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Civil Rights—Disabled Persons

ADA Requires Movie Theaters to Provide Closed Captioning, Audio Descriptions

The Americans with Disabilities Act requires movie theaters to provide closed captioning and audio descriptions to patrons with hearing and vision impairments, the U.S. Court of Appeals for the Ninth Circuit held April 30 (*Arizona ex rel. Goddard v. Harkins Amusement Enterprises Inc.*, 9th Cir., No. 08-16075, 4/30/10).

Closed captioning allows a theater to display captions to an individual viewer, while open captioning makes the captions viewable by the entire audience in a theater. A theater can provide audio descriptions, narration about key visual aspects of a movie, to individual patrons via use of a headset. The district court held that all three devices are not required as a matter of law.

Closed captioning and audio descriptions are ''auxiliary aids and services'' that the ADA requires movie theaters to provide, while open captioning is not required by the statute, the opinion by Judge Procter Hug Jr. said. The caveat to the holding is that the devices need not be provided under the statute if doing so would fundamentally alter the nature of the business or create an undue burden.

Linda M. Dardarian, partner, Goldstein Demchak Baller Borgen & Dardarian, Oakland, Calif., who represents the American Council of the Blind and the American Foundation for the Blind, which submitted an amicus brief in this case, told BNA May 6 that the district court opinion had all but written the auxiliary aids and services requirement out of the ADA. Now, after the Ninth Circuit's opinion, it is clear that the right to auxiliary aids and services does exist, she said.

Arizona and visually and hearing impaired customers of Harkins Amusement Enterprises Inc., which owns and operates movie theaters in Arizona, sued the company, claiming that its failure to provide open or closed captioning for hearing impaired customers and audio descriptions for visually impaired customers violates the ADA.

'Auxiliary Aids and Services.' The ADA prohibits discrimination by public accommodations ''on the basis of disability.'' It also provides that discrimination by a public accommodation includes the failure to ensure that the disabled are not treated differently ''because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.''

The statute defines ''auxiliary aids and services'' to include ''effective methods of making aurally delivered materials available to individuals with hearing impairments,'' ''effective methods of making visually delivered materials available to individuals with visual impairments,'' and ''other similar services and actions.''

Under federal regulations, auxiliary aids and services include qualified interpreters, ''computer-aided transcription services . . . closed caption decoders, open and closed captioning . . . videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments,'' and ''[q]ualified readers, taped texts, audio recordings . . . [and] other effective methods of making visually delivered materials available to individuals with visual impairments.''

According to the court, ''[m]ovie captioning and audio descriptions clearly are auxiliary aids and services.'' It said that ''[c]aptioning and audio descriptions are 'effective methods of making [aurally or visually] delivered materials available to individuals with [hearing and visual] impairments.' . . . Indeed, 'open and closed captioning' and 'audio recordings' are listed as examples of auxiliary aids and services in the regulations.''

The district court reasoned that captioning and descriptive narration do not come under the ADA purview because, under *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), the scope of the statute's prohibition against discrimination is limited to goods and services offered by an entity, the appellate court said. In other words, ''the ADA 'does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided,'' it explained.

The court said that ''[a]lthough *Weyer* may be controlling in the provision of goods and services generally, here Plaintiffs are seeking an auxiliary aid, which is specifically mandated by the ADA to prevent discrimination of the disabled.'' It added that the ''district court's reasoning effectively eliminates the duty of a public accommodation to provide auxiliary aids and services.''

Open Captions Out. Harkins argued that the Department of Justice's Preamble to Regulation of Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, which provides commentary on 28 C.F.R. part 36, defeats any

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requirement that it provide captioning or descriptive narration. The preamble specifically states that movie theaters ''are not required . . . to present open-captioned films.''

The regulation also stipulates that ''[t]his part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.''

Noting a House Report that suggests that courts should reconsider the auxiliary aids and services required by the ADA as new technologies are developed, the plaintiffs argued that DOJ's commentary has been superseded by new technology—open-caption projector systems. The court rejected this argument, saying that until the DOJ commentary is revised, open captions are not required under the ADA.

Closed Captions in. On the other hand, the ''commentary does not mention closed captioning, and the difference between open and closed captioning is more than linguistic,'' the court said. ''Only individual viewers see closed captions, whereas the entire audience sees open captions and is likely distracted by them. Thus, unlike open captioning, closed captioning is not foreclosed by the commentary,'' it said.

The court rejected Harkins's argument that two interpretations of the ADA in the Federal Register allow it to avoid providing any captioning. The first, 69 Fed. Reg. 44084-01, 44138, states that DOJ's regulations regarding the ADA ''do not require captioning of movies for persons who are deaf.'' The second, 73 Fed. Reg. 34508-01, 34530, says that, at the time it was written in 2008, DOJ was considering ''options under which it might require that movie theater owners and operators exhibit movies that are captioned for patrons who are deaf or hard of hearing''—the implication being that captioning was not already required.

The court said that these agency interpretations ''do not stand on the same footing'' as the commentary, and are ''of no consequence here.''

The court also rejected Harkins's argument that requiring it to provide captions and descriptive narration would ignore the word ''auxiliary,'' which connotes a subsidiary or supplementary relationship of one thing to another. The court said that the statute provides its own definition of auxiliary aids and services, and ''[c]losed captioning and descriptive narration fall comfortably within the scope of this definition.''

The court further noted that a movie theater's primary business is screening films, and that ''captions and descriptive narration are not so removed from a theater's usual business that they cannot be deemed 'subsidiary' or 'supplementary.' ''

The court concluded that its holding ''does not necessarily mean that Plaintiffs will be entitled to closed captioning and descriptive narration in Harkins's theaters. Harkins may still be able to avail itself of several defenses, such as the contention that the devices would fundamentally alter the nature of its services or constitute an undue burden.''

Chief Judge Alex Kozinski and Judge Richard R. Clifton joined the opinion.

'Slim Odds' Proving Defenses. According to Dardarian, there are only ''slim odds'' of the theater being able to demonstrate the ADA defenses. She noted that the court said that the nature of the movie theater business is presenting movies, and that providing captioning and narrative descriptions would have no impact on other patrons.

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As for the undue burden argument, Dardarian noted that during oral argument the judges observed that movie theaters are in the process of installing 3-D screens, which cost a lot more than the available technology for providing captioning and narratives for the hearing and vision impaired. She also pointed out that there were a number of hearing-impaired spectators at the oral argument for this case, and that when counsel for the theater started to address the undue burden issue, Kozinski noted the accommodations the court had made for them in the courtroom, and asked why, if the court could make those accommodations, the theaters could not.

Dardarian found the district court opinion troubling on many levels. In particular, she noted that if it was taken to its extreme, it would mean that restaurants would not have to provide braille interpretations of their menus for the vision impaired.

Review Unlikely. Stressing that the opinion was unanimous, Dardarian noted that the panel had a diverse ideological makeup, ranging from a conservative, to a moderate, to a liberal member. She also said that Kozinski was very active in trying to get the parties to settle their dispute—he even arranged a mediation after the oral argument and gave the parties time to try and work out their differences. With all this in mind, she said that the theater probably has little or no hope of en banc review.

Because there is currently not a circuit split on the issue, Dardarian suggested that the theater probably does not have a real shot of being granted a writ of certiorari to the U.S. Supreme Court.

According to Dardarian, most similar cases are brought in state court because state laws usually provide more protection than the ADA. Even so, she said that the movie theater industry thinks there is a lot at stake in these cases and has actively been trying to defeat them.

The issue may not be limited to movie theaters, either. Dardarian said that the Ninth Circuit's holding can potentially be applied to other venues, such as sports arenas and stadiums.

At bottom, Dardarian said that the opinion in this case makes clear that the different services exception to the ADA does not apply to auxiliary aids and services.

Counsel for Harkins and other members of the movie theater industry did not respond to BNA's requests for comment.

Arizona Assistant Attorney General Rose A. Daly-Rooney represented the state. Jose de Jesus V. Rico, Arizona Center for Disability Law, represented the patrons. John J. Egbert, Jennings Strouss & Salmon, Phoenix, represented Harkins.

BY BERNARD J. PAZANOWSKI

Full text at http://pub.bna.com/lw/0816075.pdf.