized injury-in-fact to satisfy the case-or-controversy requirement of Article III, therefore, Defendant's Motion to Dismiss will be granted pursuant to Rule 12(b)(1).

Article III of the Constitution restricts the federal courts to hear only actual "cases" and "controversies." U.S. Const. art. III, § 2. In determining the power of the court to entertain a suit, the "question is whether plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498-499 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). To satisfy the constitutional standing requirement, a plaintiff must provide evidence to support the conclusion that 1) the plaintiff suffered an "injury in fact," i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest, 2) which is "fairly traceable" to the challenged action of the defendant; and 3) likely to be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). "Abstract injury is not enough." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983).

In addition, when a plaintiff requests injunctive relief, he "must allege and prove that there is a 'real and immediate threat' that he will be wronged again." [3] Daniels v. Arcade, 477 Fed. App'x 125, 129 (4th Cir. 2012) (citing Bryant v. Cheney, 924 F.2d 525, 529 (4th Cir. 1991)). This requirement means a plaintiff must "state a plausible allegation that there is a likelihood that he will suffer future harm," Daniels, 477 Fed. App'x at 130, and that likelihood must be greater than a "mere possibility." Nat'l All. for Accessibility, Inc. v. CMG Bethesda Owner LLC, Civil No. JFM-12-1864, 2012 WL 6108244, at *4 (D. Md. Dec. 7, 2012). Prior injury constitutes probative "evidence bearing on whether there is a real and immediate threat of repeated injury." Lyons, 461 U.S. at 102. But prior injury itself is insufficient; the complaint must 1) "describe [plaintiff's] concrete, specific plans to return to the locus of the injury" and 2) "indicate that the plaintiff is likely to suffer the same injuries upon return." Lujan, 504 U.S. at 564; see also Millbank Hotel Partners, 2013 WL 653955, at *4.

Challenging only the first element of Lujan, "injury in fact," Defendant maintains that Plaintiff has not demonstrated a plausible intent to return or a sufficient likelihood of future injury as necessary to permit this suit for declaratory and injunctive relief to go forward. ECF No. 7-1 at 5-8. As stated previously, Plaintiff alleges he plans "to visit the Property again in December [4] on his way to Baltimore and expects to go to the Property 2-3 times a year after that." ECF No. 5 ¶ 10. Plaintiff "additionally plans to return as an **ADA** tester." Id. at ¶ 19. Plaintiff clearly stated his intent to return while traveling on Interstate 95 and the Court has no reason to doubt the veracity of his claim at this stage in the proceeding. See Daniels, 477 Fed. App'x at 130 ("We must accept this allegation as true for purposes of the motion to dismiss."). Thus, Plaintiff's plan to return to the locus of the injury satisfies the first element for injunctive relief.

***3** The second element Plaintiff must establish is his likelihood of suffering future harm at the shopping center. Lujan, 504 U.S. at 564. In Plaintiff's Complaint, he lists four barriers encountered at the shopping center that caused him difficulty and states he fears he will encounter these barriers again upon return. ECF No. 5 ¶ 14. The Complaint does not contain specific facts regarding Plaintiff's injury, but rather alleges that he "personally encountered and/or observed" the barriers and that the barriers "still exist and have not been remedied". ECF No. 5 at ¶¶ 14, 16. In reviewing the plausibility of a plaintiff's threat of future injury, this Court, in CMG Bethesda Owner LLC, observed the plaintiff's allegations of personal encounters with "architectural barriers" were too broad, and that the complaint did not sufficiently describe which violations would cause harm to the plaintiff during her next visit to the hotel. 2012 WL 6108244, at *4. Further, in Millbank Hotel Partners, this Court found that without specific facts surrounding the plaintiff's encounter with noncompliant facilities, "and armed only with boilerplate

statements that certain violations of the **ADA** exist," a complaint will fail to demonstrate more than a mere possibility of future harm. 2013 WL 653955, at *5. Plaintiff's Amended Complaint is similar to the complaints in CMG Bethesda Owner LLC and Millbank Hotel Partners, leaving the Court no choice but to speculate as to the type of harm Plaintiff is likely to face on his return to the shopping center.

Plaintiff's Amended Complaint is further deficient with regard to future injury because the Court is left to wonder which business within the shopping center is "the perfect place" for Plaintiff to stop and rest while traveling on Interstate 95. In Norkunas v. Park Road Shopping Center, Inc., the court found a plaintiff who merely had "occasion to drive through the region" on Interstate 77 could not credibly demonstrate a likelihood of future harm due to his "tenuous connection" with that region. 777 F. Supp. 2d 998, 1003-1004 (W.D.N.C. 2011). As a passerby on Interstate 95 seeking to rest, Plaintiff's connection to Defendant's shopping center is tenuous at best, especially in light of the fact that there is another shopping center directly across the street, Beards Hill Marketplace, and numerous other rest stops located on Plaintiff's route. See ECF No. 10 at 3. The Court takes judicial notice that Maryland House Rest Area, located on Interstate 95 in Aberdeen, Maryland, is less than five miles from Defendant's shopping center, and further notes that this facility is in fact a rest area. The Court is unable to find more than a mere possibility of future harm without any indication of the specific goods and services at Defendant's shopping center that Plaintiff seeks out in his travels, or a particular convenience at this center that is more advantageous to Plaintiff than that available at the other centers along his route.

As in Norkunas, this Court recognizes as plausible the allegation that "Plaintiff may leave the [interstate] for the express purpose of returning to Defendant's establishment to confirm its **ADA**-compliance. However, [ ] such a purpose is insufficient to satisfy Article III standing." 777 F. Supp. 2d at 1002 n.4. A **Title III** plaintiff cannot use his "status as a tester to satisfy the standing requirements where she would not have standing otherwise." Id. at 1005; see also Judy, 2009 WL 4261389, at *5 ("Any tester status that [the plaintiff] might possess does not confer standing to seek prospective relief where he cannot show a reasonable likelihood of returning to [the defendant's] property."). While testing an entity's compliance with federal disability statutes is not improper, the Court notes that Plaintiff has filed twelve substantially similar complaints in the United States District Court for the District of Maryland under **Title III** of the **ADA** within the last year. [5] The twelve complaints filed by Plaintiff in this Court are not necessarily form templates, yet they are similar enough to call into question the plausibility of Plaintiff's threat of future injury at Defendant's shopping center. Many of the defendant properties are in the vicinity of Interstate 95. While Plaintiff has characterized Aberdeen Market Place Shopping Center, as "a perfect place for him," Plaintiff allegedly patronizes these other properties as well. ECF No. 5 at ¶ 10.

***4** The aforementioned multitude of suits heightens the appearance that the true reason behind Plaintiff's alleged intent to return to Defendant's shopping center is to preserve and cultivate this legal action and secure legal fees, as suggested by Defendant. ECF No. 10 at 2. This Court is not aware of "any authority showing that **Title III** of the **ADA** was intended to create such broad rights against individual local businesses by private parties who are not bona fide patrons, and are not likely to be bona fide patrons in the future." Harris v. Stonecrest Care Auto Ctr., LLC, 472 F. Supp. 2d 1208, 1219 (S.D. Cal. 2007). For the above-stated reasons, Defendant's Motion to Dismiss will be granted. A separate order will issue.

_____/s/_____

William M. Nickerson
Senior United States District Judge DATED: May 4, 2016

All Citations

Slip Copy, 2016 WL 2347932

Footnotes

1 On August 31, 2015, Plaintiff filed his original Complaint. ECF No. 1. Defendant filed its first Motion to Dismiss on October 19, 2015. ECF No. 3. Plaintiff filed an Amended Complaint on November 5, 2015, ECF No. 5, mooting Defendant's first Motion to Dismiss.

2 In **ADA** litigation, "a tester is a qualified individual with a disability who is testing an entity's compliance with federal disability statutes." Judy v. Pingue, No. 2:08-CV-859, 2009 WL 4261389, at *5 (S.D. Ohio Nov. 25, 2009).

3 "[T]he standing requirements for declaratory and injunctive relief are essentially the same." Gardner v. Montgomery Cty.Teachers Fed. Credit Union, 864 F. Supp. 2d 410, 421 (D. Md. 2012); see, e.g., Nat'l All. for Accessibility, Inc. v. MillbankHotel Partners, Civil No. RDB-12-3223, 2013 WL 653955, at *6 (D. Md. Feb. 20, 2013) ("Plaintiffs have failed to show anything more than a mere possibility of future harm. Therefore, they have failed to demonstrate standing for both injunctive relief and a declaratory judgment.").

4 In analyzing Plaintiff's plan to return, the Court need not consider Plaintiff's allegation that he "plans to visit the Property again in December," ECF No. 5 at ¶ 2, as that date "has now come and gone," and so has the Plaintiff's immediate threat of future harm as to that particular visit. See CMG BethesdaOwner LLC, 2012 WL 6108244, at *5.

5 See also, Nanni v. The Avenue at White Marsh Business Trust, GJH-15-2571, (filed August 31, 2015); Nanni v. CH Realty VI/R Bel Air Festival, L.L.C., ELH-15-2573 (filed August 31, 2015); Nanni v. The Shops at Perryville, LLC, RDB-15-2574 (filed August 31, 2015); Nanni v. Ikea Property, Inc., RDB-15-3493, (filed November 17, 2015); Nanni v. White Marsh Mall, LCC, JFM-15-3494, (filed November 17, 2015); Nanni v. 8655 Pulaski Joint Venture LLC, JFM-16-260, (filed January 28, 2016); Nanni v. Edgewater Partnership Limited Partnership, JFM-16-265, (filed January 29, 2016); Nanni v. Gorfine Fiddle & Co., P.A., JKB-16-266, (filed January 29, 2016); Nanni v. Toys "R" Us Property Company II, LLC, JKB-16-727, (filed March 11, 2016); Nanni v. White Marsh Plaza Business Trust, MJG-16-729, (filed March 11, 2016); and Nanni v. Hawthorne, Inc., JKB-16-731, (filed March 11, 2016).

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2016 WL 2349112
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Western Division.

Julie Griesinger, Plaintiff,
v.
University of Cincinnati, Defendant.

Case No. 1:13-cv-808
|
Signed 05/03/2016

ORDER

Karen L. Litkovitz, United States Magistrate Judge

***1** Plaintiff Julie Griesinger brings this disability discrimination action against defendant University of Cincinnati under the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, and the American with Disabilities Act of 1990 ("**ADA**"), 42 U.S.C. § 12181 *et seq.* This matter is before the Court on defendant's motion for summary judgment (Doc. 77), plaintiff's memorandum in opposition (Doc. 85), and defendant's reply memorandum (Doc. 86).

I. Facts

Plaintiff's Learning Disability
Plaintiff was a student in the Medical Assisting program at defendant's Blue Ash College. (Doc. 1 at ¶ 5; Doc. 34 at ¶ 5). As an infant, plaintiff had a brain tumor that was treated with chemotherapy and surgery. (*See* Confidential Neuropsychological Report of Christian von Thomsen, Psy.D., Exh. PPP to Deposition of Sid Binks, Ph.D., Doc. 76-1 at 29). As a result, plaintiff has a learning disability, which includes significant memory impairment and an inability to process information at a normal rate. (*See id.* at 31-32; Independent Neuropsychological Consultation of Dr. Binks, Exh. WWW to Binks Deposition, Doc. 76-1 at 18-19; Independent Medical Evaluation of Thomas Sullivan, Ph.D., Exh. XXX to Binks Deposition ("Sullivan Evaluation"), Doc. 76-1 at 49-50). For example, after a 20-minute delay, plaintiff's ability to remember information that was verbally related to her is worse than 998 out of 1,000 people of her age. (Sullivan Evaluation, Doc. 76-1 at 50).

In high school, plaintiff utilized an individualized education plan ("IEP"). (*See* Loveland City Schools IEP, Plaintiff's Exh. 4 to Binks Deposition, Doc. 76-1 at 21-28). Under the terms of her IEP, plaintiff received the following accommodations: extended time to take quizzes or tests, access to a resource room with individualized assistance from an instructor, tests read aloud, the use of notes on tests, the option for a note taker in class, and a separate, quiet room for taking tests and quizzes. (*Id.* at 23; Deposition of Julie Griesinger, Doc. 61 at 11-14). With these accommodations, plaintiff graduated high school in 2008. (Doc. 61 at 11).

Plaintiff's Enrollment in Defendant's Blue Ash College
Plaintiff enrolled at Blue Ash College in the fall of 2008 and transferred to the medical assisting program in the fall of 2009. (Doc. 1 at ¶ 9; Doc. 34 at ¶ 9). She provided defendant's disability services office ("DSO") with a copy of her high school transcript and IEP. (Doc. 61 at 27-28). The IEP noted the following information concerning plaintiff's disability: "[Plaintiff] is a survivor of a brain tumor and received chemotherapy for ten months when she was a young child. During her preschool years, [plaintiff] received special services at the Cerebral Palsy Services Center." (IEP, Doc. 76-1 at 21). The IEP also noted

that "[w]ork completion within a specific amount of time is tough for [plaintiff]." (*Id.*). Plaintiff's mother testified that in the fall of 2008, she accompanied plaintiff to the DSO and informed a DSO employee that plaintiff would need extended time. (Deposition of Karen Griesinger, Doc. 62 at 26, 30-32). Plaintiff interviewed with DSO director John Kraimer and was granted accommodations based on that interview and the IEP she had provided. (Doc. 61 at 27-28; Doc. 1 at ¶ 10; Doc. 34 at ¶ 10).

***2** At the start of each quarter, plaintiff submitted an accommodation request form that listed the accommodations she needed. (*See* Accommodation Request Forms, Exh. F attached to plaintiff's deposition, Doc. 61-2 at 16-39). Throughout her enrollment, plaintiff requested accommodations for extended time for testing, a quiet testing environment, a note taker, and use of a tape recorder. (*See id.*). Defendant never denied plaintiff any of these requested accommodations. (*See* Doc. 61 at 37-38). With these accommodations, plaintiff completed the classroom coursework, receiving mostly As and Bs during her third and fourth years in the program. (*See* Doc. 61 at 40-41).

The Externship Requirement

To graduate from the medical assisting program, students were required to complete a clinical component, which is referred to in the record as an "externship" or "practicum." (Deposition of Mary Elizabeth Browder, Doc. 66 at 34-35). Successful completion of the externship required 320 hours in a medical setting, split equally between administrative and clinical work. (*Id.* at 42, 88). In spring 2012, Mary Browder was the externship coordinator who was charged with assigning medical assisting students to externships and monitoring their progress. (*Id.* at 47-48). Browder received reports from students and on-site supervisors. (*Id.* at 63-65). Although defendant's Externship Guidelines provided that "[i]n selecting an externship site, [defendant] take[s] into account the pace and general atmosphere of the site and [the student's] personality and talents," Browder explained that because placement facilities were limited, she focused primarily on whether a site's geographic location was accessible for the student. (*Id.* at 46-47, 58-59; Externship Guidelines, Exh. M to Browder Deposition, Doc. 66-2 at 55). Kraimer testified that the obligation to provide reasonable accommodations under the **ADA** extended to a student's externship requirement. (Doc. 67 at 21-22).

In October 2011, plaintiff requested to begin the externship in the spring 2012 term to complete her medical assisting degree. (Email from plaintiff to Rachael Allstatter dated October 13, 2011, Exh. G to plaintiff's deposition, Doc. 61-2 at 40). On March 27, 2012, plaintiff completed an accommodation request form for the spring 2012 term in which she requested a note taker for in-class lectures, extended time for testing, and the use of a tape recorder. (Accommodation Request Form dated March 27, 2012, Exh. F to plaintiff's deposition. Doc. 61-2 at 38). On April 2, 2012, plaintiff started an externship at Cincinnati Pain Management Consultants. (*See* emails from plaintiff to Browder dated March 22 and March 27, 2012, Exhs. K and L to plaintiff's deposition, Doc, 61-2 at 44-45), Plaintiff testified that beyond her accommodation request form, she did not tell defendant that she would need any other accommodation related to her externship at Cincinnati Pain Management Consultants. (*See* Doc. 61 at 51-52). Specifically, plaintiff testified:

> Well, I assumed since this is basically another class, an externship, that they would—that my teachers would tell them for me because in the manual it says that they're going to take into consideration the pace and the flow of each student. And I thought—since my teachers were aware of my disability before each class, I thought they were going to tell them—tell the sites about my disability too since it's another class.

(*Id.*).

On May 3, 2012, Julie Haley of Cincinnati Pain Management Consultants informed Browder that plaintiff's externship needed to be terminated. (E-mail from Julie Haley to Browder dated May 3, 2012 at 8:29 a.m., plaintiff's Exh. 2 attached to Browder deposition, Doc. 66-2 at 26). Haley indicated that plaintiff's externship was being terminated for the following reasons: (1) plaintiff copied previous entries from a patient's history instead of writing a new entry concerning the patient's current symptoms; (2) plaintiff "seems to be a slower learner"; (3) plaintiff was unable to properly attach a blood pressure cuff; (4) plaintiff would not finish assigned tasks; and (5) plaintiff appeared to have problems with her vision and hearing. (*See id.*; e-mail from Haley

to Browder dated May 2, 2012 at 8:24 a.m., plaintiff's Exh. 2 attached to Browder deposition, Doc. 66-2 at 27). Plaintiff denied the truth of these complaints concerning her performance. (Doc. 61 at 65-67).

***3** After plaintiff was terminated from her externship, Browder had a number of meetings with plaintiff and her parents before placing plaintiff at a second externship site. (*See* Doc. 66 at 106-09). Plaintiff's mother testified that at one of these meetings:

> [M]y husband and I asked [Browder] for the second site that [plaintiff] went to, to make sure that she was with somebody patient, that would take the time to train [plaintiff] because of her disability. And I believe [Browder's] answer was, "No, we expect you to be off the ground running,["] and. "You'll do good," and, "Believe in yourself," something like that at that time. Very nonchalant about it. Didn't really want to discuss it.

(Doc. 62 at 49). Further, plaintiff's mother testified that at this meeting, she also told Browder that plaintiff needed repetition and extended time to learn at her second externship site. (*Id.* at 51-52). Plaintiff's father testified that at this meeting:

> [We] reminded [Browder] about the accommodations, things that [plaintiff] would need, which we felt that she didn't get on the first externship, which resulted in her dismissal from that externship, things that she would need to make the second one successful. ... We talked about the time, needing extra time, as she would be able to repeat these and that she would be able to do one skill, one task, repeat it often enough until she mastered that and then move on to the next so that she wasn't overloaded with a multitude of varying responsibilities all at once to give her time to master a skill, move on to the next. We asked for someone to be patient with her, that understood what [her] disability was, how she would learn and how she could be successful.

(Deposition of John Griesinger, Doc. 64 at 23-24). Further, plaintiff's father testified that he asked Browder to communicate their requests to someone at the externship site. (*Id.* at 24). Browder denied that plaintiff's parents requested accommodations for plaintiff at this meeting. (*See* Doc. 66 at 114-16).

Browder arranged a second externship opportunity for plaintiff at Family Medical Care Associates. (*Id.* at 116). Browder testified that she told the externship site that plaintiff "may need some extra time to learn," but did not inform the site that plaintiff received accommodations through DSO. (*Id.* at 118). Plaintiff began this externship on June 18, 2012. (Doc. 61 at 93; UC Blue Ash College time sheets, Exh. U to plaintiff's deposition. Doc. 61-2 at 70). Family Medical Care Associates terminated plaintiff from the externship on June 28, 2012. (*See* e-mail from plaintiff to Browder dated June 29, 2012 at 5:43 p.m., Exh. W to plaintiff's deposition, Doc. 61-2 at 74). Davida Claxon, office manager at the second externship site, explained that plaintiff's externship was terminated for the following reasons: (1) plaintiff was unable to complete "simple [clerical] tasks without assistance"; (2) plaintiff "consistently was unable to take blood pressure, pulse, respiration, temperature (digital speaking thermometer)"; and plaintiff's "inability to take accurate vitals, perform EKGs, and communicate with patients could endanger the outcomes of patient health." (Letter from Davida Claxon dated July 9, 2012, Exh. X to plaintiff's deposition, Doc. 61-2 at 76-77).

***4** On July 26, 2012, Browder notified plaintiff by letter that she was being dismissed from the medical assisting program based on her failing grades for the externship requirement. (Letter from Browder to plaintiff dated July 26, 2012, Exh. Y to plaintiff's deposition, Doc. 61-2 at 85). The letter also quoted Claxon's statement that plaintiff's "inability to perform tasks ... could 'endanger the outcomes of patient health.'" (*Id.*).

II. Summary Judgment Standard

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Under Federal Rule of Civil Procedure 56(c), a grant of summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party

is entitled to judgment as a matter of law." *Satterfield v. Tennessee*, 295 F.3d 611, 615 (6th Cir. 2002). The Court must evaluate the evidence, and all inferences drawn therefrom, in the light most favorable to the non-moving party. *Satterfield*, 295 F.3d at 615; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Little Caesar Enters., Inc. v. OPPC, LLC*, 219 F.3d 547, 551 (6th Cir. 2000).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson*, 477 U.S. at 249, The trial court need not search the entire record for material issues of fact, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989), but must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a *prima facie* case, summary judgment is warranted. *Street*, 886 F.2d at 1478 (citing *Celotex* and *Anderson*). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

III. Resolution

Defendant moves for summary judgment on plaintiff's claims under the Rehabilitation Act and the **ADA**. Defendant argues that plaintiff's claim under the **ADA** must fail because she pled a violation of **Title III** of the **ADA**, which applies to **public accommodations** and services operated by private entities, instead of a violation of Title II, which applies to public entities such as defendant. (Doc. 77 at 24-26). [1] Defendant further argues that courts give "tremendous deference to the professional judgment of faculty" when considering accommodation requests in academic settings. (*Id.* at 27). Defendant contends no reasonable jury could find that defendant failed to reasonably accommodate plaintiff's disability under federal disability law because plaintiff neither provided a proper diagnosis of her disability nor specifically requested an accommodation for her externship. (*Id.* at 27-30). Defendant argues that no reasonable jury could find that plaintiff is entitled to compensatory or punitive damages because punitive damages are not available in private suits brought under the Rehabilitation Act and Title II of the **ADA** and there is no evidence in the record that defendant intentionally discriminated against plaintiff, which is required to recover compensatory damages. (*Id.* at 39-40). [2]

***5** Plaintiff responds that defendant failed to engage in the interactive process to accommodate her disability before her first externship. (Doc. 85 at 8-10). Plaintiff contends defendant persisted in this failure to engage in the interactive accommodation process even after she and her parents requested externship accommodations before her second externship placement. (*Id.* at 10-11). Plaintiff argues judicial deference to defendant's academic decisions is not appropriate in this case because defendant "clearly failed to make an accommodation decision" and presented no evidence that it considered possible accommodations, their feasibility, and their cost and effect on the program, (*Id.* at 12-14). Plaintiff contends that whether she was an otherwise qualified person with a disability is a jury question given the competing expert opinions about plaintiff's likelihood of successfully completing an externship with accommodations. (*Id.* at 14-16). Plaintiff argues a reasonable jury could find that defendant's personnel intended their own actions such that compensatory damages would be appropriate. (*Id.* at 16-17). Plaintiff contends the proper forum to determine whether punitive damages are appropriate is in a pretrial motion. (*Id.* at 18).

In reply, defendant argues that plaintiff's failure to properly plead her claim under Title II of the **ADA** is significant because of the different causation standards in the **ADA** and the Rehabilitation Act. (Doc. 86 at 2-3). Defendant contends that "[i]t is undisputed that neither [plaintiff] nor her family provided [defendant] with a current diagnosis during any of her time at [Blue Ash College]." (*Id.* at 4). Defendant argues that it complied with disability law by not stigmatizing plaintiff and assuming she would need accommodations in an externship. (*Id.* at 4-7). Defendant contends it had no duty to engage in the interactive process because plaintiff failed to provide a proper diagnosis or specific request for accommodations in her externships. (*Id.* at 7). Defendant argues that the requests plaintiff's parents made to Browder were not sufficiently specific and should have been directed to DSO staff, not faculty members. (*Id.* at 8). Defendant contends that even if these requests were sufficient, defendant complied with them by placing plaintiff at Family Medical Care Associates for her second externship. (*Id.* at 9). Defendant

argues that if plaintiff desired externship accommodations, she should have noted them on the accommodation request form she completed on March 27, 2012. (*Id.* at 10-12). Defendant contends that because the Court struck from the record facts related to a potential third externship, plaintiff cannot rely on those facts to bolster her claims. (*Id.* at 13). Defendant argues that no reasonable jury could award compensatory damages because plaintiff has provided no plausible evidence that defendant intended to discriminate against her. (*Id.* at 13-14).

A. NOTICE PLEADING

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Pleadings must be construed as to do justice." Fed. R. Civ. P. 8(e). Courts must construe pleadings "liberally in order to prevent errors in draftsmanship from barring justice to litigants." *Carter v. Ford Motor Co.*, 561 F.3d 562, 566 (6th Cir. 2009) (quoting *Ritchie v. United Mine Workers of Am.*, 410 F.2d 827, 833 (6th Cir. 1969)). Courts look at the "course of the proceedings" to determine whether a defendant has received notice of a plaintiff's claim. *Id.* at 566, 568-69. The Sixth Circuit has stated that "the fundamental tenor of the Rules is one of liberality rather than technicality, and it creates an important context within which we decide cases under the modem Federal Rules of Civil Procedure." *Minger v. Green*, 239 F.3d 793, 799 (6th Cir. 2001) (quoting *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 248 (6th Cir. 2000)). "[T]he argument that the ultimate legal issue in this case could be properly adjudicated upon what was plainly nothing more tha[n] an oversight in pleading is frivolous." *Foote v. Barnhart*, No. 3:06-cv-686, 2008 WL 2756256, at *10 (M.D. Tenn. Jul. 15, 2008) (citing Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.")).

***6** "The court should freely give leave [to amend a complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2). Further, a court "may permit the pleadings to be amended" during and after trial and "should freely permit an amendment when doing so will aid in presenting the merits." Fed. R. Civ. P. 15(b)(1).

Here, defendant's argument that plaintiff waived a claim under Title II of the **ADA** is not well-taken. Plaintiff's complaint gave defendant "fair notice" of her claim and "the grounds upon which it rests." *See Twombly*, 550 U.S. at 555. While plaintiff mistakenly cited to **Title III** of the **ADA** instead of Title II as relating to defendant, the Court must construe her complaint "liberally in order to prevent errors in draftsmanship from barring justice to litigants." *Carter*, 561 F.3d at 566. The Court notes that elsewhere in her complaint, plaintiff alleged that defendant is "a public university receiving federal financial assistance," which was sufficient to give defendant fair notice that Title II of the **ADA** was applicable to plaintiff's claim. (*See* Doc. 1 at ¶ 5).

More importantly, the Court looks to the course of the proceedings to determine whether defendant was on notice that plaintiff was raising a claim under Title II. *Carter*, 561 F.3d at 566, 568-69. In its motion for summary judgment, defendant fully briefed the issue of a failure to accommodate claim brought under Title II. (*See* Doc. 77 at 26-30). Thus, the Court "notes that a liberal construction of the complaint does not adversely impact the Defendant, since [it] ha[s] addressed the merits of the [Title II claim] in [its] dispositive motion." *Blankenship v. Lewis Cty. Fiscal Court*, No. 06-cv-147, 2007 WL 4404165, at *5 (E.D. Ky. Dec. 17, 2007).

Finally, the Court notes that it may permit the pleadings to be amended during and after trial to conform to the evidence presented in the case. *See* Fed. R. Civ. P. 15(b)(1). This provides yet further justification for not dismissing plaintiff's **ADA** claim on a technical oversight in pleading. *See Minger*, 239 F.3d at 799; *Foote*, 2008 WL 2756256, at *10. The parties have fully briefed plaintiff's claims under the Rehabilitation Act and Title II of the **ADA**. Plaintiff is granted leave to amend her complaint to include the correct title and citation of the **ADA** and ordered to file an amended complaint within ten (10) days of the filing of this Order. The Court will now consider plaintiff's claims on the merits.

B. DISABILITY DISCRIMINATION

Claims brought under the Rehabilitation Act are generally reviewed under the same standards that govern **ADA** claims. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 201 (6th Cir. 2010). To establish that she was dismissed from an academic program in violation of the **ADA** or Rehabilitation Act, plaintiff must show that (1) she is handicapped or disabled; (2) she is "otherwise qualified" to continue in the program; and (3) she was dismissed on the basis of her handicap or disability. *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998), "A handicapped or disabled person is 'otherwise qualified' to participate in a program if she can meet its necessary requirements with reasonable accommodation." *Id.* (citing *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1034 (6th Cir. 1995)).

***7** "A publicly funded university is not required to provide accommodation to a student under the **ADA** or Rehabilitation Act until the student provides a proper diagnosis of [her] claimed disability and specifically requests an accommodation." *Carten v. Kent State Univ.*, 78 Fed.Appx. 499, 500-01 (6th Cir. 2003) (citing *Kaltenberger*, 162 F.3d at 437). *See also Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1992) ("A relevant aspect of [the reasonableness] inquiry is whether the student ever put the medical school on notice of [her] handicap by making a sufficiently direct and specific request for special accommodations." (internal quotation marks omitted)). While a university "need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." *Kaltenberger*, 162 F.3d at 436 (quoting *Alexander v. Choate*, 469 U.S. 287, 300 (1985)).

Here, defendant apparently does not dispute that plaintiff is handicapped or disabled. In any event, a reasonable jury could find that plaintiff has a disability based on the Loveland IEP, the evaluations of Dr. von Thomsen, Dr. Binks, and Dr. Sullivan, and defendant's history of granting her accommodations in pre-externship coursework. (*See* Doc. 76-1 at 18-19, 21-29, 31-32, 49-50; Doc. 61 at 27-28, 37-38; Doc. 1 at ¶ 10; Doc. 34 at ¶ 10).

Second, a reasonable jury could also find that plaintiff is "otherwise qualified" to continue in the medical assisting program with accommodations. *See Kaltenberger*, 162 F.3d at 435. For example, when defendant granted plaintiff accommodations for coursework, she received mostly As and Bs during her third and fourth years in the program. (*See* Doc. 61 at 40-41). Further, Dr. Binks and Dr. von Thomsen opined that plaintiff could successfully complete the externship requirement if she received reasonable accommodations for her disability. (*See* Doc. 76-1 at 20, 33).

Third, a jury could reasonably conclude that defendant dismissed plaintiff from the medical assisting program on the basis of her disability. *See Kaltenberger*, 162 F.3d at 435. Defendant dismissed plaintiff from the program based on her failing grades for the externship requirement. (*See* Doc. 61-2 at 85). Plaintiff has presented evidence from which a reasonable jury could find that her failure to complete the externship was attributable to her disability and defendant's failure to accommodate it, such that plaintiff was dismissed on the basis of her disability.

Even though plaintiff has presented evidence from which a reasonable jury could find that defendant violated the **ADA** and Rehabilitation Act in dismissing plaintiff from the program, defendant offers three reasons why summary judgment in its favor is still appropriate. First, defendant argues that the requirements of federal disability law were never triggered in plaintiff's case because she never provided defendant with a "proper diagnosis" of her disability. This argument is not well-taken because a reasonable jury could find that plaintiff's Loveland IEP provided defendant with an adequate diagnosis to trigger federal disability law. (*See* Doc. 76-1 at 21). Indeed, defendant's course of conduct shows that the Loveland IEP and plaintiff's interview with DSO director Kraimer were sufficient for defendant to determine that plaintiff had a disability for which classroom accommodations were appropriate. (*See* Doc. 61 at 27-28; Doc. 1 at ¶ 10; Doc. 34 at ¶ 10). A jury could reasonably find that defendant's argument that a "proper diagnosis" was required before it could grant plaintiff externship accommodations is disingenuous when defendant already had granted plaintiff accommodations for years. Thus, even if plaintiff's previous IEP was insufficient to establish her diagnosis, a reasonable jury could find that defendant should have required a more extensive diagnosis earlier in the process instead of relying on the lack of a "proper" diagnosis as a *post hoc* justification for denying plaintiff externship accommodations.

***8** Further, *Kaltenberger* is distinguishable on this point. In *Kaltenberger*, "plaintiff told an academic counselor at the College that she thought she might have adult attention deficit disorder." 162 F.3d at 437. Unlike *Kaltenberger*, plaintiff's request for accommodations was not supported solely by her own intuition that she might have a learning disability, but by a documented history of such a disability in the form of the Loveland IEP. A reasonable jury could find that this documentation was sufficient to show that plaintiff had been diagnosed with a learning disability such that defendant's duty to engage in the interactive process concerning accommodations was triggered.

Second, defendant argues that summary judgment in its favor is appropriate because plaintiff never requested specific accommodations for the externship requirement. This argument is also not well-taken. At a minimum, plaintiff has presented evidence creating a genuine issue of fact as to whether she made a sufficient request for accommodations before the second externship, such that defendant's duty to engage in the interactive process was triggered. It is undisputed that Browder had a number of meetings with plaintiff and her parents before placing plaintiff at a second externship site. (*See* Doc. 66 at 106-09). Plaintiff has produced evidence that at one of these meetings, her mother asked Browder "to make sure that [plaintiff] was with somebody patient, that would take the time to train [plaintiff] because of her disability." (Doc. 62 at 49). Plaintiff's mother testified that she also told Browder that plaintiff needed repetition and extended time to learn at her second externship site. (*Id.* at 51-52). Further, plaintiff's father testified that "[we] reminded (Browder) about the accommodations, things that [plaintiff] would need, which we felt that she didn't get on the first externship, which resulted in her dismissal from that externship, things that she would need to make the second one successful." (Doc. 64 at 23). Specifically, plaintiff's father testified:

> We talked about the time, needing extra time, as she would be able to repeat these and that she would be able to do one skill, one task, repeat it often enough until she mastered that and then move on to the next so that she wasn't overloaded with a multitude of varying responsibilities all at once to give her time to master a skill, move on to the next. We asked for someone to be patient with her, that understood what [her] disability was, how she would learn and how she could be successful.

(*Id.* at 23-24). Further, plaintiff's father testified that he asked Browder to communicate their requests to someone at the externship site. (*Id.* at 24). A reasonable jury could find that these requests were specific enough to trigger a duty for defendant to engage in the interactive process under federal disability law.

Finally, defendant argues that summary judgment is appropriate because the Court should give "tremendous deference to the professional judgment of faculty" when considering accommodation requests in academic settings. (Doc. 77 at 27). This argument is also not well-taken, It is true that "[c]ourts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement." *Kaltenberger*, 162 F.3d at 436. However, defendant has not provided evidence that it exercised "professional academic judgment" in relation to plaintiff's requests for externship accommodations. Defendant has not provided any evidence that it considered plaintiff's requested externship accommodations and found that they were infeasible or would result in "fundamental" or "substantial" modifications to the program. *See id.* To the contrary, defendant has argued that plaintiff never requested an externship accommodation for defendant to consider. Thus, because defendant has not presented any evidence that it thoughtfully considered and rejected plaintiff's requests for externship accommodations, "deference to professional academic judgments when evaluating the reasonable accommodation requirement" is not warranted on this record. *See id.*

***9** Based on the foregoing, plaintiff has provided sufficient evidence to raise genuine issues of fact for jury resolution on her claims. Accordingly, summary judgment is denied on plaintiff's **ADA** and Rehabilitation Act claims against defendant.

C. DAMAGES

Defendant is correct that "punitive damages may not be awarded in private suits brought under ... [Title II] of the **ADA** and § 504 of the Rehabilitation Act." *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). Accordingly, defendant's motion for summary judgment is granted as to plaintiff's requests for punitive damages under the Rehabilitation Act and Title II of the **ADA**. However, defendant's motion for summary judgment is denied as to defendant's argument concerning compensatory damages. The jury

will be in a better position to consider whether defendant intended to discriminate against plaintiff based on her disability after considering the evidence presented at trial.

IV. Conclusion

Consistent with the foregoing, defendant's motion for summary judgment (Doc. 77) is **GRANTED IN PART** as to plaintiff's requests for punitive damages under the Rehabilitation Act and Title II of the **ADA**. However, defendant's motion for summary judgment is **DENIED** in all other respects.

Plaintiff is **ORDERED** to file an amended complaint that includes the correct title and citation of the **ADA** within **ten (10) days** of the filing of this Order.

IT IS SO ORDERED.

All Citations

Slip Copy, 2016 WL 2349112

Footnotes

1 Page citations for this document refer to the page number provided by CM/ECF.

2 The Court does not consider defendant's other arguments, which are related to the parties' attempts to negotiate a third externship placement after plaintiff's dismissal from the program. The Court previously struck the portions of defendant's brief related to the potential third externship given plaintiff's representation that she had abandoned any claim related to defendant's alleged failure to accommodate her in a third externship placement. (*See* Doc. 84 at 11).

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Only the Westlaw citation is currently available.
United States District Court,
W.D. Pennsylvania.

Sarah Heinzl, individually and on behalf of all others similarly situated, Plaintiff,
v.
Cracker Barrel Old Country Stores, Inc., Defendant.

Civil Action No. 14-1455
|
Signed 01/27/2016

ROBERT C. MITCHELL, United States Magistrate Judge

I. *Recommendation*

***1** It is respectfully recommended that the motion to certify class filed on behalf of the plaintiff (ECF No. 103) be granted, as defined herein. It is further recommended that the motion for summary judgment filed on behalf of the defendant (ECF No. 64) be denied.

II. *Report*

Plaintiff, Sarah Heinzl, brings this action individually and on behalf of all others similarly situated against Defendant, Cracker Barrel Old County Stores, Inc. ("Cracker Barrel"), alleging violations of **Title III** of the **Americans** With **Disabilities Act**, 42 U.S.C. §§ 12181 to 12189(**ADA**). Specifically, she alleges that the facilities at Cracker Barrel are not fully accessible to and independently usable by individuals who use wheelchairs for mobility, as she does, because of various barriers in the parking lot and along the route to the building entrance. Moreover, she contends that Cracker Barrel's company-wide **ADA** compliance policies and practices are woefully inadequate to ensure that Cracker Barrel meets its legal obligation to provide facilities accessible to persons, like her and the proposed class, who have mobility disabilities.

Presently before the Court are two motions. Plaintiff has filed a motion for class action certification. Defendant has filed a motion for summary judgment, in which it contends that Plaintiff's claims are moot because it has remediated the architectural barriers at the seven stores identified in the Complaint. The motions have been fully briefed and a hearing was held on the class certification motion. For the reasons that follow, Plaintiff's motion should be granted and Defendant's motion should be denied.

Facts

Plaintiff is a twenty-six year old native of Pittsburgh, Pennsylvania who has a mobility disability and is limited in the major life activity of walking. (Compl. ¶ 2; Heinzl Dep. 7:2–6, 11:14–19.)[1] Due to a neuro-immunologic disease, she has been in a wheelchair for the past eleven years and, as a result of her disability, is a member of a protected class under the **ADA**. (Compl. ¶ 15; Heinzl Dep. 13:22–14:7.) Despite her disease, Plaintiff actively participates in athletic activities, travels frequently, and regularly drives her automobile by herself. (Heinzl Dep. 14:23–15:6, 21:18–22, 23:3–9.) She has worked as an outside contractor for the Three Rivers Center for Independent Living, and is currently pursuing a graduate degree at the University of Arizona. (Heinzl Dep. 16:13–17:13, 49:14–18; Heinzl Dep. II 6:3–8.[2])

Plaintiff has visited Defendant's retail property located at 200 Davis Boulevard, Pittsburgh, Pennsylvania on numerous occasions. (Compl.¶ 18.) She estimates that she visits this location at least eight times per year, as this particular location is near a mall and other retail stores where she shops regularly. (Heinzl Dep. 23:10–14, 30:17–22.)[3] Moreover, she intends to

continue patronizing this location in the future. (Heinzl Dep. 23:19–22.) She has also visited other Cracker Barrel stores. (Heinzl Dep. 23:4–9.)

***2** During her visits to this location, Plaintiff experienced extreme difficulty in the purportedly accessible parking lot. As she described it at deposition: "I drive myself, and I am—find it very important to be independent. [ ] I went to the store with my mother. And with my vehicle, I put my wheelchair right next to me, so that I can get it out myself. I can do everything by myself. [ ] At this location, I did so. And when I put my wheels on my chair and got it out of the car, it rolled away. And my mom had to race after it through a parking lot." (Heinzl Dep. 25:1–14.) Plaintiff explained that her wheelchair rolled away because she "parked in a handicapped spot that was not level." (Heinzl Dep. 36:3–22.)[4] Consequently, due to the risk of her wheelchair rolling away, she no longer visits this store on her own. (Heinzl Dep. 28:3–8.) Instead, in subsequent visits to this location, she has had her mother or a friend accompany her.

Following this experience, Plaintiff testified that she "told [investigators at Carlson Lynch Sweet & Kilpela, LLP] about my problem with the store and asked them to investigate." (Heinzl Dep. 44:24–45:6.) Thereby, on her behalf, investigators examined over a hundred Cracker Barrel retail locations across seven states. (Compl. ¶ 19; ECF No. 102, Vols. II–V, App. 448–1308) (containing "**ADA** Report: Cracker Barrel, Pennsylvania, New York, West Virginia, Texas, Kentucky & Ohio locations" and "**ADA** Report: Cracker Barrel, Tennessee Locations").

Defendant's Remediations

Defendant points out that the architectural barriers that Plaintiff identified at the Pittsburgh, Pennsylvania store and at the other six stores mentioned in the Complaint have been remediated. (ECF No. 66 ¶¶ 6–12 & Expert Reports A.1 to A.7.) Plaintiff admits that these remediations have occurred. (ECF No. 101 ¶¶ 6–12.) However, she notes that this did not occur until after Defendant litigated and lost: 1) a motion to dismiss (ECF Nos. 10, 35); 2) two protective orders seeking to bar class discovery and limit discovery to the location Plaintiff visited (ECF Nos. 20, 30); 3) a motion to stay class discovery until after class certification (ECF No. 32); 4) Plaintiff's motion to compel (ECF No. 27); and 5) Plaintiff's motion for sanctions (ECF No. 41). In addition, and as explained below, Plaintiff asserts that she is challenging Defendant's **ADA** compliance policy, rather than individual architectural barriers at specific stores.

Defendant's Policies and Practices

Steven Dorsey, Defendant's Senior Director of Construction of Facility Services, admitted that the Company has no formal **ADA** policy, and does not have a formal process in place to monitor and evaluate **ADA** compliance at its locations after stores are opened. (Dorsey Dep. 14:6–9, 15:6–10, 26:22–27:1, 74:17–75:4.)[5] Instead, Mr. Dorsey explained, Defendant relies on two processes to monitor **ADA** compliance following construction: (1) Unit Assessments, which are biennial inspections of Defendant's locations for any and all issues relating to maintenance and physical appearance and; (2) customer complaints. (Dorsey Dep. 19:18–21:6, 107:21–108:7.) Plaintiff states that Defendant's Associate General Counsel, Elizabeth Wilson, corroborated that Defendant primarily uses these two processes to monitor **ADA** compliance. (Wilson Dep. 7:18–20, 17:23–18:13, 33:4–45:15, 60:6–62:19.)[6]

***3** Defendant denies these statements based upon Wilson's discussion of the "formal process regarding customer complaints" (Wilson Dep. 61:3–4). But Wilson admitted that the Unit Assessment process is formal while customer complaints are "episodic." (Wilson Dep. 62:1–7.) Defendant also cites Dorsey's testimony that he interprets an annual survey conducted on all 637 stores to constitute a formal process. (Dorsey Dep. 135:12–18.)

The first process—Unit Assessments—requires facility managers to complete a Unit Assessment Form on a biennial basis. (Dorsey Dep. 14:10–15:4, 48:13–51:3, 74:17–75:4.) By way of background, approximately ten facility managers are each assigned an approximately equal number of Defendant's 637 stores, and each is responsible for performing the Unit Assessment of those stores. (Wilson Dep. 17:21–18:13, 33:4–34:15, 123:21–124:5.) Defendant's facility managers have no formal training

in identifying **ADA** violations, aside from "quarterly meetings where they go over topics of interest," which may or may not include **ADA** issues (Wilson Dep. 124:18–24; Dorsey Dep. 32:10–12, 136:11–24), and are not provided the appropriate tools to measure the slopes of Defendant's parking facilities. (Dorsey Dep. 57:12–14, 74:17–75:4, 89:3–9.) Instead, facility managers evaluate **ADA** compliance through "obvious visibility issues...." (Dorsey Dep. 89:3.)

Dorsey did state that, at quarterly meetings, he asks the legal department to provide direction to facility managers that they need to know about the **ADA**. (Dorsey Dep. 57:8–11.) See also Wilson Dep. 124:21–24.

As recently as December 17, 2014 at least one facility manager was unsure how he was supposed to assess properties for **ADA** work. See Email Between Shane Brock and Dan Sherfy, ECF No. 102, Vol. I, App. 382.

Plaintiff states that Wilson did not even know when Defendant first required its facility managers to generally check for **ADA** compliance during the Unit Assessments. (Wilson Dep. 59:20–60:5.) Defendant responds that Wilson did testify that she knew that facility managers had been checking for **ADA** compliance for as long as she could remember, that she had worked for Cracker Barrel for 16 years and that no one could give a complete history of changes made to the Unit Assessment form. (Wilson Dep. at 27:8–28:24.)

Plaintiff notes that the Unit Assessment is not an **ADA** accessibility evaluation. Rather, it is a comprehensive maintenance survey that covers a wide range of issues and inspections, of which compliance with the **ADA** is but a small part. (Wilson Dep. 17:21–18:13, 32:4–20.) See also Dorsey Dep. 49:1–5 (The purpose behind the Unit Assessment Form is "[f]or the facility manager to do an assessment on the building grounds, roofs; determine what action might need to be needed in the following year.").

Plaintiff contends that the Unit Assessment Process is materially flawed in several important respects. For example, there is no uniform standard by which an **ADA** assessment is triggered. Rather, included on the Unit Assessment Form, which is several pages and encompasses more than 200 evaluations covering approximately 24 topics, is a single line that facility managers can "check if they felt there was an **ADA** issue" during their store inspection. (Wilson Dep. 17:21–18:13); see also ECF No. 102, Vol. I, App. 375–381 (sample Unit Assessment Form). This box simply indicates that an **ADA** Assessment is needed based on the facility manager's perception, but facility managers have no tools to use or formal training in identifying accessibility barriers. (Dorsey Dep. 32:10–12, 136:11–24.) Out of these 200 inspection items there is a single generic box titled "**ADA** Assessment needed" and a box beneath it entitled "Sidewalk from dining room to emergency exit **ADA** compliant." See Unit Assessment Form, App. 375.

***4** Mr. Dorsey testified that, beginning in September 2015, every facility manager, for the first time, was going to be given a laser level to assess the slope at each parking facility at Defendant's stores. (Dorsey Dep. 57:12–58:13.) However, when Plaintiff inquired in her Third Set of Interrogatories if Defendant has made any changes or modifications to its **ADA** policies or practices since the beginning of this litigation, Defendant responded:

> Defendant has considered but not put into practice any changes to its **ADA** policies and practices. In 2015, Defendant drafted a revised Unit Assessment Form in an attempt to provide Facility Managers with a more useful tool for evaluating stores under their supervision. However, the utility of the revised Form has not been substantiated and accordingly the form has not been put into use.

(ECF No. 102, Vol. I, App. 420–32, Answer No. 1.) When Ms. Wilson was asked about the use of laser levels, she explained that she "didn't consider that to be a final plan." (Wilson Dep. 16:18–17:7.) Therefore, facility managers are not using laser levels to assess slope at this time. Further, Defendant has no plans to make changes to its **ADA** policies and practices at any point in the future. (Wilson Dep. 14:19–15:3.) Defendant also indicated that it ultimately did not implement that program because it found that the facility managers who currently are charged with inspecting its stores and ensuring ongoing **ADA** accessibility were not providing consistent results. (Wilson Dep. 21:2–22:3.)

Defendant has procedures in place to construct and renovate its facilities so that they comply with the **ADA**: 1) Defendant hires professional architects and engineers to design **ADA** compliant specifications; and 2) Defendant hires professional contractors to construct and renovate stores based on the architectural and engineering designs. (For construction, see Dorsey Dep. 13:17–14:5, 19:11–17, 21:21–22:15; Wilson Dep. 26:25–27:7, 57:2–57:21; see for renovation, Dorsey Dep. 23:23–25:4, 32:6–9, 76:9–77:1; Wilson Dep. 53:22–55:14.)

However, Defendant rarely, if ever, formally measures the slope, or evaluates the overall **ADA** compliance, of its parking facilities post-construction. (Dorsey Dep. 44:18–45:23; Wilson Dep. 58:15–59:5.) Plaintiff notes that, even though Defendant claims that it evaluates **ADA** compliance post-construction when required by state law, it has only identified one state that requires such measurements (Dorsey Dep. 44:18–45:23), and that it has failed to produce any documents showing that it has ever measured the slopes of its parking facilities post-construction or that it has ever evaluated **ADA** compliance post-renovation.

Defendant contends that its stores and parking facilities are accessible and **ADA** compliant as a result of its construction and renovation procedures. See Defendant's Second Supplemental Answers to Plaintiff's First Set of Interrogatories, ECF No. 102, Vol. I, App. 391, 392–93, 394; Wilson Dep. 26:25–27:4, 76:14–77:23.

Ms. Wilson states that: 1) in 2012, after the 2010 **ADA** standards were promulgated and scheduled to go into effect, Cracker Barrel instituted a company-wide **ADA** Compliance Plan; 2) Cracker Barrel began voluntary remediation efforts before any litigation had been filed and its Compliance Plan resulted in the identification and removal of **ADA** barriers in hundreds of its restaurants; 3) utilizing the Compliance Plan, Cracker Barrel has identified and remediated barriers to the exteriors of 64 stores (not counting the 7 stores remediated in response to this lawsuit), even though it never received a single customer complaint about the slope and accessibility of its parking lots; 4) since 2012, Cracker Barrel has spent millions of dollars making the exteriors of its stores **ADA** compliant; 5) it has scheduled an additional 68 stores for exterior barrier remediation between now and the end of fiscal 2017; 6) parking lots in general have a life span of 10–20 years and it is impossible to know when a parking lot will need to be resurfaced and/or regraded; and 7) each of the seven properties listed in the Complaint was built prior to the promulgation of new **ADA** standards and was rendered non-compliant by external factors and/or the promulgation of new regulations. (Wilson Aff. ¶¶ 5–7, 9–13.)[7]

*Defendant's 97 Store Pre–**ADA** Compliance Initiative*

***5** Aside from Defendant's construction and renovation procedures and its maintenance practices, Defendant has employed an **ADA** program specifically targeting 97 stores built before 1993. (Dorsey Dep. at 64:4–66:25; Wilson Dep. 25:15–21; Cracker Barrel Pre–**ADA** 97 Store Initiative, App. 383–90.)

Defendant hires professional third-party **ADA** specialists to survey each of these 97 stores, and then completes renovation to the stores and their parking facilities based on the third-party assessments. (Dorsey Dep. 76:2–77:20; Wilson Dep. 48:11–55:14.)

Following the surveys done on the 97 pre-**ADA** stores and one-time remediation, these stores are subsequently monitored for ongoing accessibility via the Unit Assessment process and Defendant's other maintenance practices identified above. (Dorsey Dep. 33:14–34:5, 69:18–70:5.)

Plaintiff contends that, regardless of whether stores were built before or after the **ADA's** enactment, Defendant relies on the Unit Assessment Process to identity **ADA** issues across all of its locations on an ongoing basis. (Wilson Dep. 124:6–17.) If the facility manager checks the box on the Unit Assessment Form indicating that an **ADA** assessment is needed, Defendant then retains a third party consultant to conduct a survey. (Wilson Dep. 17:21–18:13.) Since about 2011, Defendant has relied on three outside consultants—Quality Project Management ("QPM"), Design and Engineering ("D & E"), and Robert Buck ("Buck")—to complete site surveys and drawings to address **ADA** issues. (Dorsey Dep. 39:11–40:3, 104:10–25, 115:4–116:4; Wilson Aff. ¶¶ 3–4.) Then, after the survey, Defendant follows a common process for remediating exterior **ADA** items. See

Pl.'s Br. (ECF No. 104) Ex. A (Process Flow for Exterior **ADA** Items). Yet, even following third party surveys and remediation work, stores are subsequently monitored via the inadequate Unit Assessment Process. (Dorsey Dep. 73:8–75:4.)

To coordinate these third party projects, in January 2014, Mr. Dorsey tasked Daniel Sherfy—Defendant's Construction Remodel Manager—to resolve all **ADA** issues. (Dorsey Dep. 70:3–71:16.) Mr. Dorsey explained that he wanted to put all **ADA** issues "on one person" in the interests of "consistency, ensur[ing] that we have good tracking and good negotiating of bids, combining work." (Dorsey Dep. 117:16–118:9; Wilson Dep. 55:17–56:14). See also ECF No. 104 Ex. B (email from Daniel Sherfy, dated August 11, 2014, stating that he will be "soliciting bids," "preparing contracts for the projects," and appearing "on site on the initial day of construction to kick-off the project").

Moreover, Plaintiff argues that Defendant has adopted the untenable position that structural modifications to its parking facilities are permanent. See Def.'s Br. Summ. J. (ECF No. 65) at 8–9. Specifically, Defendant contends that all of its stores comply with the **ADA** because they either were initially constructed, and/or subsequently renovated pursuant to **ADA** compliant designs. See Wilson Dep. 56:23–59:19, 76:20–80:21. See also ECF No. 102, Vol. I, App. 391–406 (Defendant's Second Supplemental Answers to Plaintiff's First Set of Interrogatories, Answers to Interrogatory Nos. 3, 6). Plaintiff argues that Defendant seems to overlook the changing nature of parking lots, in spite of both corporate designees' acknowledgment to the contrary. (Dorsey Dep. 14:10–25; Wilson Dep. 79:3–80:21.)

***6** Throughout discovery, Defendant has produced a selection of site surveys completed by QPM, D & E, and Mr. Buck. Plaintiff's investigators have also conducted site surveys across seven states and have found violations at 107 of Defendant's stores. Plaintiff argues that, if Defendant conducts Unit Assessments on all of its properties once every two years (see Dorsey Dep. 14:10–15:4, 74:17–75:4), Defendant's facility managers must have conducted at least one Unit Assessment, between 2011 and 2015, on each of the 107 stores surveyed by Plaintiff's investigators, but, during that four year span, only found 29 of the 107 stores in violation of the **ADA**.

Plaintiff contends that Defendant has failed to discover and appropriately remediate barriers to access at its stores. For example, Defendant's practices and procedures failed to identify the barriers encountered by Plaintiff at Defendant's 200 Davis Boulevard, Pittsburgh, Pennsylvania location. Defendant contends that the Davis Boulevard location was originally constructed in compliance with the **ADA**. (Wilson Dep. 110:6–16.) Yet, when Plaintiff visited this store, architectural barriers prevented her from independently accessing the store. (Heinzl Dep. 25:1–14, 26:13–16, 36:3–12; see also Compl. ¶¶ 18–19.) Despite taking the position that structural modifications to parking lots are permanent, Defendant has acknowledged that changes to parking lots can occur, due to, inter alia, "erosion or freeze/thaw or the earth moves [.]" (Dorsey Dep. 14:10–25; see also Wilson Dep. 79:3–80:21.) Therefore, Defendant's maintenance practices allowed the Davis Boulevard location to fall out of compliance at the time of Plaintiff s visit, and also allowed the store to remain inaccessible for all of her subsequent visits. (Wilson Dep. 110:6–113:9.) Despite conducting at least two or three Unit Assessments on this property, the Unit Assessment Process failed to identify the barriers. (Wilson Dep. 110:6–113:9.) Moreover, in addition to allowing barriers to occur and persist at its Davis Boulevard location, Defendant's Unit Assessment Process failed to detect and remediate the accessibility failures at the other stores identified in the Complaint as well. (Wilson Dep. 114:14–19.)

To demonstrate the ineffectiveness of Defendant's maintenance practices and its construction and renovation procedures, Plaintiff's Complaint identified seven of Defendant's properties (the "Subject Properties"), all of which discriminated against Plaintiff and other individuals with disabilities by way of existing architectural barriers in the parking facilities. (Compl. ¶ 19; see also **ADA** Report: Cracker Barrel, Pennsylvania, New York, West Virginia, Texas, Kentucky & Ohio Locations, Part 1, ECF No. 102, Vol. II, App. 453–72, 514–24.)

After Plaintiff's complaint was filed, Plaintiff's counsel, on her behalf, expanded the investigation to include more than 100 of Defendant's properties located throughout seven states. See ECF No. 102, Vols. II–V.

This investigation identified a total of 107 Cracker Barrel stores with **ADA** non-compliant parking facilities, which violated the **ADA** in numerous ways, including excessive slopes in purportedly accessible parking spaces, access aisles, curb ramps and walking surfaces, improper signage, lack of signage, and/or other **ADA** violations. *Id.* [8]

***7** Of the 107 stores identified by Plaintiff as inaccessible, Defendant has produced professional third-party **ADA** assessments showing that it identified 29 of those same stores as **ADA**-noncompliant. See All Documents Contained in Plaintiff's Appendix, Vol. 6.

Defendant responds that it had already remediated 15 of the stores which Plaintiff's investigators subsequently identified as having been non-compliant and therefore denies the accuracy of their methodology and findings. (ECF No. 109 Ex. 5.)

Defendant believes that these and other professional third-party **ADA** assessments are accurate. (Wilson Dep. 76:2–79:19, 80:25–86:1.) Additionally, there has never been a time when a professional third-party assessor identified **ADA** work related to a parking lot and Defendant did not act on it. (Wilson Dep. 88:23–90:5.)

Three of the 29 assessments were conducted after Plaintiff completed her corresponding survey. Compare Defendant's **ADA** Assessments (ECF No. 102, Vol. VI, App. 1402–07) with Declaration of Quinn Riordan, ¶¶ 4(aa)-(cc) (ECF No. 102, Vol. VII, App. 1436–38). The 26 remaining assessments of the 29 were conducted before Plaintiff completed her corresponding survey. Compare Defendant's **ADA** Assessments (ECF No. 102, Vol. VI, App. 1309–1401) with Riordan Decl. ¶¶ 4(a)-(z).

Plaintiff notes that, for some of these 26 stores, Defendant's previous assessment found certain features accessible, while Plaintiff's subsequent assessment found the same features inaccessible, meaning these properties have fallen out of compliance since Defendant's original assessment. For example:

a. On November 15, 2011, Buck assessed Defendant's 3454 Percy Priest Drive, Nashville, Tennessee property and found no sloping issues with the accessible parking spaces or access aisles. (ECF No. 102, Vol. VI, App. 1309–12.) Plaintiff surveyed the same property on May 18, 2015, and found excessive slopes in purportedly accessible parking spaces and access aisles. (ECF No. 102, Vol. IV, App. 806–14);

b. On July 19, 2013, QPM assessed Defendant's 1791 Lexington Road, Richmond, Kentucky property and found no sloping issues with access aisles and accessible parking spaces. (ECF No. 102, Vol. VI, App. 1383–84.) Plaintiff surveyed the same property on May 20, 2015, and found excessive slopes in the access aisles and purportedly accessible parking spaces. (ECF No. 102, Vol. IV, App. 730–36.)

Plaintiff further observes that, for other of these 26 stores, Defendant's previous assessment noted architectural barriers, which also were noted on Plaintiff's subsequent survey, suggesting that Defendant has either failed to complete remediation one, two, or even three years since discovering **ADA** violations, or that Defendant did complete remediation and the barriers have since recurred. For example:

a. On October 10, 2012, Buck assessed Defendant's 1021 Cosby Highway, Newport, Tennessee property and found excessive slopes in purportedly accessible parking spaces. (ECF No. 102, Vol. VI, App. 1365–70.) Plaintiff surveyed the same property on May 19, 2015, and found excessive slopes in purportedly accessible parking spaces. (ECF No. 102, Vol. IV, App. 956–59);

b. On July 8, 2013, QPM assessed Defendant's 6801 Shelby Oaks, Memphis, Tennessee property and found excessive slopes in all purportedly accessible parking spaces and access aisles. (ECF No. 102, Vol. VI, App.1373–74.) Plaintiff surveyed the same property on May 21, 2015, and found excessive slopes in purportedly accessible parking spaces and access aisles. (ECF No. 102, Vol. V, App. 1238–44.)

***8** Plaintiff notes that at the 9214 Park West Boulevard, Knoxville, Tennessee property, Mr. Buck found signage issues in November 2011, and Plaintiff found those same issues in 2015. *Compare* ECF No. 102 Vol. VI, App. 1333–36 with ECF No.

102, Vol. IV, App. 1010–16; see also Wilson Dep. 90:12–94:9. Plaintiff contends that, although Defendant claims installing signage is a "quick fix" (Wilson Dep. 44:8–45:21), this store either has been without signage for over three years, or had signage installed, but then had those signs taken down. Defendant responds that:

> Plaintiff has not established that the same violations in the same locations were noted by both sets of surveys. The Buck photographs indicate that a sign was not installed at the space just left of the Cracker Barrel sign, but the Carlson Lynch photographs show that a sign was installed in that space, indicating that Cracker Barrel had replaced missing signage in between the two inspections.

(ECF No. 107 ¶ 33.)

Plaintiff states that she has identified architectural barriers at stores that were included in Defendant's 97 store pre-**ADA** compliance initiative and that she has conclusively been able to determine had all **ADA** remediation work completed before Plaintiff conducted her corresponding and subsequent surveys, which found that barriers had either developed or recurred since remediation. For example:

a. On November 15, 2011 Buck assessed Defendant's 350 South Mount Juliet Road, Mount Juliet, Tennessee property. See ECF No. 102 Vol. VI, App. 1313–17. As of January 1, 2014 or March 17, 2014, all exterior **ADA** work was completed. (Vol.I, App.407, 408.) On May 15, 2015, however, Plaintiff surveyed the same property and found a narrow access aisle, lack of access aisles, and excessive slopes in a curb ramp, an access aisle, and purportedly accessible parking spaces. (Vol.IV, App.815–25.)

b. On November 16, 2011 Buck assessed Defendant's 23 Executive Drive Crossville, Tennessee property. (ECF No. 102 Vol. VI, App. 1325–1328.) As of July 2, 2013, all **ADA** work was completed. (Vol.I, App.409–10.) On May 18, 2015, however, Plaintiff surveyed the same property and found excessive slopes in an access aisle and purportedly accessible parking spaces. (Vol.IV, App.865–73.)

c. On November 16, 2011 Buck assessed Defendant's 5001 Central Avenue Pike, Knoxville, Tennessee property. (Vol.VI, App.1329–32.) As of As of January 1, 2014 or March 17, 2014, all **ADA** exterior work was completed. (Vol.I, App.407, 408.) On May 18, 2015, however, Plaintiff surveyed the same property and found excessive slopes in a curb ramp, access aisles, and purportedly accessible parking spaces. (Vol.IV, App.897–909.)

Defendant's Admissions and Denials

Plaintiff notes that Defendant admits that parking lots are receptive to change and that their structural elements are not permanent:

> Q: [Mr. Dorsey's] testimony was this is what happens, there is weather, there is, you know, the earth moves and stuff happens at locations and that is why—that's why you have these changes overtime after construction; is that fair?
>
> A: Yes – I remember him saying that at his deposition.
>
> Q: Do you have any reason to doubt that that is accurate?
>
> A: Well, there could be other reasons for changes but, yes.
>
> Q: Sure.
>
> A: Yes, parking lots change.

(Wilson Dep. 79:20–80:15.) Mr. Dorsey testified as follows:

Q: So, if there was a—if there was a gap in the scope of work prepared, then there would be a gap in the **ADA** compliance because that work wouldn't have been done?

A: Correct. The underlying issue is, [d]id weather then make changes to what work was done two years ago[.]

***9** (Dorsey Dep. 129:17–25.)

Additionally, Defendant contends that the 200 Davis Boulevard, Pittsburgh Pennsylvania location originally was constructed in compliance with the **ADA**. (Wilson Dep. 106:22–113:15.) Nevertheless, when Plaintiff originally visited this store, and for all subsequent visits, architectural barriers were present and impeded her ability to independently access the store. (Heinzl Dep. 25:1–14, 26:13–16, 36:3–12; see also Vol. II, App. 514–18.)

Further, Defendant specifically admitted that structural modifications at two of its stores were not permanent. Defendant's witnesses testified that its 3280 Towne Boulevard, Middletown, Ohio and 275 Brenton Way, Shepherdsville, Kentucky stores both were constructed and/or renovated so as to comply with the **ADA**. (See for Ohio location, Wilson Dep. 76:2–79:19; see for Kentucky location, Wilson Dep. 80:25–86:1.) Nevertheless, Defendant recognized that its own professional third-party assessor found **ADA** violations at the parking facilities of each store. Thus, Defendant admitted structural modifications to its parking facilities are not permanent. (Wilson Dep. 76:2–79:19, 80:25–86:1.)

Defendant was unaware of and failed to catch the violations at the Subject Properties and Defendant admits this:

A: And we had no customer complaints about the stores either so there would have been no reason to inspect them because, again, we didn't have knowledge of any issues.

...

Q: You also had no notice because the facility services manager during their routine inspection of facilities didn't indicate that an **ADA** inspection was necessary, correct?

A: Right but you also who knows when the problem arose it could have been off cycle.

...

Q: Similarly, that is because similar to the Robinson Towne Center location [the restaurant visited by Plaintiff] that is because there was not a need indicated by the facility services manager during the unit assessment process or because of a consumer complaints or some other event that such an evaluation was necessary; correct?

A: We had no knowledge at the time that something was needed to be remediated.

Q: At any of those other stores we just spoke about?

A: Right.

Q: That is because you had not received a customer Complaint about the parking lots; correct?

A: About the slopes or parking lots of paths of travel, that is correct.

Q: And the unit assessment process hadn't resulted in the facility services manager indicating that a third-party **ADA** inspection was necessary at that store; correct?

A: Correct.

(Wilson Dep. 112:15–18, 112:24–113:6, 115:20–116:17; see generally Wilson Dep. 106:22–119:1.)

The Subject Properties were remediated only as a result of this litigation and Defendant admits this:

Q: And when our—when the lawsuit was filed, a determination was made in Cracker Barrel to remediate the property?

A: Yes.

Q: On the basis of our Complaint?

A: Yes.

...

Q: And a similar determination I assume was made with regard to all of the other properties in the Complaint; correct?

A: That they needed to be remediated?

***10** Q: Yes.

A: Yes.

(Wilson Dep. 113:10–15; 114:14–19; see generally Wilson Dep. 106:22–119:1.)

Defendant contends that it would have discovered and remediated the barriers anyway as part of its ongoing voluntary **ADA** compliance plan or that remediation is unnecessary. See Wilson Aff. Ex. 5 (showing that Cracker Barrel had scheduled 13 stores for remediation which Plaintiff's investigators allege to be non-complaint as part of this lawsuit); Wilson Aff. ¶ 15 (noting that Cracker Barrel closed its Charleston and West Virginia stores after his lawsuit was filed, making remediation unnecessary).

Defendant admits that it intends to continue applying and implementing its current **ADA** compliance policies and practices identified above to all of its stores, including the Subject Properties. (See ECF No. 102, Vol. I, App. 420, 423–24; Wilson Dep. 14:4–15:3, 31:16–32:3; 118:21–119:1.)

Plaintiff states that Defendant introduced no evidence that it intends to, or is willing to maintain compliance at the Subject Properties. Defendant responds that its voluntary compliance program continues unabated and that it has produced evidence that it has spent and budgeted millions of dollars and scheduled remediations through fiscal year 2017. (Dorsey Dep. 80:19–25; Wilson Aff. ¶ 10; see also Wilson Aff. Ex. 5.)

Plaintiff states that Defendant introduced no evidence that it has an effective **ADA** maintenance policy or practices capable of maintaining compliance at the Subject Properties or any of the Defendant's stores. Defendant responds that Plaintiff has admitted that "Defendant has procedures in place to construct and renovate its facilities so that they comply with the **ADA**." (ECF No. 102 ¶ 18.)

Plaintiff states that Defendant introduced no evidence showing remediation was the result of a plan or policy that eventually would have caught the **ADA** violations or that such a plan or policy currently is in place and effective. Defendant denies this statement. See Wilson Aff. Ex. 5 (showing that Cracker Barrel had scheduled 13 stores for remediation which Plaintiff's investigators allege to be non-complaint as part of this lawsuit).

Defendant's witnesses testified that Cracker Barrel never received complaints about its parking lots. (Wilson Dep. 128:10–18.) However, at least two lawsuits have been filed in regards to sloping violations at Defendant's stores. (ECF No. 102, Vol. I, App. 411; see also Wilson Dep. 128:19–129:19.) Defendant responds that the cited testimony refers to customer complaints documented through Cracker Barrel's complaint process, not lawsuits. (Wilson Dep. 61:2–12.)

Plaintiff states that Defendant refuses to admit wrongdoing in this case:

a. Defendant refuses to admit that its **ADA** compliance policies are inadequate or recognize its systemic compliance failures. (Answer (ECF No. 40) ¶¶ 4, 11, 21);

b. Defendant refuses to admit that any of its properties, including the Subject Property, are or were noncompliant. (Answer ¶¶ 18–21, 34–35, 38–40; Def.'s Answers Pl.'s First Set Interrog., App. 433, 436–37; Def.'s Second Supp. Answers Pl.'s First Set Interrog., ECF No. 102, Vol. I, App. 391, 394, 395.)

***11** Defendant responds that it "does deny that its voluntary **ADA** Compliance Plan violates the **ADA**, but Defendant has admitted that the subject properties contained barriers to access that were in need of remediation, and the fact that it admits that it made those remediations constitutes such an admission as a matter of law." (ECF No. 107 ¶ 46.)

Procedural History

Plaintiff filed this action on October 27, 2014. Federal question jurisdiction is based on the **ADA** claim, 28 U.S.C. § 1331; 42 U.S.C. § 12188(a). She alleges that the cited violations constitute "a failure to remove architectural barriers" in violation of 42 U.S.C. § 12182(b)(2)(A)(iv) and a failure to alter, design or construct accessible facilities after the effective date of the **ADA** in violation of § 12183(a)(1) and the appropriate regulations, which will deter her and similarly situated individuals from returning to Defendant's facilities and that, without injunctive relief, she will be unable to fully access Defendant's facilities in violation of her rights under the **ADA**. (Compl.¶¶ 34–41.) She also brings this action on behalf of all others similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. (Compl.25–30.)

On December 1, 2014, Defendant filed a motion to dismiss on the ground of standing (ECF No. 10). On December 22, 2014, Plaintiff filed a brief in opposition (ECF No. 14). On April 24, 2015, the Court entered an order denying Defendant's motion to dismiss (ECF No. 35).

Following a period of discovery, Defendant filed a motion for summary judgment on the ground of mootness (ECF No. 64) on September 8, 2015. Plaintiff filed a response on December 15, 2015 (ECF No. 105) and Defendant filed a reply brief on January 4, 2016 (ECF No. 106). On December 15, 2015, Plaintiff also filed a motion to certify class (ECF No. 103). Defendant filed its response in opposition on January 4, 2016 (ECF No. 108) and Plaintiff filed a reply brief on January 6, 2016 (ECF No. 110). A hearing was held on the class certification motion on January 7, 2016.

Timing of Filings [9]

At a settlement conference held on January 7, 2016 prior to the hearing on the motion for class certification, Defendant's counsel, Attorney Laura Mall, was asked why she had filed her brief in opposition to the motion on January 4, 2016 when an Order of Court dated November 20, 2015 explicitly set the filing deadline as December 31, 2015 (ECF No. 99). [10] In response, Attorney Mall invoked the "3–day rule," Fed.R.Civ.P. 6(d), claiming that it permitted her to add three days to the date the brief was due pursuant to Rule 6(a). She was wrong: "The time-computation provisions of subdivision 6(a) apply only when a time period must be computed. They do not apply when a fixed time to act is set." *Miller v. City of Ithaca*, 2012 WL 1589249, at *1 (N.D.N.Y. May 4, 2012) (quoting Advisory Committee Notes to 2009 Amendments to subdivision (a) of Rule 6). *See also Meeks v. Powers*, 2010 WL 4286319, at *2 (D.S.C. Oct. 18, 2010) ("Defendants essentially take the position that Rule 6(a)(1)(C) trumps the plain language of the Magistrate Judge's Order ... set[ting] the deadline.... The Magistrate Judge's order, however, did not require that Defendants compute a time period. It clearly stated that Defendants' papers were due on a date certain.") Because the order of Court set a deadline of December 31, 2015, no computations of time were necessary and the brief was due on that date.

***12** Attorney Mall also argued that her brief did not have to be filed on December 31, 2015 because Chief Judge Conti had issued a notice that the Court would be "closed" on that day. This argument is also erroneous. [11] Attorney Mall cannot argue that

December 31 was a "legal holiday" as that phrase is defined in Rule 6(a)(6) for purposes of calculating a date under Rule 6(a)(1)(C) because it is not listed as a day set aside by statute, Rule 6(a)(6)(A), and she has not argued, much less demonstrated, that it was appointed a holiday by the President or Congress, Rule 6(a)(6)(B), or by the Governor or Legislature of the Commonwealth of Pennsylvania, Rule 6(a)(6)(C). As for the argument that the closing of the Clerk's Office by the Chief Judge is equivalent to a legal holiday under Rule 6(a):

> the plain language of the Rule precludes such a reading. The Rule, on its face, refers to a "legal holiday" as a day appointed by the President, Congress, or the relevant state. It does not grant this power to the federal judiciary.

García–Velázquez v. Frito Lay Snacks Caribbean,358 F.3d 6, 9 (1st Cir. 2004) (explicitly rejecting the contention that New Year's Eve is a "legal holiday").

Nor could Attorney Mall contend that the Clerk's Office was "inaccessible" on December 31, 2015 under Rule 6(a)(3) because, pursuant to the electronic filing features of ECF, the Clerk's Office is always open for the reception of electronic filings, including on weekends and holidays. *In re Buckskin Realty, Inc.*, 2015 WL 94536, at *11 (Bankr.E.D.N.Y. Jan. 6, 2015). *See also Miller*, 2012 WL 1589249, at *3 ("the Clerk's office is accessible when electronic filing is available. With electronic filing, the Clerk's office was accessible for purposes of filing papers and Defendants could have filed their motion in a timely manner."); *Westfield Ins. Co. v. Interline Brands, Inc.*, 2013 WL 1288194, at *5 (D.N.J. Mar. 25, 2013) ("Due to the electronic filing capabilities of the court, the Watts Defendants were able to file their Notice of Removal on October 31, 2012, on the electronic filing system (CM/ECF) despite the fact that the Clerk's Office was physically inaccessible on that date [because of Hurricane Sandy].")

Moreover, if the Clerk's Office is deemed to have been "inaccessible" on December 31, 2015, the Court would have to conclude that it would similarly have been "inaccessible" on Monday, January 4, 2016 at 7:07 p.m., when Attorney Mall finally filed the response brief, because the Clerk's Office closes at 4:30 p.m. (See NEF to ECF No. 108.) In summary, no provision of Rule 6 allowed for a brief due on December 31, 2015 to be filed after that date.

Finally, it must be noted that this is the second time this kind of issue has arisen in this case. On December 1, 2014, Defendant filed a motion to dismiss (ECF No. 10) and a briefing order set Plaintiff's response date as December 22, 2014 (ECF No. 12). Plaintiff filed her response on that date as ordered (ECF No. 14) and the briefing order did not contemplate a reply brief. On January 5, 2015, a Report and Recommendation was filed (ECF No. 15), recommending that the motion be denied. Attorney Mall called Chambers immediately thereafter to complain that the R & R was "premature" and to request that the undersigned "vacate" the R & R. Her argument was based upon the following calculations: 1) her reply brief would have been due on December 29, 2014 (7 days after the brief in opposition was filed), but; 2) invoking Rule 6(d), she added three days to the due date and arrived at New Year's Day, a "legal holiday" under Rule 6(a)(6)(A), thereby giving her another day, but; 3) Chief Judge Conti had announced that the Court would be closed on Friday, January 2, 2015 and therefore she did not have to file her brief on that day, or the Saturday or Sunday which followed, and thus; 4) her brief was actually due on January 5, 2015. As the analysis above explains, even assuming that her first two arguments passed muster, [12] the third one absolutely did not and therefore her brief would have been due no later than January 2, 2015. Attorney Mall made no effort to contact the Court to confirm that her calculations were correct or to request an extension of time.

***13** Attorney Mall was notified that the R & R would not be vacated. Rather, she was asked to include the substantive arguments she had intended to make in her reply brief with the objections she would file to the R & R. On January 20, 2015, Attorney Mall filed her objections to the R & R and included a footnote again arguing that "the Magistrate Judge issued his R & R before Defendant's filing deadline to file its Reply Brief." (ECF No. 16 at 1 n.1.) In the order denying Defendant's motion to dismiss, Judge Hornak indicated that the "Court does not find [this and other footnotes made in the objections] apt to the matters now before the Court." (ECF No. 35 at 2 n.1.) Judge Hornak further observed that Attorney Mall had filed a reply brief to the objections (a filing not contemplated by the Federal Rules of Civil Procedure, the Local Rules of this Court or any judge's practices and procedures) without seeking leave of the magistrate judge. *Id.*

Given this history, it is (to say the least) surprising that Attorney Mall did not contact the Court to explain the calculations that led her to conclude that her response was due until January 4, 2016. Nor did she request an extension of time in which to file the response, even when she telephoned Chambers on December 30, 2015 to confirm that she could file a 30–page brief in response to Plaintiff's brief of the same length.

Nevertheless, the Court should accept the untimely filed response brief and consider the arguments made therein, for two reasons. First, it is noted that Attorney Mall incorporated the arguments by reference and reiterated them at the hearing on January 7, 2016. Second, there is a "preference expressed in the Federal Rules of Civil Procedure in general ... for resolving disputes on their merits." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550 (2010). The same is true of Plaintiff s reply brief.

Motion for Class Certification

Plaintiff argues that: 1) courts routinely certify classes for injunctive relief under the **ADA** where removal of an architectural barrier or modification of a policy will affect the entire class; 2) the requirement of numerosity is met because thousands of people with mobile disabilities patronize Defendant's stores, as shown by census data and admitted by Defendant's witnesses; 3) the requirement of commonality is met where a common policy affects the entire class; 4) the requirement of typicality is met because her claims are representative of the class; 5) the requirement of adequacy is met because the law firm of Carlson, Lynch, Sweet and Kilpela has extensive experience in handling **ADA** **Title** **III** cases; and 5) a single injunction would provide relief to the entire class.

Defendant argues that: 1) the **ADA** does not authorize the kind of relief that Plaintiff seeks, only an injunction to remove architectural barriers, not to "modify" an **ADA** compliance policy already in place and she relies on Title II cases (involving public entities), which are different from **Title** **III** cases; 2) Plaintiff lacks standing to pursue policy-related relief because she has not suffered injury in fact, the seven stores identified in the Complaint have been remediated and thus she cannot point to a "real and immediate threat" of future injury and any potential future injuries will not be traceable to Defendant but to weather and other factors outside its control; 3) injunctions ordering parties to "comply with the law" are overbroad; 4) she cannot satisfy numerosity based on pure speculation; 5) she cannot satisfy commonality because **Title** **III** does not require compliance plans; 6) she cannot satisfy typicality because her proposed remedy (improving the Unit Assessment form) will not alter the result and she is subject to unique defenses (such as being a "paid tester"); and 7) she cannot satisfy adequacy because of the unique defenses and because she has moved to Arizona, which has made her participation in the case more difficult.

***14** In a reply brief, Plaintiff responds that: 1) modification of a policy is expressly provided for in the statute and regulations; and 2) the elements for class certification are met, as she explained in her principal brief.

*Scope of **ADA** Relief*

Title **III** of the **ADA** "prohibits discrimination against the disabled in the full and equal enjoyment of **public** **accommodations**." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128 (2005). Specifically, it requires "places of **public** **accommodation**" to "remove architectural barriers ... in existing facilities ... where such removal is readily achievable," 42 U.S.C. § 12182(b)(2)(A)(iv), and to "design and construct facilities for first occupancy [no] later than 30 months after July 26, 1990 that are readily accessible to and usable by individuals with disabilities," § 12183(a). Places of **public** **accommodation** include "a restaurant, bar, or other establishment serving food or drink," § 12181(7)(B), and thus include Cracker Barrel. Failure to meet these requirements constitutes a violation of the **ADA** which may be enforced by individuals bringing suit for injunctive relief in federal court, § 12188(a). The statute further states that "injunctive relief shall also include ... modification of a policy...." *Id.*

"Under **Title** **III** of the **ADA**, private plaintiffs may not obtain monetary damages and therefore only prospective injunctive relief is available." *Anderson v. Macy's, Inc.*, 943 F.Supp.2d 531, 538 (W.D.Pa.2013) (citation omitted). *See* 42 U.S.C. § 12188(a) (providing that the remedies available to individuals shall be those set forth in 42 U.S.C. § 2000a–3(a), which allows a private right of action only for injunctive relief for violations of Title II of the Civil Rights Act of 1964); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (noting that Title II allows for injunctive relief only).

Defendant argues that the provision regarding modification of a policy has been applied only to a situation in which a place of **public accommodation** enforces a "policy" that discriminates against individuals with disabilities. It cites cases requiring modification of a policy when: an arts center prohibited service dogs, *Lentini v. California Center for the Arts,* 370 F.3d 837, 843–46 (9th Cir. 2004); a movie theater allowed non-disabled patrons to sit in seats designated for disabled patrons and their companions, *Fortyune v. American Multi–Cinema, Inc.,* 364 F.3d 1075, 1087 (9th Cir. 2004); and a store refused to reconsider its policy of not selling alcohol to people who were intoxicated when a customer explained that he suffered from brain damage that gave the appearance that he was intoxicated when he was not, *Dudley v. Hannaford Bros. Co.,* 333 F.3d 299 (1st Cir. 2003).

Although these cases involved policies of the kind Defendant describes, they did not hold that other kinds of policies cannot violate the **ADA**. For this proposition, Defendant cites *Gaylor v. Greenbriar of Dahlonega Shopping Center, Inc.,* 975 F.Supp.2d 1374 (N.D.Ga.2013). In that case, a customer who suffered from MS brought suit against a shopping center with architectural barriers. The court held that the barriers violated the **ADA**, but with respect to the plaintiff's claims about a discriminatory policy, the court stated as follows:

> ***15** Plaintiff contends that [he] is also entitled to summary judgment on [his] claim that Defendant has a discriminatory policy toward the disabled. The only allegation in the complaint relating to this claim states: "Defendant either does not have a policy to assist people with disabilities or refuses to enforce such a policy if it exists." In [his] motion for summary judgment, Plaintiff relies on the following undisputed facts in support of this claim: (1) Defendant has no official policy regarding how disabled patrons are treated; (2) Defendant has an unofficial policy of helping people who need it; (3) Defendant has not written down this unofficial policy or communicated it to the tenants of the property; (4) Defendant does not provide any training to its tenants or employees regarding the accommodation of disabled persons; (5) Defendant has placed no individual in charge of making sure its property complies with the **ADA**; and (6) Defendant presumed that an inspection by the City in 1981—more than a decade before the **ADA** became law—ensured compliance with the **ADA**.
>
> The Court concludes that these facts do not establish a violation of the **ADA**, and that Defendant, rather than Plaintiff, is therefore entitled to summary judgment on this claim. Plaintiff's reliance on broad statements by Congress and the courts regarding the nature of discrimination against the disabled and the goals of the **ADA** is misplaced. None of these statements indicates that it is violation of the **ADA** for the owner of a **public accommodation** not to have an official policy regarding the treatment of disabled persons, or to have an unofficial policy of helping people who need it, regardless of whether the policy is written down or communicated to anyone. Nor does Plaintiff cite any provision of the **ADA** requiring an owner to put someone in charge of **ADA** compliance, or any authority that an owner's mistaken assumption that it is in compliance with the **ADA** is itself a violation of the law.
>
> Finally, with regard to Defendant's failure to provide any training to its tenants or employees regarding the accommodation of disabled persons, Plaintiff cites no provision of the **ADA** requiring a defendant in a case involving architectural barriers to provide any such training. Plaintiff relies on the Second Circuit's decision in *Camarillo v. Carrols Corp.,* 518 F.3d 153 (2d Cir. 2008). That case, however, did not involve architectural barriers but an owner's alleged failure to take steps necessary to ensure against discrimination because of the absence of auxiliary aids and services. See 42 U.S.C. § 12182(b)(2)(A)(iii). The court held that an owner's failure to effectively train employees how to deal with disabled individuals could violate that provision of the **ADA**. *Camarillo,* 518 F.3d at 157 (alleged failure by owners of fast food restaurants, which did not provide large print menus, to train employees how to deal with legally blind plaintiff could violate requirement to ensure that disabled individuals not treated differently from others due to absence of auxiliary aids or services).
>
> Plaintiff in this case has not alleged a violation of **Title III's** provision regarding auxiliary aids and services. Instead, he alleges only the existence of architectural barriers. Plaintiff cites no provision of the law regarding architectural barriers that imposes a duty on an owner to train others in how to deal with disabled individuals. Instead, the provisions on which Plaintiff relies require an owner either to remove architectural barriers from existing facilities, or to make new construction and alterations readily accessible to and usable by disabled individuals, and nothing more. See 42 U.S.C. §§ 12182(b)(2)(A)(iv) & 12183(a). Therefore, Plaintiff's claim based on an alleged discriminatory policy must fail.

*Id.*at 1394–95 (footnote and record citations omitted).

Defendant also contends that Plaintiff is relying on cases arising under **ADA** Title II (regarding public entities), which has heightened compliance obligations, rather than **Title III**, which concerns **public accommodations**. See 28 C.F.R. § 35.105 (requiring public entities to evaluate their current services, policies and practices and make necessary modifications thereto); § 35.150(d) (requiring public entities that employ more than 50 persons to develop a transition plan setting forth the steps necessary to complete such changes). Defendant argues that Plaintiff relies on *Californians for Disability Rights, Inc. v. California Department of Transportation,* 249 F.R.D. 334, 341 (N.D.Cal.2008) ("Caltrans"), in which the court indicated that it could craft injunctive relief under these regulations to require the California Department of Transportation to set milestones and benchmarks for fixing barriers to access. However, Plaintiff cites the *Caltrans* case for its discussion of the Rule 23 factors, not the issue of whether injunctive relief is available under these circumstances. Moreover, the court in *Caltrans* actually held that there is no private right of action to enforce either the self-regulation or transition plan regulations under Title II. *Id.* at 341–42. Thus, to the extent that Title II and **Title III** have different regulations, the distinction is without a difference from the perspective of a private plaintiff bringing a suit for enforcement of a violation.

***16** Plaintiff responds that the plaintiff in *Gaylor* provided scant evidence of failure to maintain accessible features and that the court failed to consider provisions of the **ADA** and its implementing regulations that would encompass a situation such as this one. Unlike the plaintiff in *Gaylor,* Plaintiff herein does not rely on broad statements by Congress and the courts regarding the nature of discrimination and the goals of the **ADA**, Plaintiff does not contend that Defendant violated the **ADA** merely because it mistakenly thought it was in compliance with the law, and Plaintiff does not cite a lack of training regarding the accommodation of disabled persons as an **ADA** violation (rather, she contends that the facilities managers lack training in **ADA** compliance in order to demonstrate that Defendant's **ADA** compliance policy is ineffective). Thus, *Gaylor* (which is not binding on this Court in any event) is distinguishable.

In addition to § 12188(a)(2), which as noted above, expressly provides for "modification of a policy" as a form of relief, Plaintiff also cites 28 C.F.R. §§ 36.211 and 36.501. The first regulation requires **public accommodations** to "maintain in operable working order those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act." The second provision states that:

> In the case of violations of §§ 36.304, 36.308, 36.310(b), 36.401, 36.402, 36.403, and 36.405 of this part, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by the Act or this part. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part.

28 C.F.R. § 36.501(b). Plaintiff notes that § 36.211 is not included in the first sentence, which limits the injunctive available for violations that are predicated solely on structural barriers. She contends that, when a **public accommodation** violates other sections of the **ADA**, relief is not so limited, but as the second sentence indicates, it shall also include "modification of a policy."

Plaintiff also cites cases which, she notes, implicitly recognize the relief she seeks here. See *Sawczyn v. BMO Harris Bank Nat. Ass'n,* 8 F.Supp.3d 1108, 1115 (D.Minn.2014) (denying a voluntary cessation defense, in part, on the basis that the defendant could not show that it would maintain compliance, thereby implicitly holding that an injunction against the defendant's maintenance policy or practice is proper under the **ADA**); *Thomas v. Branch Banking and Trust Co.,* 32 F.Supp.3d 1266, 1271 (N.D.Ga.2014) (recognizing that a defendant's failure to maintain accessibility would preclude application of the voluntary cessation defense and thus, implying that injunctive relief against the defendant's maintenance policy or practice is available under the **ADA**); *National Alliance for Accessability, Inc. v. McDonald's Corp.,* 2013 WL 6408650, at *7 (MD.Fla. Dec. 6, 2013) (rejecting Defendant's argument that no relief was available because structural features had been remediated and stating, "[w]hile some aspects of this case may have become moot, the Court finds that, at a minimum, the scope of an injunction directed to maintenance and future compliance remains at issue"); *Moeller v. Taco Bell Corp.,* 816 F.Supp.2d 831, 861–62,

869 (N.D.Cal.2011) (rejecting a voluntary cessation defense, even where the defendant had **ADA** maintenance policies and remediated inaccessible parking lots, because the defendant failed to follow its own policies and could rescind them at any time, ultimately finding "that plaintiffs have established that classwide injunctive relief is warranted, with regard to maintaining compliance, both as to Taco Bell 4518, and as to all corporate Taco Bell restaurants in California."). [13]

***17** As Plaintiff admits, these cases imply, but do not actually hold, that modification of a policy can apply to a case such as this one, because they were discussing other issues such as mootness and standing (which are discussed below). Nevertheless, Defendant (who has raised this argument) has failed to demonstrate that the relief Plaintiff seeks is not available under the **ADA**. **Title III** explicitly provides that injunctive relief includes "modification of a policy" and Defendant has not demonstrated that the word "policy" is limited to practices such as, for example, those prohibiting service animals. In addition, the regulations which Plaintiff cites contemplate an ongoing process of effective **ADA** compliance, which Plaintiff has challenged in this case. And the cases she cites acknowledge that **Title III** entities are under an ongoing duty to review their places of **public accommodation** for compliance and to remediate them accordingly. Therefore, this argument should be rejected.

Standing

The Supreme Court has held that:

> In every federal case, the party bringing the suit must establish standing to prosecute the action. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The standing requirement is bom partly of " 'an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.' " *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178–1179 (C.A.D.C.1982) (Bork, J., concurring)).

Elk Grove Unified Sch. Dist. v. Newdow,542 U.S. 1, 11 (2004). The Court has explained that:

> In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), we held that, to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envt'l Servs (TOC), Inc.,528 U.S. 167, 180–81 (2000).

Defendant argues that Plaintiff no longer has standing because she does not live near the store at which she encountered an architectural barrier, given that she is attending graduate school in Arizona. However, it cites no authority in support of the premise that an individual who moves away temporarily to attend graduate school cannot have a concrete and specific intent to return to a location. In addition, "Article III standing is determined as of the time a complaint is filed. Standing does not have to be maintained throughout all stages of the litigation." *McDonald's*, 2013 WL 6408650, at *7. *See Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1157 (2013) ("we assess standing as of the time a suit is filed").

As this Court held when Defendant filed a motion to dismiss based on standing, Plaintiff patronizes the Pittsburgh, Pennsylvania store and encountered an architectural barrier there, she has expressed an intent to return to it (and other Cracker Barrel locations) and she satisfies the deterrent effect test as well. She also testified at her deposition that she intends to continue patronizing this store in the future. (Heinzl Dep. 23: 19–22.) Moreover, as explained herein, because Plaintiff is challenging Defendant's **ADA** nationwide compliance policy (rather than a barrier at a specific location), whether she is living in Arizona or Pennsylvania is irrelevant. Defendant's contentions that Plaintiff will not be "injured" by its allegedly ineffective **ADA** compliance policy and that any future violations will be traceable to the weather and not Cracker Barrel are not supported by logic or the language

of the **ADA**. Defendant cites no authority to support the argument that, if its **ADA** compliance policy is ineffective and results in an unidentified architectural barrier in a Cracker Barrel parking lot ("caused" by weather or other external factor), it can continually avoid responsibility for these lapses. Plaintiff also points to lack of signage and van accessible parking, which cannot be blamed on external sources.

***18** Under Defendant's construction of the **ADA**, it could even have an express policy of ignoring architectural barriers at its stores, then (only when it is sued over such barriers and it has contested the suit for some time), remediate the barrier and put an end to the matter. As Plaintiff observes, the **ADA** was not intended to work in this fashion: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges or accommodations of any place of **public accommodation**." 42 U.S.C. § 12182(a).

In addition, when a plaintiff has presented a class action complaint, the issue of standing is limited to the plaintiff's individual standing, not whether the plaintiff can challenge policies as they relate to a multitude of locations. Rather, that is an issue of class certification. As the Tenth Circuit has observed:

> Abercrombie insists that our standing analysis does not end at the Park Meadows Mall. It argues that Ms. Farrar lacks standing to bring a claim for nationwide injunctive relief because she does not intend to visit every Hollister store with a porch—over 230 stores nationwide. We have no doubt that if Ms. Farrar were seeking a nationwide injunction in her own right, then she would lack standing to challenge accessibility barriers at stores she never intends to visit. Although the concepts of standing and adequacy of status to maintain a class action appear related, they are independent criteria and must be evaluated separately. *See Hassine v. Jeffes,* 846 F.2d 169, 175–76 (3d Cir. 1988). The question whether an injunction may properly extend to Hollister stores nationwide is answered by asking whether Ms. Farrar may serve as a representative of a class that seeks such relief. All that is necessary to answer this question is an application of Rule 23.

Colorado Cross–Disability Coalition v. Abercrombie & Fitch Co.,765 F.3d 1205, 1212–13 (10th Cir. 2014) *(CCDC)* (footnote and some citations omitted). *See also Garner v. VIST Bank,* 2013 WL 6731903, at *9 (E.D.Pa. Dec. 20, 2013) (plaintiff satisfied standing requirements with respect to the ATM he used and the challenges to the remaining ATMs represented an issue of class certification, not standing).

Defendant argues that an injunction ordering it to "comply with the law" is overbroad. *Belitskus v. Pizzingrilli,* 343 F.3d 632, 650 (3d Cir. 2003). Defendant cites a case in which Judge Eddy cited this proposition in denying a motion for class certification. She stated that:

> The injunction Plaintiff seeks is little more than "obey the law"—remediate parking lots that may have fallen out of compliance to comply with the **ADA** maximum sloping requirements. As Bob Evans notes, the differences and unique designs of each lot, and lack of commonality, makes it impossible to craft one injunction that remedies all injuries to the class in one stroke. Bob Evans' conduct is not such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them, nor can it answer the common question in one stroke.

Mielo v. Bob Evans Farms, Inc.,2015 WL 1299815, at *12 (W.D.Pa. Mar. 23, 2015).

In this case, however, Plaintiff is not seeking an injunction that merely seeks to have Defendant obey the law or to merely "remediate parking lots that have fallen out of compliance." Rather, she requests that Defendant be compelled to put in place an **ADA** compliance policy that will effectively take note of **ADA** violations on an ongoing basis so that they can be remedied and Defendant's stores remain compliant. For these reasons, Defendant's argument should be rejected and the Court can turn to an evaluation of the Rule 23 factors.

Rule 23 Requirements

***19** "To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). These factors are usually referred to as "numerosity," "commonality," "typicality" and "adequacy."

Numerosity

Plaintiff contends that numerosity "is generally satisfied where the class claims involve more than forty plaintiffs. Nevertheless, it is not required that the lead plaintiff demonstrate the precise number of class members when a reasonable estimate can be inferred from the record." *In re Rent–Way Sec. Litig.*, 218 F.R.D. 101, 112 (W.D.Pa.2003) (citing *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001)). Plaintiff contends that courts frequently use census data and common sense to determine that numerosity has been satisfied. *See Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 508 (N.D.Cal.2011) (using U.S. Census data to infer that thousands of persons with mobility and/or vision disabilities visit defendant's park each year); *Caltrans*, 249 F.R.D at 347 (employing U.S. Census Data to find that numerosity was satisfied); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 608 (N.D.Cal.2004) (same); *Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd.*, 197 F.R.D. 522, 525 (S.D.Fla.2000) (same); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D.Cal.1994) (inferring from U.S. Census data that the number of wheelchair users and semi-ambulatory persons affected by alleged access barriers at theaters is in the thousands).

She points out that both of Defendant's witnesses agreed that it was reasonable to assume that thousands of people with mobility disability disorders visit Cracker Barrel's more than 600 stores each year. (Dorsey Dep. 130:14–131:6; Wilson Dep. 127:20–128:18.) Defendant argues that Dorsey was responding to a question about "disabilities" in general, not limited to mobility disabilities and that Wilson said "We don't keep track of our customer base in that way, but I assume that yes, a large number of our guests have varying degrees of issues." (Wilson Dep. at 127:5–17.) However, when Wilson was asked whether it was reasonable to assume that thousands of people with mobility disabilities utilize accessible parking spaces at Cracker Barrel restaurants each year, she said "yes."

Commonality

With respect to commonality, Plaintiff argues that she has identified a uniform policy or practice that affects all class members, which "bridges the gap" between individual claims of harm and the existence of a class of persons who have suffered the same injury. *Thorpe v. District of Columbia*, 303 F.R.D. 120, 145–46 (D.D.C.2014). Plaintiff argues that she and the proposed class have been denied full and equal access to Defendant's stores because of Defendant's deficient **ADA** compliance policy, which permits its parking facilities to fall out of compliance with the **ADA** without detection. All of Defendant's stores are purportedly assessed for potential **ADA** violations during what Defendant calls the "Unit Assessment Process," which is a biennial site inspection conducted at each of its locations. Based on this inspection, if a facility manager determines that an **ADA** assessment is needed—a determination made, apparently, according to no cognizable standard whatsoever – all subsequent surveys and remediation projects are coordinated by one employee, Mr. Sherfy. (Dorsey Dep. 50:18–51:3; 70:6–10.) Plaintiff argues that this centralized process consistently fails to identify **ADA** violations for multiple reasons.

***20** First, Plaintiff notes that the employees who conduct these inspections have neither received the proper tools nor the proper training to identify **ADA** issues. (Dorsey Dep. 32:10–13.) Having no training upon which to rely, facility managers instead look for "obvious visibility issues, cracks, separations." (Dorsey Dep. 84:7–85:4; 88:21–24; 89:3–9.) Facility managers do not take "specific measurements." (Dorsey Dep. 85:5–9; 89:6–9.) Thus, if there is a slope violation, facility managers must identify it with the naked eye. (Dorsey Dep. 89:3–19.)

In addition, Plaintiff argues that extensive surveys completed by both her investigators and Defendant's consultants show that Unit Assessment Process commonly fails to detect **ADA** violations. For example, facility managers had used the Unit Assessment Process to inspect, on at least two or three prior occasions, the subject property at 200 Davis Boulevard that was visited by Plaintiff. (Wilson Dep. 101:22–107:24.) None of those inspections triggered any action by Defendant, however, because Defendant's untrained employee did not note any **ADA** violations. After this lawsuit was filed, however, Defendant's third-party survey confirmed Plaintiff's assertions. Likewise, Defendant had not retained a third party consultant to survey five of the six other stores named in the Complaint prior to this lawsuit because it "had no knowledge at the time that something needed to be remediated." (Wilson Dep. 107:3–109:8; 115:20–116:24.) Ms. Wilson testified that, for all the locations in the complaint where Plaintiff alleged slope violations in either access aisles or accessible parking spaces, Defendant's own pre-remediation reports confirmed these violations and Defendant subsequently conducted remediation accordingly. (Wilson Dep. 118:1–12.)

Plaintiff also argues that, even when Defendant's employees determine that a comprehensive **ADA** inspection of a particular location is necessary, that process fails to remediate the violations found; sometimes including even the most obvious and basic violations. For instance, at Defendant's Knoxville, Tennessee location, a pre-**ADA** store, a Defendant-ordered **ADA** site survey on November 16, 2011 found, inter alia, no "van accessible signage" and no signage signifying spaces are accessible. (ECF No. 102 Vol. VI, App. 1333–36 (Buck survey of 9214 Park West Boulevard, Knoxville, Tennessee); Wilson Dep. 90:12–22.) More than three years later, on May 19, 2015, Plaintiff's investigators surveyed the same location and found that Defendant had failed to install the required signs. (Vol.IV, App.1010–1016.) Even though Defendant's corporate designee testified that installing a sign in a parking lot is "a quick fix" and should be addressed promptly, it has taken Defendant nearly four years to simply install a sign. Wilson Dep. 44:8–45:21; 90:12–94:9. Thus, even when the Unit Assessment Process identifies **ADA** violations, Defendant fails to employ a reliable procedure to ensure that those violations are promptly remedied. Defendant responds that Plaintiff is pointing to two different spots in the parking lot and that it did install a sign where one was first noticed as missing.

Plaintiff argues that courts have routinely certified classes where similarly deficient common policies have denied classes of individuals their most basic civil rights under the **ADA**. *See, e.g.*, *Thorpe*, 303 F.R.D. at 146 (finding commonality satisfied where plaintiffs contend Defendant failed to implement an effective system for class members); *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D.Or.2012) (finding commonality satisfied where "lawsuit challenges a system-wide practice or policy that affects all members of a putative class."); *Gray*, 279 F.R.D. at 516 ("finding common question of whether defendant has taken reasonable steps to comply with the Rehabilitation Act remedy access barriers"); *Caltrans*, 249 F.R.D. at 346 (certifying a class of individuals with disabilities challenging access barriers across the state of California because "[t]he question of [the defendant's] system-wide discriminatory practices [was] an issue common to all plaintiffs"); *Lucas v. Kmart Corp.*, 2005 WL 1648182, at *1 (D.Colo. July 13, 2005) (certifying class of individuals with disabilities challenging access barriers across 1,500 locations because the defendant had "centralized policies and practices that created architectural and related barriers and impeded the ability of wheelchair-bound shoppers from using or enjoying access to Kmart"); *Moeller*, 220 F.R.D. at 608–14 (N.D.Cal.2004) (certifying class of individuals with disabilities challenging barriers at approximately 220 restaurants and stating that the existence of "centralized decision-making is an additional factor weighing heavily towards a finding of commonality, if it does not establish commonality outright").

***21** Defendant argues that these cases were brought under **ADA** Title II, not **Title III**. As explained above, this is a distinction without a difference: **Title III** requires **public accommodations** to become and remain compliant with **ADA** requirements and allows for modification of a policy as a form of injunctive relief, and the fact that Title II and **Title III** have different regulations is of no moment because the Title II regulations are not privately enforceable. Thus, if courts can grant injunctions requiring

public entities to modify their ongoing **ADA** compliance policies, there is no reason that such relief cannot be entered with respect to places of **public accommodation** under **Title III**.

Typicality

With respect to typicality, Plaintiff contends that she has claims typical of the class. Defendant contends that she is subject to unique defenses.

"The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal,* 43 F.3d at 57. Defendant does not dispute that Plaintiff's claims differ from those of the proposed class. Rather, it argues that, because she is a "paid tester," she is subject to defenses not applicable to the proposed class members.

Defendant cites the *Mielo* case for the proposition that an **ADA** "tester" (someone who is a named plaintiff as opposed to someone who use or frequents an establishment solely to partake of goods or services there) is subject to "a unique, possibly disqualifying defense." 2015 WL 1299815, at *7 (citing *CCDC,* 765 F.3d at 1211). However, the *CCDC* case upon which *Mielo* relied actually held that:

> "testers have standing to sue under Title II of the **ADA**." We believe the same is true for **Title III** of the **ADA**. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332–34 (11th Cir. 2013) (holding that testers have standing under **Title III** of **ADA**). Like Title II, **Title III** provides remedies for "any person" subjected to illegal disability discrimination. *Compare* 42 U.S.C. § 12133 (Title II), *with id.* § 12188(a)(1) (**Title III**). Thus, anyone who has suffered an invasion of the legal interest protected by **Title III** may have standing, regardless of his or her motivation in encountering that invasion.

*CCDC,*765 F.3d at 1211 (quoting *Tandy v. City of Wichita,* 380 F.3d 1277, 1287 (10th Cir. 2004)). *See also Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1069 (9th Cir. 2009) (plaintiff had standing regardless of motive for visiting **public accommodation**); *Garner,* 2013 WL 6731903, at *7 (same); *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 227–28 (D.N.J.2003); *Klaus v. Jonestown Bank and Trust Co.*, 2013 WL 4079946, at *7. As one court recently noted, "given the remedial purposes of **Title III** and the role assigned by Congress to private enforcement of its provisions, the benefit of the doubt as to standing should be accorded even to the 'tester' plaintiff." *Marradi v. Galway House, Inc.*, 2014 WL 1454266, at *4 (D.Mass. Apr. 15, 2014).

Finally, Defendant challenges Plaintiff's adequacy, again referring to her as a "paid tester" and "in effect, a hired gun." (ECF No. 108 at 27.) As explained above, however, the weight of authority is to permit standing to a plaintiff who acts as a tester. [14] Moreover, as Plaintiff's testimony indicates, she has worked for years for various organizations to better the lives of individuals with disabilities. The implication that she visits Cracker Barrel restaurants solely to provide grist for a litigation mill and/or to make money is not borne out by the record. More importantly, it is still incumbent upon Defendant to ensure that its facilities comply with the **ADA**, regardless of the possible motive (or motives) of individuals who visit them.

***22** Defendant does not contend that the law firm of Carlson, Lynch, Sweet & Kilpela could not adequately represent the proposed class. It is noted that this firm has considerable experience in litigating **ADA Title III** cases. Therefore, Plaintiff has demonstrated that she meets the Rule 23(a) requirements.

Rule 23(b) Application

"Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.' Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 614 (1997). "Rule 23(b)(2) applies ... when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal–Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2557 (2011). As explained above, Plaintiff has proffered evidence that Defendant's policy of **ADA**

compliance is ineffective and that it affects all members of the class. A single injunction would provide relief to each member of the class.

It is therefore recommended that Plaintiff's Motion be granted and that the following Class be certified:

> All persons with qualified mobility disabilities, who were denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any Cracker Barrel store location in the United States on the basis of disability because such persons encountered accessibility barriers due to Cracker Barrel's failure to comply with the **ADA's** accessible parking and path of travel requirements.

It is further recommended that Sarah Heinzl be appointed as the representative Plaintiff for this Class and that the law firm Carlson Lynch Sweet & Kilpela, LLP be appointed as counsel for the Class.

Summary Judgment Standard of Review

As amended effective December 1, 2010, the Federal Rules of Civil Procedure provide that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non moving party must set forth "specific facts showing that there is a genuine issue for trial" or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In following this directive, a court must take the facts in the light most favorable to the non-moving party, and must draw all reasonable inferences and resolve all doubts in that party's favor. *Hugh v. Butler County Family YMCA*, 418 F.3d 265, 266 (3d Cir. 2005); *Doe v. County of Centre, Pa.*, 242 F.3d 437, 446 (3d Cir. 2001).

***23** Defendant argues that: 1) this case is moot now that the seven stores identified in the Complaint have been remediated; 2) Plaintiff cannot bring a class action for a moot case; 3) Plaintiff lacks standing because the stores have been remediated; 4) no exception to mootness exists; and 5) Plaintiff cannot recover attorney's fees because she is not a prevailing party and the Supreme Court has rejected awarding attorney's fees under the catalyst theory pursuant to the **ADA**.

Plaintiff responds that: 1) this case is not moot because Defendant does not meet the standards for the voluntary cessation doctrine; 2) she is challenging the policy of Defendant's **ADA** compliance, which remains in place even after the seven stores identified in the Complaint have been remediated; and 3) there is no evidence that the stores will remain **ADA** compliant, given that facility managers are not trained in **ADA** compliance, that Defendant identified only 29 stores when Plaintiff's investigators identified 107, and that Defendant admits that weather and other factors can cause parking lots to fall out of compliance.

In its reply brief, Defendant argues that: 1) Plaintiff originally challenged the architectural barriers at seven stores, so now that they have been fixed she has changed course and contends that, at some hypothetical time in the future they will become non-compliant but that does not demonstrate an exception to mootness; 2) Plaintiff relies upon cases in which a company's practice which violates the **ADA** (for example, disallowing service dogs) could recur, but that is not the situation presented here; and 3) even applying that standard, Defendant would meet it because Cracker Barrel has long had an **ADA** compliance policy, it inaugurated a plan to make stores complaint in 2012 (before this case was filed) and hired consultants to make this possible, and it has admitted its prior non-compliance by fixing the stores Plaintiff identified in the Complaint.

Mootness

Defendant argues that this case is moot because it has remediated the parking lots at the seven stores identified in the Complaint and no exception to the mootness doctrine applies. Plaintiff responds that the proper analysis is that of voluntary cessation, which Defendant has not demonstrated.

The Court of Appeals has held that:

> Under Article III, section 2 of the U.S. Constitution, federal judicial power extends only to cases or controversies. If a claim does not present a live case or controversy, the claim is moot, and a federal court lacks jurisdiction to hear it. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396–97, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). As the United States points out, voluntary cessation does not automatically render the case moot. *In Friends of the Earth, Inc., v. Laidlaw Environmental Services*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), the Supreme Court held that "it is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' " (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)). The standard for "determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (citing *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)). Moreover, the party alleging mootness bears the "heavy," even "formidable" burden of persuading the court that the challenged conduct cannot reasonably be expected to resume. *Id.* at 189–90, 120 S.Ct. 693.
>
> ***24** *United States v. Government of Virgin Islands*,363 F.3d 276, 284–85 (3d Cir. 2004) (footnote omitted).

In order to demonstrate that the voluntary cessation doctrine applies, Defendant must show that: 1) the challenged conduct was isolated rather than continuing; 2) it has had a change of heart and did not simply fix the problem in response to a lawsuit; and 3) it has acknowledged responsibility. *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (citing *Laidlaw*, 528 U.S. at 189). *See DeJohn v. Temple Univ.*, 537 F.3d 301, 311 (3d Cir. 2008) (defendant's refusal to change its policy for more than a year after suit was filed and just before motions were due, and its continued defense of former policy were relevant factors in evaluating that there was a "reasonable expectation" that it would reimplement the policy); *Sawczyn*, 8 F.Supp.3d at 1114 (even accepting bank's assertion that its ATMs were now **ADA** compliant, the fact that they were not prior to suit being brought was relevant both with respect to the issue of whether bank's compliance was voluntary and also with respect to the issue of whether bank's procedures were effective when violations went unnoticed and unrepaired for eighteen months); *McDonald's*, 2013 WL 6408650, at *6–7 (McDonald's act of fixing violations after the filing of a complaint, which showed a history of passive indifference, did not eliminate the possibility of future violations when the requirements of the **ADA** had been well publicized for many years).

Plaintiff argues that Defendant cannot meet any of these factors: 1) the policy of inadequate **ADA** review is continuing; 2) Defendant admits that it remediated the seven stores in response to a lawsuit and it has stated that it has no intention of changing its inadequate compliance policy; and 3) it has not acknowledged responsibility. Defendant argues that it has an **ADA** compliance policy, but it is that policy which Plaintiff is challenging herein. It contends that it began to check its stores in 2012, before this case was filed, but its witnesses admitted that the seven stores identified in the Complaint were remediated in response to this lawsuit and its **ADA** compliance policy failed to identify numerous non-compliant stores that Plaintiff subsequently identified. Finally, it argues that it has acknowledged responsibility by remediating the seven stores identified in the Complaint, but its responses to discovery explicitly deny responsibility.

In the case (cited by Defendant) in which the Supreme Court held that a plaintiff whose lawsuit caused a defendant to voluntarily change its conduct is not a "prevailing party" for purposes of receiving attorney's fees under the **ADA**, the Court stated that, even in a case that is brought solely for equitable relief:

it is not clear how often courts will find a case mooted; "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotation marks and citations omitted). If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees. Given this possibility, a defendant has a strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs. *Cf. Marek v. Chesny*, 473 U.S., at 7, 105 S.Ct. 3012 ("[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff" (internal quotation marks and citation omitted)).

***25** *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*,532 U.S. 598, 609 (2001).

Defendant cites the *Thomas* case, in which the court held that, once a bank brought its non-complying ATMs into **ADA** compliance, the case was moot. In that case, however, the court observed that:

Thomas does not aver that once-compliant ATMs have fallen into noncompliance. That is, this case contains no allegations or evidence that BB & T has failed to *keep* its ATMs in compliance. This case is solely about BB & T's failure to timely implement one-time modifications to its ATMs after the promulgation of the 2010 **ADA** standards.

If, hypothetically, Thomas brought allegations that BB & T failed to perform proper maintenance on its ATMs, the result here might be different. If BB & T's ATMs seesawed between compliance and noncompliance, there would be a reasonable expectation of recurrence, which would likely suffice to defeat a mootness challenge. Alternatively, that type of repetitive injury could be classified as one not capable of judicial review that could not be mooted by voluntary cessation. *See generally L.C. by Zimring v. Olmstead*, 138 F.3d 893, 895 n. 2 (11th Cir. 1998), *aff'd in part, vacated in part sub nom., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999). But no such allegations exist here.

32 F.Supp.2d at 1271.

In this case, by contrast, Plaintiff has alleged and proffered evidence that Cracker Barrel's supposedly compliant parking lots have fallen out of compliance. Moreover, Plaintiff has proffered evidence that Cracker Barrel's **ADA** compliance policy has missed numerous stores that were out of compliance. *See Moore v. Dollar Tree Stores, Inc.*, 85 F.Supp.3d 1176, 1187–88 (E.D.Cal.2015) (even after defendant fixed the operational pressure of exterior doors, evidence was disputed as to whether they reasonably could be expected to lapse into noncompliance).

Defendant has not demonstrated that it has met the requirements of the voluntary cessation doctrine. In addition, even if the voluntary cessation doctrine did not apply, there are four exceptions to the general defense of mootness:

> (1) secondary or "collateral" injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit.

Chong v. District Director, I.N.S.,264 F.3d 378, 384 (3d Cir. 2001). As noted above, Defendant's approach to the **ADA** appears to be of the "capable of repetition yet evading review" variety: it remediates individual stores when sued for **ADA** violations, then moves to dismiss the case as moot. Moreover, if the practice is the non-compliant **ADA** policy rather than the architectural barriers at individual stores, then the practice is ongoing and Defendant is free to resume it any time. Finally, as explained herein, the case should be certified as a class action and thus three of the four exceptions to mootness would be met.

***26** Defendant also argues that Plaintiff lacks standing now that the seven stores named in the Complaint have been remediated. This argument is discussed above.

For all the reasons cited above, it is recommended that the motion to certify class filed on behalf of the plaintiff and as defined above (ECF No. 103) be granted. It is further recommended that the motion for summary judgment filed on behalf of the defendant (ECF No. 64) be denied.

Litigants who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections by February 10, 2016. Any party opposing the objections shall file a response by February 24, 2016. Failure to file timely objections will waive the right of appeal.

All Citations

Slip Copy, 2016 WL 2347367

Footnotes

1 ECF No. 1; Pl.'s App. (ECF No. 102) Vol. I, App. 1–60.

2 ECF No. 102, Vol. VII, App. 1408–1435.

3 Defendant “denies” this statement (ECF No. 107 ¶ 1), but provides no basis for its denial.

4 Defendant denies this statement based on Plaintiff's indication that she had removed the manufacturer-installed braking device from her wheelchair (Heinzl Dep. 30:4–7) and argues that the chair rolling away “was due to Plaintiff's own actions.” (ECF No. 107 ¶ 4.) This statement implies that the parking lot did not have an excessive slope, which is contradicted by the Report of Plaintiff's investigators (ECF No. 102, Vol. II, App. 514–17) and Defendant's current position that: “The barriers Plaintiff claims she encountered at the Pittsburgh, Pennsylvania store have since been removed.” (ECF No. 66 ¶ 6.)

5 ECF No. 102 Vol. I, App. 61–222.

6 ECF No. 102 Vol. I, App. 223–373.

7 ECF No. 109–1.

Defendant argues that: “Photographic 'snapshots' of strategically placed level slope readings alone do not establish that the overall slopes of the parking spaces in question failed to meet ADA requirements.” (ECF No. 107 ¶ 6.)

26.) It cites no authority for the proposition that the **ADA** regulates "overall" slopes (presumably meaning an average) rather than measurements taken at any point along the area in question, nor has it explained its implication that "strategically placed level slope readings" provide inaccurate information.

9 The discussion that follows applies with equal force to the reply brief in support of Defendant's motion for summary judgment, which was also due by December 31, 2015 but not filed until January 4, 2016.

10 This date was not chosen at random, but was designed to provide the Court and Plaintiff with sufficient time to review the response prior to the hearing scheduled for January 7, 2016.

11 The Clerk of Court, in a message that was placed on the Court's website and sent out to all counsel via email, specifically referred counsel to Rule 6(a) which, as explained in the text, makes clear that the closing of the Court on December 31 did not create a "legal holiday" or extend filing deadlines.

12 The first argument assumes that Judge Hornak's practices and procedures, which allow for a reply brief to be filed within 7 days of an opposition brief, applied to this case. Because the briefing order was issued by a magistrate judge on referral from a district judge, it is not clear whether the district judge's practices and procedures would govern.

13 Plaintiff also proffers three examples of courts approving class-wide settlement agreements containing detailed modifications of defendants' **ADA** monitoring, maintenance, construction and training policies and practices. (ECF No. 110 Exs. A–C.) However, parties may structure settlement agreements in any manner they wish and thus these agreements do not address whether such modifications would be subject to injunctive relief under **ADA** **Title** **III**.

14 In the *Anderson* case, Judge Hornak observed that the issue of whether a plaintiff may satisfy the intent to return requirement if she visits the establishment solely as a tester has not been addressed by the Third Circuit. 943 F.Supp.2d at 542 n. 12. He then cited cases on both sides of the issue of whether testers have standing. Id However, it is noted that three courts of appeals and numerous district courts have concluded that testers have standing, while fewer (generally older) district courts cases have concluded that they do not.

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