

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Eric Wong,

Plaintiff,

v.

Chatterbox Enterprises, Inc., and
Tyrone Sharpe,

Defendants.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER FOR JUDGMENT**

Judge Charles A. Porter, Jr.
Court File No. 27-CV-14-2417

The above-entitled matter came duly on before the Honorable Charles A. Porter, Jr. for a Court Trial on April 13, 2014.

Paul Hansmeier, Esq. appeared on behalf of Plaintiff Eric Wong. Susan D. Minsberg, Esq. appeared on behalf of Defendants.

Based on all of the files, records, and proceedings herein, the Court makes the following, which constitute the Court's Findings of Fact, Conclusions of Law and Order for Judgment:

ORDER

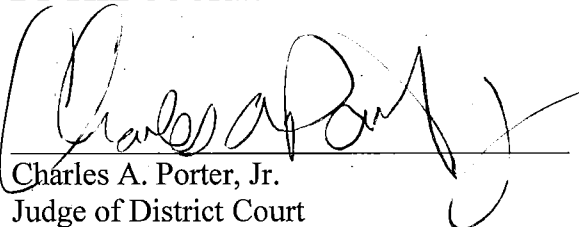
1. Plaintiff is the prevailing party.
2. Defendants shall remediate the patio entrance so that it complies with the Americans with Disability Act's Standards for Accessible Design (ADAAG) no later than six weeks from the date of this order. Remediation includes ensuring the ramp's running slope is within ADAAG guidelines and removing all inside and outside obstructions to the patio doorway.

3. Defendants shall file and serve an affidavit of compliance, detailing the remediation and how it complies with the ADA no later than **six weeks** from the date of this order.
4. Plaintiff shall submit an objection to Defendant's affidavit of compliance, if any, no later than **nine weeks** from the date of this order. Plaintiff's objection shall include an affidavit from a qualified disinterested party detailing how Defendant's remediation does not comply with this order.
5. Pursuant to 42 U.S.C. § 12205, 28 C.F.R § 36.505, and Minn. Stat. 363A.33, Subd. 7, Plaintiff may submit an Affidavit in Support of Attorney's Fees that complies with Minn. Gen. R. Prac. 119.02, no later than **three weeks** from the date of this Order. If Defendants choose to respond, their submission shall be served and filed no later than **six weeks** from the date of this Order.
6. A hearing on Plaintiff's attorney's fees will be scheduled at the request of any party. Such request shall be made no later than **six weeks** from the date of this Order. If a hearing is not requested, the Court will deem it waived by all parties and take the matter under advisement.
7. The attached memorandum is incorporated herein by reference and constitutes the Courts Findings of Fact and Conclusions of Law.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: Aug 27, 2015

BY THE COURT:


Charles A. Porter, Jr.
Judge of District Court

MEMORANDUM

I. Facts

Plaintiff Eric Wong (Wong) suffers from a rare progressive genetic condition, Ehlers-Danlos syndrome, which causes frequent subluxation (partial dislocations) of his shoulders, elbows, hips and knees. He is substantially limited in performing major life activities, including but not limited to walking and standing. Wong also suffers from postural orthostatic hypertension, a condition related to Ehlers-Danlos syndrome which can cause Wong to faint while performing tasks that require him to be upright. Wong has been declared legally disabled by an administrative law judge of the United States Social Security Administration. Wong's disability requires him to use a wheelchair for mobility.

On November 20, 2013, Wong visited Defendant Chatterbox Enterprises, Inc. ("Chatterbox"), a restaurant/bar located in Minneapolis, MN, in a building owned by Defendant Tyrone Sharpe. Wong was unable to enter the restaurant in his wheelchair. The main entrance featured an un-ramped vertical change in level of approximately six inches. The patio entrance featured an un-ramped vertical change in level of approximately two inches.¹ In addition, the patio entrance did not appear to be open at the time: the patio gate was closed and a bar stool in the interior of the restaurant appeared to block the doorway. Finally, there was no signage at either the main entrance or patio entrance indicating the existence and/or direction of a wheelchair accessible entrance.

Approximately two weeks before trial, Defendants made an attempt at remediating the change in level at the patio entrance. However, the remediation was ineffective because it featured an excessive running slope. Approximately two days before trial, Defendants made a second attempt at remediating the patio entrance by using a technique referred to as "sandjacking." Defendants did not present any

¹ Defendants' assertion that the change in level at the patio entrance was approximately a ½ inch is not supported by the evidence. Steven Miller's testimony revealed that his measurement on the change in level did not include the metal bevel. The ADAAG recognizes that a bevel is a part of a change in level. See e.g. ADAAG 303.2 and 303.3.

evidence or testimony regarding the resulting change in level or running slope of the newly changed entrance.²

On April 12, 2015, one day before trial, and a day after Defendants performed “sandjacking,” Wong returned to Chatterbox and noticed that signage had been installed at both the main and patio entrances. However, Wong credibly testified that neither entrance appeared accessible in his wheelchair due to their change in level and because stools were again blocking the interior patio entrance.

Wong testified that at a time before the initiation of this action, when he could walk and did not need the assistance of a wheelchair for mobility, he patronized Chatterbox. Wong would like to return to socialize with friends and have a beer like he did before, but the architectural barriers at Chatterbox prevent him from accessing the building.

II. Conclusions of Law

A. Violation of the ADA

Title III of the ADA prohibits discrimination in places of public accommodation against persons with disabilities. *See* 42 U.S.C. § 12182(a). Discrimination includes “a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities ... where such removal is readily achievable.” 42 U.S.C. § 12182(b)(2)(A)(iv). The ADA grants a private right of action for injunctive relief to “any person who is being subjected to discrimination on the basis of disability.” 42 U.S.C. § 12188(a)(1).

i. Standing

A plaintiff’s standing to sue “is the threshold question” in every ADA case. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing determines “the power of the court to entertain the suit.” *Id.* Standing is based on the facts as they existed at the time the lawsuit was filed. *See, e.g., Friends of the Earth, Inc. v.*

² The Court did not consider the post-trial Affidavit of Julee Quarve-Peterson, filed on May 11, 2015.

Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190–91 (2000); *Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir.2000) (citation omitted).

To demonstrate standing, Wong has the burden of proving: (1) that he suffered an “injury in fact,” (2) that there was a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision. *Small v. Gen. Nutrition Companies, Inc.*, 388 F. Supp. 2d 83, 86 (E.D.N.Y. 2005) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). For the reasons stated below, the Court finds that Wong has standing to bring the current action.

1. Injury In Fact

An “injury in fact” is a harm that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Id.* at 560 (internal quotation marks and citations omitted). Wong must show that he “sustained or is immediately in danger of sustaining some direct injury as the result of the challenged ... conduct and [that] the injury or threat of injury [is] both real and immediate....” *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks and citations omitted). Courts considering ADA claims have found that plaintiffs who have encountered barriers at public accommodations prior to filing their complaints have standing to bring claims for injunctive relief if they show a plausible intention or desire to return to the place but for the barriers to access. *See Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1138 (9th Cir.2002); *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir.2001); *Steger*, 228 F.3d 889. Intent to return to the place of injury “someday” is insufficient. *Lujan*, 504 U.S. at 564. In the context of Title III of the ADA, however, plaintiffs need not engage in the “futile gesture” of visiting a building containing known barriers that the owner has no intention of remedying. *See* 42 U.S.C. § 12188(a)(1).³ In sum, Wong must at least prove actual knowledge of the

³ Nor does the Plaintiff need to visit a building containing barriers that the owner has attempted, but failed to remedy.

barriers and intent to visit the building in the imminent future but for those barriers. *Steger*, 228 F.3d at 892; *Small*, 388 F. Supp. 2d 83, 86-87.

In this case, Wong has established an injury in fact. Wong visited Chatterbox on November 20, 2013, and encountered two entrances that he was unable to traverse in his wheelchair. Since his original visit, Wong has revisited the restaurant, but found it was still inaccessible to him. Finally, Wong desires to return to Chatterbox in the near future once the barriers are remediated.

The Court rejects Defendants' argument that Wong cannot establish an injury in fact because he lacks the financial capacity to patronize Chatterbox. Congress enacted the ADA in 1990 to remedy pervasive and continuous discrimination against persons with disabilities. *See* 42 U.S.C. § 12101(a) and (b); *see PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-77 (2001). One purpose of the ADA is to alleviate the isolation felt by individuals with disabilities by increasing their access to public accommodations. S. Rep. No. 116, 101st Cong., 1st Sess. 10-11 (1989). It is both insulting and discriminatory to suggest that there is no way that Wong can find access to the minimal funds necessary through friends or otherwise to patronize Chatterbox.

2. There is a Causal Relationship Between the Injury and the Challenged Conduct

Chatterbox's inaccessible entrances are a barrier that is related to Wong's disability. Wong's disability requires him to use a wheelchair for mobility. Wong is unable to enter through the front entrance because of the high threshold step. Wong is also unable to traverse the patio entrance because (1) the patio gate is closed, (2) the patio door is locked, and (3) the interior bar stool(s) blocked the doorway.⁴

⁴ Defendants maintain that the patio gate is closed and the patio door is locked during non-business hours. Similarly, Defendants maintain that the stools are stacked near the doorway during non-business hours. However, the Plaintiff testified that he visited Chatterbox during normal business hours and observed these obstructions. The Court finds Plaintiff's testimony credible.

The Court is without sufficient information to find whether or not the newly remediated patio entrance contains a threshold too high for Wong to traverse in his wheelchair. On the one hand, Defendants maintain that they remediated the patio entrance on the eve of trial. On the other hand, Plaintiff testified that he visited the Defendant premises on the day before trial and observed the patio entrance had a change in level too high for him to traverse. (*See infra* for further discussion).

3. Wong's Injury will be Redressed by Compliance with this Order

Wong's injury will be redressed by Defendants complying with this order—an order favorable to Wong. Therefore, the third and final element of standing is satisfied.

4. Conclusion

In the final analysis, the ADA's language and policy leads the Court to conclude that Wong has standing to seek relief under the ADA. Congress intended that the ADA serve as a “clear and comprehensive national mandate” to eliminate discrimination against disabled individuals. 42 U.S.C. § 12101(b)(1). It envisioned “clear, strong, consistent, enforceable standards addressing discrimination against [disabled] individuals.” *Id.* at § 12101(b)(2). Further, the ADA is a remedial statute (*see Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir.1996)), and should be broadly construed to effectuate its purpose (*see Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

ii. Defendants Violated the ADA

In order to prevail on a violation of Title III of the ADA, Wong must establish that

1. He has a disability within the meaning of the ADA;
2. The Defendants own, lease or operate a place of public accommodation; and
3. The Defendants discriminated against Wong within the meaning of the ADA

See Argenyi v. Creighton Univ., 703 F.3d 441, 446, 447 (8th Cir. 2013); *Roberts v. Royal Atl. Corp.*, 542 F.3d 363, 368 (2d Cir. 2008); *Molski v. MJ Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007).

The parties do not dispute that (1) Wong has a disability within the meaning of the ADA and (2) the Defendants own, lease or operate a place of public accommodation. And, the Court finds in favor of Plaintiff for the third element—that the Defendants discriminated against Wong within the meaning of the ADA.

Discrimination Under the ADA

The ADA provides a private right of action for preventative relief, including an application for a permanent or temporary injunction or restraining order for “any person who is being subjected to discrimination on the basis of disability in violation of [Title III].” 42 U.S.C. §§ 12182(a)(1), 2000a–3(a). Section 12182(a) provides: “No 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.” *Id.* § 12182(a).

Under Title III of the ADA, “discrimination” specifically includes “failure to remove architectural barriers ... in existing facilities ... where such removal is readily achievable.” *Id.* § 12182(b)(2)(A)(iv). The affirmative obligation to remove architectural barriers applies to all places of public accommodation. 28 C.F.R. § 36.104. The provision giving rise to this affirmative obligation does not provide for an exception that is subject to when the premises was constructed or last modified. The Department of Justice promulgates the ADA Standards for Accessible Design (ADAAG). 28 C.F.R. § 36 App. D. The ADAAG “provide[s] valuable guidance for determining whether an existing facility contains architectural barriers.” *Pascutti v. N.Y. Yankees*, 87 F. Supp. 2d 221, 226 (S.D.N.Y. 1999).

In this case, Wong was discriminated against within the meaning of the ADA due to architectural barriers that rendered Chatterbox inaccessible to him because of his disability. In November 2013, the two public entrances to Chatterbox had changes in threshold height that exceeded the ADAAG’s

guidelines. ADAAG § 404.2.5 (“Thresholds, if provided at doorways, shall be ½ inch (13mm) maximum.”). In addition, the patio entrance gate was closed, the patio entrance door was locked, and the doorway was blocked by bar stools. Wong was unable to traverse such entrances due to his disability and his use of a wheelchair for mobility.

On April 12, 2013, Wong encountered similar obstructions at Chatterbox. The main entrance had a change in threshold that exceeded the ADAAG’s guidelines. The patio entrance gate was closed, the patio entrance door appeared to be locked, and the interior doorway was blocked by bar stools. In addition, although the Defendants maintain they remediated the patio entrance’s change in level, Wong credibly testified that it still appeared too high for him to traverse in his wheelchair.

Remediation is Readily Achievable

Remediation is “readily achievable” if plaintiff articulates “a plausible proposal for barrier removal, ‘the costs of which facially do not clearly exceed its benefits.’” *Roberts v. Royal Atl. Corp.*, 542 F.3d 363, 373 (2d Cir. 2008) (citations omitted). The ADA defines “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense.” *Id.* § 12181(9). The ADA further sets out several factors to be considered in determining whether removal of architectural barriers is readily achievable: (1) nature and cost of the action; (2) overall financial resources of the facility or facilities involved; (3) number of persons employed at such facility; (4) effect on expenses and resources; (5) impact of such action upon the operation of the facility; (6) overall financial resources of the covered entity; (7) overall size of the business of a covered entity with respect to the number of its employees; (8) the number, type, and location of its facilities; (9) type of operation or operations of the covered entity, including composition, structure, and functions of the workforce of such entity; and (10) geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity. *Id.* § 12181(9)(A)-(D); *see also First Bank Nat’l Ass’n v. FDIC*, 79 F.3d 362, 370 n. 8 (3d

Cir. 1996); *Colorado Cross Disability Coal. v. Hermanson Family Ltd. P'ship I*, 264 F.3d 999, 1002 (10th Cir. 2001).

In this case, remediation is readily achievable. The Department of Justice has indicated that installing an entrance ramp is considered to be a “modest measure” that is “likely to be readily achievable.” See 28 C.F.R. Pt. 36, App. C.⁵ In fact, Chatterbox maintains that the patio entrance was successfully remediated days before trial via a method known as “sandjacking.” The Court, however, is without sufficient information to find that the newly remediated patio entrance complies with the ADA. The Defendants failed to provide evidence or testimony regarding the running and cross slopes of the newly-remediated patio entrance. Therefore, the Court is unable to determine whether the newly-remediated patio entrance complies with the applicable ADAAG measurements.

Defendants nevertheless maintain that Plaintiff’s claims are moot because Plaintiff failed to meet his burden of proof that the new patio entrance does not comply with the ADA. The Court rejects the Defendant’s argument. First, it was the Defendants who remediated the patio entrance on the eve of trial, providing Plaintiffs with little to no opportunity to inspect the premises. Second, Defendants failed to provide sufficient evidence regarding the actual measurements of the new entrance’s threshold. Third, even if the Court accepts Defendants’ argument that Plaintiff’s claims are moot, the Court would still declare Plaintiff as the prevailing party because it wasn’t until Plaintiff brought this action (and the eve before trial) that Defendants remediated the patio entrance.

Finally, even if the new sandjacking technique created an ADA compliant threshold, the patio entrance is still inaccessible to Wong because on April 12, 2015, the patio gate was closed during business hours and stools in the interior of the doorway blocked the entrance. Reasonable people could

⁵ As an agency charged with implementing the ADA, the Department of Justice’s interpretation is entitled to substantial deference. *Bowles v. Seminole Rock Sand Co.*, 325 U.S. 410 (1945).

not disagree that remediating such obstructions are readily achievable. Yet, Defendants have failed to do so.

In sum, Plaintiff has established that Defendants have violated the ADA.

B. Defendants Violated the MHRA

Wong's Minnesota Human Rights Act (MHRA) claim can be treated as co-extensive with his ADA claim. *See* Minn. Stat.

363A.11 and Minn. Stat. § 363A.29; *See, e.g. Laumeyer v. Melrose Dairy Proteins, LLC*, No. 04-cv-2678-DWF-RLE, p. 6 n.1 (D. Minn. Sept. 13, 2005) (citing *Fenny v. Dakota, Minn. & Eastern R.R. Co.*, 327 F.3d 707, 711 n.5 (8th Cir. 2003); and *Roberts v. KinderCare Learning Ctrs., Inc.*, 86 F.3d 844, 846 n.2 (8th Cir. 1996)). Therefore, for the reasons stated above, the Court finds that Defendants have violated the MHRA.

III. Conclusion

Plaintiff is the prevailing party. Defendants must remediate the patio entrance to ensure (1) the change in threshold complies with the ADAAG guidelines, (2) the patio gate is open during business hours, (3) the patio door is unlocked during business hours and (4) the interior doorway is free from all obstructions and exterior obstacles.

The Court will address Plaintiff's requests for costs and attorney's fees pursuant to 42 U.S.C. § 12205, 28 C.F.R. § 36.505, and Minn. Stat. 363A.33, Subd. 7, as outlined in paragraphs 5 and 6 of the order above.

C.A.P.