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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROGER A. LONG, et al.,	)	
	)	
Plaintiffs,	)	CV-S-97-1570-(RLH)
	)	
v.	)	
	)	
COAST RESORTS, INC., et al.,	)	UNITED STATES' MEMORANDUM AS AMICUS CURIAE OF POINTS AND AUTHORITIES
	)	
Defendants	)	
	)	

I. INTRODUCTION

Plaintiffs Roger A. Long and Ronald Ray Smith, individuals who use wheelchairs, and Disabled Rights Action Committee, a non-profit entity organized to promote the rights of individuals with disabilities, filed this action under title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181 through 12189 (the "ADA" or the "Act"). The plaintiffs assert that the Orleans Hotel and Casino violates title III because numerous features do not comply with the ADA's Standards for Accessible Design, 28 C.F.R. pt. 36, Appendix A ("the Standards"), and because the facility's fixed-route transportation system does not provide equal access for individuals with disabilities. On August 31, 1998, plaintiffs and defendants filed cross-motions for summary judgment. On January 12, 1999, this Court issued its summary judgment ruling. The Court held that several conditions identified by plaintiffs at the Orleans Hotel and Casino did not rise to the level of violations of the Standards.[1] This Court ruled that two conditions did constitute violations of the Standards -- counter heights at three casino bars (Alligator, Crawfish, and Mardi Gras Bars), and doors within non-accessible guest rooms. The Court ordered relief regarding the bar counters. However, regarding non-accessible guest room doors, this Court determined that defendants had substantially complied with the law, and that no injunctive relief was warranted.

Presently before the Court is Plaintiffs' Motion for

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[1]The United States takes no position on the Court's rulings that certain features of the facility do not violate the Standards because we lack sufficient factual information upon which to form an opinion.

Clarification, or In The Alternative, for Reconsideration or, In The Alternative, for Relief From the Judgement [sic] that was filed on January 25, 1999. The United States respectfully submits that the Court's January 12, 1999, Judgment and Order, which failed to award injunctive relief to widen non-accessible guest room doors, is in error and should be amended.

For private actions, the ADA's enforcement provisions mandate that violations of the Standards and § 303 must be corrected and all elements covered by the law must be made "readily accessible to and usable by individuals with disabilities." Congress insisted upon a mandatory enforcement scheme to ensure that its goal of a fully accessible future for individuals with disabilities would be accomplished. Moreover, Congress specifically directed in legislative history that the requirement to be "readily accessible" for hotels includes doors wide enough for wheelchairs to enter within non-accessible guest rooms. The significant distinctions between § 303 (public accommodations and commercial facilities' new construction responsibilities) and § 302(b)(2)(A)(iv) (public accommodations' readily achievable barrier removal responsibilities) will be rendered meaningless if new construction violations are not required to be made "readily accessible to and usable by individuals with disabilities." Accordingly, the United States respectfully requests that the Court grant the plaintiffs' motion for Clarification and Reconsideration, grant plaintiffs' motion for summary judgment regarding non-accessible guest room doors, and deny defendants' motion for summary judgment on that same issue.

II. STATUTORY AND REGULATORY FRAMEWORK

The Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., is Congress' most comprehensive civil rights legislation since the Civil Rights Act of 1964. Its purposes are "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. § 12101(b)(4), and to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision of goods and services offered to the public by private businesses.

This case concerns title III of the ADA, 42 U.S.C. §§ 12181 through 12189, which prohibits discrimination on the basis of disability in both public accommodations and commercial facilities.[2] Title III's general mandate prohibiting

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[2]The statute defines "public accommodations" to be entities (1) whose operations affect commerce, and (2) that fall into one or more of twelve categories of public accommodations set out in the Act. See 42 U.S.C. § 12181(7). The Orleans Hotel and Casino is a "public accommodation," as it falls within at least two of the statute's categories of public accommodation: it is a "hotel, motel, or other place of lodging," within the meaning of § 301(7)(A), a "restaurant, bar, or other establishment serving food or drink," § 301(7)(B), a "motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment," § 301(7)(C), and it is also an "auditorium, convention center, lecture hall, or other place of public

discrimination against individuals with disabilities is set out in section 302(a) of the Act, which provides that

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Section 303 of the Act adds another category of prohibited activity -- the design and construction of new facilities that are not "readily accessible to and usable by individuals with disabilities" -- and extends this prohibition not just to public accommodations, but to all commercial facilities. See 42 U.S.C. § 12183.

The Act directs the Attorney General to issue regulations to carry out the provisions of title III. 42 U.S.C. § 12186(b). Section 303 specifically requires that the regulations include, or incorporate by reference, architectural accessibility standards. 42 U.S.C. § 12183(a). The statute provides that these architectural standards must meet or exceed those developed by another federal agency, the Architectural and Transportation Barriers Compliance Board (also known as the "Access Board"). The architectural standards promulgated by the Attorney General must be "consistent with the minimum guidelines and requirements issued by" the Access Board. 42 U.S.C. § 12186(c).[3]

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gathering," within the meaning of § 301(7)(D). See 42 U.S.C. §§ 12181(7)(A), (B), (C), (D).

[3]The Access Board is composed of twenty-four members,eleven of whom are representatives of various federal agencies, and thirteen of whom are private citizens appointed to the Board by

As required by the statute, the Attorney General timely issued a title III implementing regulation on July 26, 1991. See 28 C.F.R. Part 36. The regulation includes architectural standards for newly constructed public accommodations and commercial facilities, entitled the Standards for Accessible Design. See 28 C.F.R. Part 36, Appendix A ("the Standards"). Among other things, the Standards set several requirements for hotel facilities. See Standards §§ 4.1.3, 9.

III. ARGUMENT

A. Congress intended that the ADA's new construction provisions would create a fully accessible future that would open doors to persons with disabilities.

In enacting the Americans with Disabilities Act, Congress found that "individuals with disabilities continually encounter various forms of discrimination, including. . .the discriminatory effects of architectural, transportation and communication barriers." 42 U.S.C. § 12101(a)(5). To combat this discrimination, Congress created two separate accessibility requirements for private entities -- "readily achievable barrier removal" for existing facilities and "readily accessible to and usable by individuals with disabilities" for new construction facilities. Existing facilities need only provide accessibility that is "easily accomplishable and able to be carried out without

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the president. 29 U.S.C.A. § 792(a)(1) (West Supp. 1996). The Attorney General, as head of the Department of Justice, is one of the eleven federal members of the Board. 29 U.S.C.A. § 792(a)(1)(B) (West Supp. 1996).

much difficulty or expense." 42 U.S.C. 12181(9).[4] The Attorney General's implementing regulations set forth numerous examples of barrier removal, establish priorities for entities to comply with these requirements, and provide alternatives when barrier removal is not readily achievable. 28 C.F.R. §§ 36.304, 36.305.

By contrast, § 303's new construction requirements are far more exacting, and covered entities must comply with the Standards, except in very limited circumstances that were specifically identified by Congress. 28 C.F.R. § 36.401.[5] See

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[4]"Readily achievable barrier removal" is essentially a financial resources matter. Factors include –

(A) The nature and cost of the action needed under this Act;
(B) The overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12181(9). Given the vast financial resources of the defendants here, it is unlikely that many accessibility changes would be found to be not readily achievable.

[5]Congress provided only one defense to violations of the ADA Standards -- "structural impracticability." The Department's title III regulations explain "full compliance [with the ADA Standards] will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. § 36.401(c)(1). See also H.R. Rep. No. 101-485, pt. 2, at

also Coalition of Montanans Concerned With Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1168 (D. Mont. 1997) ("The overall policy of the ADA is to require relatively few changes to existing buildings, but to impose extensive design requirements when buildings are modified or replaced.").

The Committee reports elaborate on the differences between the two requirements --

> the concepts of "readily achievable" and "readily accessible" are sharply distinguishable and represent almost polar opposites in focus. The phrase "readily accessible to and usable by individuals with disabilities" focuses on the person with a disability and addresses the degree of ease with which an individual with a disability can enter and use a facility; it is access and usability which must be 'ready.' 'Readily achievable,' on the other hand, focuses on the business operator and addresses the degree of ease or difficulty of the business operator in removing a barrier; if barrier removal cannot be accomplished readily, then it is not required.

S. Rep. No. 101-116, at 65-66 (1989); H.R. Rep. No. 101-485, pt. 2, at 109-110 (1990). Through the ADA's accessibility standards, Congress intended to provide an accessible future for individuals with disabilities. As the legislative history makes clear,

> [t]he ADA is geared to the future -- the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible.

H.R. Rep. 101-485, pt. 3, at 63 (1990) (emphasis added).[6]

120-121 ("'structurally impracticable' is a narrow exception that will apply only in rare and unusual circumstances"). Clearly, such a defense is not applicable here, for doors within non-accessible guest rooms.

[6]Congress recognized "it is always less expensive to build something new in an accessible manner that it is to retrofit an existing facility to make it accessible." H.R. Rep. No. 101-485,

Therefore, Congress set out to achieve its goal of a fully accessible future through this two-tiered set of accessibility requirements.

B. Title III of the ADA requires the Orleans Hotel and Casino to be readily accessible to and usable by individuals with disabilities.

Section 303 of the ADA requires that newly constructed facilities be "readily accessible to and usable by individuals with disabilities[7]. . .in accordance with standards set forth. . .in regulations issued under this subchapter." 42 U.S.C. § 12183(a). The standards referred to -- the Attorney General's Standards for Accessible Design -- specifically address hotel facilities and elements within these facilities that must be designed and constructed to be accessible to persons with disabilities, including, among other things, doors within non-accessible guest rooms. Section 9.4 explicitly provides "[d]oors and doorways designed to allow passage into and within all sleeping units or other covered units shall comply with 4.13.5." Standards § 9.4. Section 4.13.5 provides, in pertinent part, "[d]oorways shall have a minimum clear opening of 32 in (815 mm)

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pt. 2, at 119 (1990).

[7]Congress explained that readily accessible "is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter and use a facility. While the term does not necessarily require the accessibility of every part of every area of a facility, the term contemplates a high degree of convenient accessibility, entailing accessibility of parking areas, accessible routes to and from the facility, accessible entrances, usable bathrooms and water fountains, accessibility of common use areas, and access to the goods, services, programs, facilities, accommodations and work areas available at the facility. H.R. Rep. No. 101-485, pt. 2, at 117-118 (1990).

with the door open 90 degrees. . ." Standards § 4.13.5.

C. Congress specifically identified those features that would make a new hotel facility readily accessible to and usable by individuals with disabilities.

While Congress delegated authority to the Attorney General to develop the new construction accessibility standards, Congress specifically identified in the Act's legislative history certain obvious and important features to be included therein. In particular, Congress detailed accessibility features for new hotels. Doors within all hotel rooms (including non-accessible guest room doors) were specifically named by Congress. The House and Senate Committee Reports state that making a hotel "readily accessible to and usable by" individuals with disabilities –

> includes, but is not limited to, providing full access to the public use and common use portions of the hotel; requiring all doors and doorways designed to allow passage into and within all hotel rooms and bathrooms to be sufficiently wide to allow passage by individuals who use wheelchairs; making a percentage of each class of hotel rooms fully accessible (e.g., including grab bars in bath and at the toilet, accessible counters in bathrooms); audio loops in meeting areas; signage; emergency flashing lights or alarms; braille or raised letter words and numbers on elevators; and handrails on stairs and ramps.

H.R. Rep. No. 101-485, pt. 2, at 118 (1990); S. Rep. No. 101-116, at 70 (1990)(emphasis added).[8] Representative Morrison explained

[8]Indeed, even the hotel industry's trade organization, the American Hotel and Motel Association, testified in support of the accessible doors requirement within non-accessible guest rooms for new facilities, stating "[t]he term "readily accessible" has another implication for the lodging industry when the term is applied to guest rooms. . . .when it [the Committee Report] uses a hotel as an example, it speaks of all doors and doorways being designed to allow passage into and within all hotel rooms. If that is intended as a specific requirement, that all doorways in newly constructed hotels be of sufficient width to allow

this requirement,

> Disabled people are frequently frustrated by the inaccessibility of hotel rooms. Very few rooms, even in new hotels, are made fully accessible. The rest of the rooms often feature restroom doors too narrow to enter. Often, it has been impossible for disabled persons who need to fly to a city on short notice to do business, to find a usable hotel room. For the same reason, organizations of disabled persons are often stymied when trying to find a hotel for a conference, because virtually all hotels feature too few rooms to accommodate the organizations' disabled members. For this reason, the ADA requires new hotels to meet a number of requirements. Common-use areas like lobbies and restaurants must be accessible, a few rooms must be fully accessible -- including grab bars and wheelchair turning space in the restroom -- and audio loops for the use of hearing-impaired persons must be available in meeting rooms. In addition, doors to all guestrooms, and doors to the restrooms in all guestrooms, must be of a standard wheelchair-accessible width. This is a reasonable way to solve the problem. While it might not be reasonable to propose that every guestroom in a new hotel be fully accessible -- including restroom grab bars and turning spaces -- it is reasonable to require a percentage of fully accessible rooms and simply the appropriate door widths in the other rooms. Then, many wheel-chair users and other people with physical disabilities will be able to use those guest rooms that are not fully accessible. It will be much easier for disabled persons to book usable rooms when they don't have a lot of time in advance, and also it will greatly relieve the difficulties of organizations of disabled persons finding hotels to accommodate large groups.

136 Cong. Rec. 646, at H2625 (1990)(statement of Rep. Morrison). Based upon these clear indications of congressional intent, the Attorney General did, in fact, incorporate these accessibility requirements into the Standards, and promulgated the guest room doors requirement as Standard § 9.4.

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wheelchair passage, we have no disagreement with that." Americans with Disabilities Act of 1989: Hearings Before the House Comm. On the Judiciary and the House Subcomm. On Civil and Constitutional Rights, 101st Cong. 140-141 (1989)(Statement of the American Hotel & Motel Association).

D. The Orleans Hotel and Casino is a newly constructed facility that must comply in full with the Standards, including the requirement for non-accessible guest room doors.

Section 303 of the ADA requires all places of public accommodation and commercial facilities that are designed and constructed for firs occupancy after January 26, 1993, and those that are altered after January 26, 1992, to comply with the accessibility standards for new construction. 42 U.S.C. § 12183(a)(1). It is undisputed that the Orleans Hotel and Casino facility is a newly constructed facility within the meaning of title III of the Act and must comply with the Standards. Long v. Coast Resorts, Inc., CV-S-97-1570 (RLH), Slip op. at 4, 10 (D. Nev. Jan. 12, 1999). The record in this case is clear that the doors and doorways within non-accessible guest rooms at the Orleans Hotel are only 28 inches wide, and provide only 25 inches of clear width. Id. at 4, 14. The ADA Standards require a 32 inch clear opening width for these doors, and therefore, this feature of the facility violates the Standards. Indeed, this Court recognized as much, stating ". . .this may be considered a technical violation of the Guidelines[.]" Id. at 16. When a violation of the ADA's Standards and § 303 of the Act has been determined, as in the instant situation, the only remedy allowed by law in a private action like this one to enforce title III of the ADA is to enjoin the responsible parties to make the feature accessible to and usable by individuals with disabilities. 42 U.S.C. § 12188(a)(2).

E. The ADA Makes Clear that Violations of the Standards Must Be Made Readily Accessible To and Usable By Individuals With Disabilities.

Section 308 of the Act specifies the enforcement scheme for violations of the Americans with Disabilities Act. 42 U.S.C. § 12188. For private rights of action, § 308(2) provides, in relevant part, "[i]n the case of violations of. . .section 303(a), 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 this title." 42 U.S.C. § 12188(2) (emphasis added).[9] See also 28 C.F.R. § 36.501(b) (injunctive relief available for private suits).[10] Congress was clear in its intention that new

[9]The only remedy available to vindicate the interests of individuals with disabilities who file a private lawsuit under § 303 is injunctive relief. 42 U.S.C. § 12188. Courts typically have discretion regarding whether to issue an injunction. Congress may, however, "intervene and guide or control the exercise of the court' discretion." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). See also TVA v. Hill, 437 U.S. 153, 173 (1978) (holding Congress foreclosed usual discretion possessed by court of equity in Endangered Species Act, 16 U.S.C. § 1531 et seq.). This is particularly appropriate where, as here, no monetary relief is available to plaintiffs. Here, Congress has explicitly stated in the language of the statute that an injunction shall be issued to remedy violations of § 303. Accordingly, it is axiomatic that an injunction should be issued requiring the Orleans to make doors within non-accessible guest rooms readily accessible to and usable by individuals with disabilities.

[10]The few courts that have considered violations of the new construction standards have followed this statutory directive. See Independent Living Resources v. Oregon Arena Corp., 1 F. Supp. 1124 (D. Ore. 1998) (owners required to make modifications to conform with Standards); Independent Living Resources v. Oregon Arena Corp.,982 F. Supp. 698, 713 (D. Ore. 1997) (court does not have discretion to waive requirement of Standards); Coalition of Montanans Concerned With Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1171 (D. Mont. 1997)

construction must be made to comply with the accessibility standards.[11] The House Report of the Energy and Commerce Committee notes that "an order to make a facility readily accessible to and usable by individuals with disabilities is mandatory" under this standard. H.R. Rep. No. 101-485, pt. 4, at 64 (1990). See also 136 Cong. Rec. E1920 (statement of Rep. Hoyer) (May 22, 1990) (section 308(2) "explicitly mandates that injunctive relief must include orders to make facilities readily accessible to and usable by individuals with disabilities"). Accordingly, when a Court finds that the Standards have been violated -- and, thereby, that discrimination under § 303(a) has occurred -- the statutory language mandates that violations be made readily accessible to and usable by individuals with disabilities.[12] For the Orleans Hotel and Casino, such an order

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(defendants enjoined to redesign and construct airport terminal, including elevators); Small v. Dellis, No. Civ. AMD 96-3190, 1997 WL 853515 (D. Md. Dec. 18, 1997) (ADA violated when newly constructed restrooms not readily accessible). Cf. Kinney v. Yerusalim, 9 F.3d 1067 (3rd Cir. 1993) (City ordered to install curb ramps as required by Standards); Deck v. City of Toledo, 29 F. Supp. 2d 431 (N.D. Oh. 1998) (same).

[11]When, as here, a statutory provision is clear and unambiguous, courts shall give effect to such provision. See Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984); Mesa Verde Constr. Co. v. Northern California Dst. Council of Laborers, 861 F.2d 1124, 1131 n.5 ("If the intent of Congress is clear, that is the end of the matter; for the court. . ., must give effect to the unambiguously expressed intent of Congress.").

[12]This Court stated in the January 12, 1999 order that the Orleans "has made a good faith effort to comply with this provision of the regulation and guidelines." Slip op. at 16. However, defendants "good faith" in attempting to comply with the statute is not an appropriate consideration in this instance for

must include fixing the doors within non-accessible guest rooms.

This Court also suggests that the costs estimated for widening the doors within non-accessible guest rooms at the Orleans Hotel -- $800,000 -- mitigate against requiring such changes. Long, Slip op., at 16. However, there is no costs or "undue burden" defense[13] applicable to the new construction requirements of the Act. See Kinney v. Yerusalim, 9 F.3d 1067, 1074 (3d Cir. 1993). The Kinney court explained regarding title II new construction and alteration requirements,

> "[a]llowance of an undue burden defense for existing facilities serves as recognition that modification of such facilities may impose extraordinary costs. New construction and alterations, however, present an immediate opportunity to provide full accessibility. . . .Congress acknowledged the existence of an undue burden defense for existing facilities, but clearly warned, '[n]o other limitation should be implied in other areas.'

Id. See also H.R. Rep. No. 101-485, pt. 3, at 50 (1990).

In order to eradicate discrimination against individuals

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determining whether there has been compliance mandated by the law. "Good faith" is to be considered only in cases brought by the Attorney General, and where civil penalties are at issue. 42 U.S.C. § 12188(b)(5). Section 308(b) sets out the enforcement scheme for cases brought by the Attorney General. If the Attorney General brings a pattern or practice case or a case under the "general public importance" provisions, she has the authority to seek a civil penalty to vindicate the public interest. In those instances, a court shall consider "any good faith effort or attempt to comply with this Act by the entity." 42 U.S.C. § 12188(b)(5). Any "good faith" the Orleans can demonstrate in complying with the ADA is simply not relevant to whether injunctive relief is proper.

[13]The "undue burden" defense, which is available under title II's program access requirements for existing facilities and title III's auxiliary aids requirements, is analogous to "readily achievable." See 28 C.F.R. §§ 35.150(a)(3); 36.202 (definition of undue burden). See also 42 U.S.C. § 12111(10) (definition of undue hardship).

with disabilities and thereby achieve Congress' goals, the new construction standards must be enforced in their entirety. Not to do so, would be to effectively eliminate § 303 new construction obligations from the statute. By failing to require remedies for proven violations of the Standards, "readily accessible to and usable by individuals with disabilities" will be replaced by the lesser "readily achievable" standard. And Congress' goal of a fully accessible future will be eviscerated

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that Plaintiffs' Motion for Clarification, or In The Alternative, Reconsideration, or in the Alternative, Relief From Judgement [sic] be granted, Plaintiffs' Summary Judgment Motion with respect to widening doors in non-accessible guest rooms be granted, and Defendants' Motion for Summary Judgment on this same issue be denied.

Respectfully submitted,

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