

The ADA at 31: Still No Teeth?

By Michael Hellmann

When the ADA was enacted 31 years ago, many people felt it lacked teeth, in that the consequences for violators were too light. This ADA attorney feels that choosing the right path to pursue a case is the key to better enforcement and thereby greater compliance. I have often heard it said that “We’ve come a long way with ADA and made much progress, but there is still much work to be done.”

Before breaking down this topic into enforcement options available under Titles II and III, (my areas of practice) I have a couple of comments about employment claims under Title I. The most significant fact to be aware of is that employers win about 95% of the cases. This is likely the result of greater access to resources, such as attorneys, human resource staff and personnel records. In addition, the possibility of retaliation must also be considered when deciding whether to file a claim against an employer. Retaliation comes in many forms; it can be subtle and is often difficult to prove. It is a good idea for the employee to ask him or herself whether it is wise to continue working for someone that has been accused of employment discrimination, and how difficult it will be to find another job. While the fear of retaliation should not be a total deterrent against filing any Title I action, it is a critical consideration that should be kept in mind. The remainder of this commentary includes an analysis of three (3) possible options for pursuing accessibility barrier claims under Titles II and III. My list of options to pursue consists of: 1. ADA lawsuits, 2. Human Rights complaints, and 3. US Department of Justice (DOJ) involvement, followed by some conclusory remarks. The list does not include all possibilities, but rather three of the more popular ways of pursuing ADA complaints.

Option 1- ADA lawsuits

Filing a formal lawsuit is a good place to start in analyzing options since the automatic reaction today seems all too frequently to be, “take them to court,” or “sue them.” An ADA accessibility barrier complaint can be taken to court (usually federal) and filed as a lawsuit upon payment of a filing fee of about \$200. Financial arrangements with attorneys willing to bring ADA lawsuits vary, but few if any will take such a case on a contingency basis, where the client pays only if the case is won. The reason for that is because neither Title II nor III provide compensatory damages in the form of monetary relief. Herein lies the biggest problem in pursuing such a complaint: there is only injunctive relief available. In other words, a restaurant without a ramp may be a clear violation, yet under ADA law a successful claim will only result in a court order that a wheelchair ramp be built but no financial compensation will be awarded. While the ADA provides for reasonable attorney’s fees being awarded to the prevailing party, this area has received so much opposition in the courts that it should not be counted on. In addition to the expense of representation, litigation also tends to be a long drawn-out process. For all of these reasons I have serious reservations about ADA lawsuits and advise against using them as the first means of action. In fact, an ADA lawsuit probably should only be considered when the attorney feels it’s a very strong case and can be joined with some other cause of action (non-ADA) which allows for money damages, such as negligence claim if possible.

While these shortcomings of bringing a lawsuit are apparent to me as a lawyer, most business owners and local government leaders are not familiar with them. That is why the mere mention of possible legal action can create enough of a reaction to cause changes to happen. This “threat of a lawsuit” should be kept in mind as a negotiating tactic. For example, simply saying to someone that you would like to resolve all things amicably, but if you cannot do so

then you are ready to refer it to an ADA attorney just might get the same results as an actual lawsuit.

Option 2- Human Rights complaints

An alternative to taking one's complaint to state or federal court, the option of filing a human rights complaint should be considered. There is a NYS Division of Human Rights and many localities have their own Human Rights Commissions. Both offices enforce against discrimination based on disability and accept complaints for lack of accessibility. Procedures are less formal than the courts and cases tend to move along faster (supposedly). A client is not required to have an attorney and filing a complaint is free. Cases are resolved by a hearing or mediation conference.

For a while I felt that human rights complaints were the answer to all the troubles associated with taking a case to court. The fact that there are no fees, no need for an attorney and less formal proceedings made this option seem like an excellent choice. I have had some very good experiences with both the NYS Division and the local County Commission on Human Rights. I even filed a few complaints as the plaintiff, not the attorney, for accessibility barriers I had encountered myself. Accessibility, or lack thereof, was understood fairly well by those involved, procedures were pretty straightforward and overall, the results were good. Then the picture started to change. First there was an accessibility complaint I filed with a local commission in which I received a favorable finding; was even awarded money damages, but the problem was having the judgment enforced. It was a restaurant owner that I was up against who did not want to make the necessary access modifications, let alone pay out any compensation. I then discovered that the Commission had limited power for enforcing judgments so I would have to file a separate state court action in order to do so. In the meantime, the owner declared bankruptcy, closed the restaurant, made no access modifications and paid no money. My complaint had been all for naught.

Similarly, in the NYS Division several other complaints I filed began to experience significant problems. No longer was I seeing the Division taking action to intervene by contacting the alleged violator directly; instead cases were facing lengthy delays in scheduling hearings and adjournments, and unreasonable response times by Administrative Law Judges (ALJs). The worst scenarios I faced happened at about the same time in two different cases. They were each claims against restaurants for inaccessibility. From the date of filing complaints, the cases were delayed for over three years before going to hearing. Waiting for the proposed orders, objections and final order added more time during which both restaurants went out of business, making the matters moot. In the one case I prevailed, access modifications were ordered but the defendant was no longer the owner, rendering the result meaningless. I was however, awarded \$2000 as compensation for emotional distress under the NYS Human Rights Law. I am yet to receive any notice of the Division's efforts to recover the judgement. The other case I lost, but it took so long for closure that I was exasperated from frustration. Suffice it to say, I probably won't be going back to the Division anytime soon.

Option 3 - Department of Justice (DOJ) involvement

DOJ involvement could mean the Department doing any of the following: a) investigating the claim and subsequently bringing a lawsuit or promoting mediation; b) joining a lawsuit as a plaintiff or submitting an amicus brief, which is usually a statement of support for the plaintiff's claim, or c) possibly targeting the alleged violation under one of DOJ's special campaigns such as Project Civic Action, if the complaint is against a public entity. While an impressive array of actions, a potential claim could instead result in the Department deciding not to get involved or placing it on a very lengthy waiting list, either of which is all too common. Discussing DOJ involvement makes me recall an experience I had in the early ADA days when I actually visited the Department's offices in Washington DC. I had been able to get an appointment with an attorney in the ADA Division. From our discussion I was astounded to learn the DOJ had only 10 attorneys at that time covering ADA cases for the entire US! With

such a tremendous caseload it's no wonder it can be quite a wait before a new claim gets any attention. Therefore, in my opinion, relying on the DOJ for action is a longshot and should only be considered in addition to one or more of the other options. For example, filing a complaint could be coupled with a statement of support, or amicus, from the DOJ.

Conclusion

Under my analysis above, none of the three options escaped unscathed from heavy criticism as possible ways to pursue ADA complaints. The downside of trying to bring an ADA lawsuit is mainly monetary. Except for the positive value of bringing about access changes (and this must not be overlooked), there is no financial reward available, only injunctive relief. Thus, it can be awfully expensive to obtain legal representation. Human rights complaints, while avoiding the pitfalls of an ADA lawsuit, have other systemic issues. The excessive delays and limitations on powers such as enforcing judgments outweigh the attractive qualities of this option. Lastly, involvement by the DOJ has a plethora of problems ranging from providing claimants a false sense of security to being overloaded and understaffed.

What then is left to help with ADA enforcement? The best answer I can offer here comes from all my years of advocacy work. I am referring to basic advocacy efforts including letter writing, boycotts, media coverage and the like. The honest answer is that there is no 'quick fix' for better ADA enforcement. Those ways that have proven to work all along must be re-visited and relied upon. We also need to be creative. Once I had the regional ADA Technical Assistance Center send literature to an inaccessible business that I had already attempted to convince to comply.

Since there are no ADA police issuing summonses for violations, it is ultimately up to us, the disability community, to take on the task of enforcement. Rather than be complacent and content with the statement that the ADA has no teeth, we need to figure out how to make use

of the few teeth it does have. This then is the real challenge of ADA enforcement: its teeth may not be easy to find, but they are in there. Remember, there is still much work to be done, so carry on...

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