

2010 WL 4633992 (N.D.Cal.) (Trial Pleading)
United States District Court, N.D. California.

GALPERN,
v.
CITY OF BERKELEY, et al.

No. 3:10CV04689.
October 18, 2010.

Complaint for Violations of: (1) American with Disabilities Act (42 U.S.C. § 12131, et seq.); (2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794, et seq.); (3) California Government Code § 11135, et seq.; (4) Unruh Civil Rights-Act (Cal.Civil Code § 51, et seq.); (5) California Government Code § 4450, et seq.)

Note: This document was obtained from the above titled case. (PDF information below.)

Court: Superior Court of California, Alameda County.

Title: Andrew GALPERN, Plaintiff, v. CITY OF BERKELEY, a public entity; Tom Bates, in his office capacity as Mayor; Linda Maio, Darryl Moore, Max Anderson, Jesse Arreguin, Laurie Capitelli, Susan Wengraff, Kriss Worthington; Gordon Wozniak, in their office capacities as members of the Berkeley City Council Michael K. Meehan, in his official capacity as Chief of Police, City of Berkeley Does 1 through 100, Defendants.

Docket Number: No. 10536595.

Date: September 15, 2010.

Bruce Nye, SBN 77608, Mythily Sivarajah, SBN 252494, Adams | Nye | Becht LLP, 222 Kearny Street, Seventh Floor, San Francisco, California 94108-4521, Telephone: (415) 982-8955, Facsimile: (415) 982-2042, Attorneys for Plaintiff, Andrew Galpern.

JURY TRIAL DEMANDED

JURISDICTION AND VENUE

1. Jurisdiction and venue are proper in this Court because this action arises under California state law and federal statutes under which this Court has concurrent jurisdiction, Defendants are located in the County of Alameda, and the acts and omissions complained of herein have occurred and continue to occur in the County of Alameda.

2. To the extent that there is any Claims Statute requirement, Plaintiff has complied with applicable claims statutes.

INTRODUCTION

3. This lawsuit is brought against the City of Berkeley (“the City”), the Mayor, City Council Members and Chief of Police in their official capacities (collectively “Defendants”) to address systemic and pervasive discrimination against people with mobility disabilities with respects to the City’s sidewalks, crosswalks and other walkways (hereafter sometimes “pedestrian rights of way”) in an approximately six-block area of West Berkeley, specifically the pedestrian rights of way located in the area bounded by East Shore Highway, Fourth, Page and Gilman Streets (“the subject area”).

4. Plaintiff brings this action to remedy violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §12131, *et seq.* and its accompanying regulations (“ADA”), Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq.* and its accompanying regulations (“the Rehabilitation Act”), as well as analogous state statutes including California Government Code § 11135, California Civil Code § 51, *et seq.*, and California Government Code § 4450. Plaintiff seeks declaratory and injunctive relief pursuant to the above statutes, damages, attorneys’ fees and costs under applicable law.

5. The City’s pedestrian rights of way in the subject area are not readily accessible to and usable by Plaintiff Andrew Galpern or other persons with mobility disabilities. Given the numerous physical access barriers on the City’s pedestrian rights of way in the subject area, Plaintiff and other persons with disabilities must choose between avoiding activities and travel in the subject area, including visiting public facilities and friends in the subject area, or risking injury or death by traveling on or around inaccessible pedestrian rights of way. The lack of access to the City’s pedestrian rights of way in the subject area deprives Plaintiff and other people with mobility disabilities of their independence, and essentially relegates them to second-class citizen status.

6. For at least the past three years, the City’s pedestrian rights of way in the subject area have been subject to numerous physical access barriers created by the City allowing parking of cars and placing of debris on sidewalks and driveways. Indeed, the City has knowingly and deliberately allowed businesses and their employees in the subject area to use pedestrian rights of way as parking lots and material storage facilities, despite the City’s actual knowledge that by so doing, it was unlawfully depriving persons with mobility disabilities of their rights under the ADA and other disability rights laws.

7. The ADA, the Rehabilitation Act and their implementing regulations require City to conduct a self-evaluation of its “current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of [the Rehabilitation Act and the ADA] and; to the extent modification of any such services, policies, and practices is required, [City is required to] proceed to make the necessary modifications.”

8. For thirteen years, Defendants flagrantly violated the Rehabilitation Act and the ADA by ignoring the self-evaluation requirement. When City did undertake a self-evaluation between 2004 and 2006, it completely omitted a review of its obligation to enforce its parking laws so as to make its sidewalks equally accessible to persons with mobility disabilities. City made this omission from its self-evaluation despite its knowledge going back to at least 2004 that cars were being parked in Berkeley in a way that both violated state law, and deprived persons with mobility disabilities of equal access to sidewalks, while City’s traffic enforcement personnel informally and knowingly permitted this ongoing practice.

9. Accessibility of pedestrian rights of way goes to the heart of the purpose of the ADA and other disability rights laws, including integration and accessibility. Defendants provide and are responsible for maintaining these public pedestrian rights of way, which constitute an essential government program, service, and activity for residents and visitors alike. Yet, because Defendants have deliberately chosen not to enforce the City’s parking laws, this system of pedestrian rights of way is not accessible to persons with mobility disabilities in violation of multiple federal and state disability rights laws.

PARTIES

10. Plaintiff Andrew Galpern was a resident of the City of Berkeley from 1996 until 2005, and presently resides in the City of Albany, State of California. He continues to frequent the subject area on a regular basis and continues to rent and use the garage at his former residence in the subject area as a storage and work space. Plaintiff Galpern uses a wheelchair for mobility, and is a “qualified person with a disability” and a person with “a disability” within the meaning of all applicable statutes and regulations, including 42 U.S.C. § 12131(2), 28 C.F.R. § 35.104, 29 U.S.C. § 705(20(B) and California Government Code § 12926: Plaintiff Galpern regularly visits the subject area in connection with his volunteer work, to patronize businesses in the area and to access the garage he rents in the subject area.

11. The City is a local government entity with the responsibility of providing Plaintiff with access to its public facilities, programs, services, and activities. The City is responsible for constructing, maintaining, repairing, and regulating the system of pedestrian rights of way within the City. Presently, and at all times relevant to this Complaint, the City has been a public entity within the meaning of Title II of the ADA and has received federal financial assistance within the meaning of the Rehabilitation Act as well as state financial assistance within the meaning of Government Code Section 11135.

12. Defendant Tom Bates is the Mayor of the City. Linda Maio, Darryl Moore, Max Anderson, Jesse Arreguin, Laurie Capitelli, Susan Wengraf, Kriss Worthington and Gordon Wozniak are members of the Berkeley City Council. The Mayor and the City Council members are each, in their official capacity, legally responsible for ensuring compliance with federal and state law by the City. Michael K. Meehan is Chief of Police of the City of Berkeley, and is legally responsible, in his official capacity, for ensuring compliance with the City's traffic and parking-laws. The City, the Mayor, the City Council Members and the Chief of Police are collectively referred to as "Defendants."

FACTUAL ALLEGATIONS

13. Defendants have systematically failed, and are failing, to maintain accessible pedestrian rights of way in the subject area, in violation of federal and state law. Specifically, parking on sidewalks is prohibited by California Vehicle Code § 22500(f) and by Berkeley Municipal Code §§ 14.48.020 and 14.24.040. Driving on a sidewalk or blocking a sidewalk with a vehicle is prohibited by Berkeley Municipal Code § 14.24.040. Furthermore, parking on public sidewalks and storing materials on public sidewalks constitutes a public nuisance in violation of California Civil Code § 3480. Nonetheless, Defendants have made a conscious and deliberate decision not to enforce the law in the subject area and have permitted, and continue to permit, unlawful blockage of the sidewalks by vehicles and stored materials and debris.

14. While the blockage of sidewalks is an inconvenience to anyone seeking to use them, it creates particular obstacles and difficulties, and causes injury which is different in kind for persons using wheelchairs, such as Plaintiff Galpern. This is because, while persons lacking mobility disabilities can maneuver around obstructions or step off the curb when such obstructions are encountered, persons using wheelchairs, such as Plaintiff Galpern, are effectively deprived the use of a sidewalk for the entire block where any obstruction is permitted.

15. For the past one year, and for the past three years, Plaintiff has regularly been deprived of the use of sidewalks by the Defendants' violations of the law and refusal to enforce the laws as alleged above. When the sidewalks have been blocked, Plaintiff has been able to traverse the subject area only by maneuvering his wheelchair in the streets, and has had to carefully roll over the broken, cracked and bumpy portions of such streets. He often has had to battle to keep his balance and avoid toppling in the streets while at the same time competing with forklifts and trucks that routinely use the streets in the subject area.

16. Plaintiff has repeatedly complained to Defendants, orally, via e-mail and by letter, about the sidewalk obstructions. Berkeley Police Department personnel have admitted to him that they have known about the problem for years, but have stated that they accommodated parking on the sidewalk by local business employees to allow them close-in parking near their places of business.

FIRST CAUSE OF ACTION

(The Americans with Disabilities Act 42 U.S.C. § 12101 et seq.)

Against All Defendants

17. Plaintiff incorporates by reference each and every allegation contained in the foregoing paragraphs.

18. Congress enacted the ADA upon finding, among other-things, that "society has tended to isolate and segregate individuals with disabilities" and that such forms of discrimination continue to be a "serious and pervasive social problem." 42 U.S.C. § 12101 (a) (2).

19. In response to these findings, Congress explicitly stated that the purpose of the ADA is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)

(1)-(2).

20. Title II of the ADA provides in pertinent part: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

21. At all times relevant to this action, the City is and was a “public entity” within the meaning of Title II of the ADA and provides a program, service or activity to the general public.

22. At all times relevant to this action, Plaintiff is and was a qualified individual with disabilities. within the meaning of Title II of the ADA and met the essential eligibility requirements for the receipt of the services, programs, or activities of the City. 42 U.S.C. § 12131.

23. Defendants are mandated to operate each program, service, or activity “so that, when viewed in its entirety, it is readily accessible to and useable by individuals with disabilities.” 28 C.F.R. § 35.150; see also 28 CFR. §§ 35.149 & 35.151. Pedestrian rights of way themselves constitute a vital public-program, service, or activity under Title II of the ADA. 28 C.F.R. § 35.104; *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir., 2002).

24. The regulations implementing Title II of the ADA provide that a public entity must maintain the features of all facilities required to be accessible by the ADA. 28 C.F.R. § 35.133. Facilities required to be accessible include roads, walks, and passageways. 28 C.F.R. § 35.104.

25. Defendants have violated and continue to violate the ADA by failing to enforce City and State codes and ordinances or otherwise prohibit parking or the unlawful blockage of sidewalks in the subject area and thereby denying plaintiff the benefits of the City’s pedestrian rights of way.

26. Defendants have violated and continue to violate the ADA by-failing to timely respond to and remedy complaints about the said obstructions to the City’s pedestrian-rights of way.

27. Defendants committed the acts and omissions alleged herein with intent and/or reckless disregard of Plaintiff’s rights.

28. As a direct and proximate result of the aforementioned acts, Plaintiff has suffered, and continues to suffer humiliation, hardship and anxiety, due to Defendants’ failure to address accommodations, modifications, services and access required for Plaintiff’s disabilities.

29. Because Defendants’ discriminatory conduct is ongoing, declaratory and injunctive relief are appropriate remedies.

30. Pursuant to 42 U.S.C. § 12133, Plaintiff is entitled to compensatory damages and to declaratory and injunctive relief as well as reasonable attorneys’ fees and costs incurred in bringing this action.

SECOND CAUSE OF ACTION

(Section 504 of the Rehabilitation Act 29 U.S.C. § 794 et seq.)

Against All Defendants

31. Plaintiff incorporates by reference each and every allegation contained in the foregoing paragraphs.

32. Section 504 of the Rehabilitation Act of 1973 provides in pertinent part: “No otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance, ...” 29 U.S.C. § 794.

33. Plaintiff is otherwise qualified to participate in the services, programs, or activities that are provided to individuals in the

City. See 29 U.S.C. § 794(b),

34. The City is a direct recipient of federal financial-assistance sufficient to invoke the coverage of Section 504, and has received such federal financial assistance at all times relevant to the claims asserted in this Complaint.

35. Defendants have violated and continue to violate the Rehabilitation Act and the regulations promulgated thereunder by excluding Plaintiff from participation in, denying Plaintiff the benefits of, and subjecting Plaintiff based solely by reason of his disability to discrimination in the benefits and services of the use of the City's pedestrian rights of way as alleged hereinabove.

36. Defendants committed the acts and omissions alleged herein with intent and/or reckless disregard of Plaintiff's rights.

37. As a direct and proximate result of the aforementioned acts, Plaintiff has suffered and continues to suffer humiliation, hardship, and anxiety due to Defendants' failure to address accommodations, modifications, services and access required for his disabilities.

38. Because Defendants' discriminatory conduct is ongoing, declaratory and injunctive relief are appropriate remedies. 39. Pursuant to 29 U.S.C. § 794(a), Plaintiff is entitled to compensatory damages, to declaratory and injunctive relief and to recover from Defendants the reasonable attorneys' fees and costs incurred in bringing this action.

THIRD CAUSE OF ACTION

(California Government Code § 11135)

Against All Defendants

40. Plaintiff incorporates by reference each and every allegation contained in the foregoing paragraphs:

41. Section 11135(a) of the California Government Code provides in pertinent part; "No person in the State of California shall, on the basis of ... disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state."

42. The City is funded directly by the State of California and receives financial assistance from the State of California sufficient to invoke the coverage of Government Code Sections 11135, et seq. The City was the recipient of such funding and financial assistance at all times relevant to the claims asserted in this Complaint.

43. Defendants have violated and continue to violate California Government Code § 11135 by unlawfully denying plaintiff the benefits of and unlawfully subjecting plaintiff to discrimination under the City's programs and activities and for the reasons set forth above.

44. Defendants have refused and failed to provide Plaintiff with full-and equal access to their facilities, programs, services and activities as required by California Government Code Sections 11135, et seq.

45. As a direct and proximate result of the aforementioned acts, Plaintiff has suffered, and continues to suffer humiliation, hardship and anxiety, due to Defendants' failure to address accommodations, modifications, services and access required for Plaintiffs' disabilities.

46. Because Defendants' discriminatory conduct is ongoing, declaratory and injunctive relief are appropriate remedies.

47. Plaintiff is also entitled to reasonable attorneys' fees and costs in filing this action.

FOUKTH CAUSE OF ACTION

Unruh Civil Rights Act

(California Civil Code § 51 et seq.)

Against All Defendants

48. Plaintiff incorporates by reference each and every allegation contained in the foregoing paragraphs.

49. California Civil Code § 51(b) provides in pertinent part that “All persons within the jurisdiction of this state are free and equal, and no matter what their ... disability or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”

50. Pursuant to California Civil Code § 51(f), a violation of the ADA also constitutes a violation of California Civil Code §51 et seq.

51. Defendants own, operate and/or lease business establishments within the meaning of the Unruh Civil Rights Act. City facilities are public accommodations whose facilities and programs are open to the general public and are operated for the public benefit. The City provides its facilities, programs and services to the public, enters into business contracts with a myriad of business entities, and markets and promotes its programs, services, facilities and activities to the general public. The City is a “business establishment” and pedestrian rights of way are “accommodations, advantages, facilities, privileges, or services” within the meaning of California Civil Code § 51 et seq.

52. Defendants and their agents and employees have violated and continue to violate California Civil Code § 51 et seq. by denying Plaintiff full and equal access to the City’s pedestrian rights of way comparable to the access that it offers to others and for the reasons set forth above, including violating the ADA.

53. The actions of Defendants constitute intentional discrimination against persons with disabilities and violate the Unruh Civil Rights Act, Cal. Civ. Code §§ 51, et seq., in that physically disabled persons have been and are denied full and - equal accommodations, advantages, facilities, privileges, and services provided to non-disabled persons.

54. As a direct and proximate result of the aforementioned acts, Plaintiff has suffered, and continues to suffer, humiliation, hardship and anxiety, due to Defendants’ failure to address accommodations, modifications, services and access required for Plaintiffs-disabilities.

55. Pursuant to California Civil Code § 52.1 (f), Defendants are liable to Plaintiff for up to three times his actual damages, but no less than \$4,000 for every offense of California Civil Code § 51 et seq.

56. Because Defendants’ discriminatory conduct is ongoing, declaratory and injunctive relief are appropriate remedies.

57. Plaintiff is also entitled to reasonable attorneys’ fees and costs in filing this action.

FIFTH CAUSE OF ACTION

Denial of Equal Access of Publicly Funded City Facilities

(California Government Code § 4450, et seq.)

Against All Defendants

58. Plaintiff incorporates by reference each and every allegation contained in the foregoing paragraphs.

59. The City's facilities are publicly funded and intended for use by the public within the meaning of California Government Code § 4450, et seq.

60. Defendants and their agents and employees have-violated and continue to violate California Government Code § 4450, et seq., and regulations implemented pursuant thereto, by constructing, altering, installing, maintaining, and/or operating their pedestrian rights of way in violation of disability access requirements and for the reasons set forth above. The aforementioned acts and omissions of Defendants constitute a denial of equal access to and use of the City's pedestrian rights of way and caused Plaintiffs to suffer deprivation of their civil rights.

61. As a direct and proximate result of the aforementioned acts, Plaintiff has suffered, and continues to suffer, humiliation, hardship and anxiety, due to Defendants' failures to address accommodations, modifications, services and access required for Plaintiff's disabilities.

62. Because the City's discriminatory conduct is ongoing, declaratory and injunctive relief are appropriate remedies.

63. Plaintiffs are also entitled to reasonable attorneys' fees and costs in-filing this action.

SIXTH CAUSE OF ACTION

Nuisance

(California Civil Code §3479)

Against All Defendants

64. Plaintiff incorporates by reference each and every allegation contained in the foregoing paragraphs.

65. By failing and refusing to enforce the state laws and city ordinances against parking on sidewalks, as hereinabove alleged, Defendants have created a public nuisance, in that they have caused a condition that is injurious to health and that obstructs the free use of property, interfering with the comfortable enjoyment of life or property.

66. The condition created by Defendants affects a substantial number of people at the same time.

67. An ordinary-person would be reasonably-annoyed or disturbed by the condition.

68. The seriousness of the harm outweighs the social utility of Defendants' conduct in failing and refusing to enforce the law.

69. Plaintiff has not consented to the condition.

70. Plaintiff has suffered harm that is different in kind than that suffered by the general public, in that while the general public will reasonably be annoyed or disturbed by the condition, Plaintiff, as a person with a mobility disability who relies on the use of a wheel chair for transport, is physically endangered and subject to severe impairment of his ability to freely travel in the subject area.

71. As a direct and proximate result of the aforementioned acts, Plaintiff has suffered, and continues to suffer, humiliation, hardship and anxiety, due to Defendants' conduct in refusing to enforce the City's laws and its continued creation of a public nuisance.

72. Because the City's discriminatory conduct is ongoing, declaratory and injunctive relief are appropriate remedies.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment as follows:

1. A declaration that Defendants' conduct as alleged herein has violated, and continues to violate, Title II of the Americans with Disabilities Act; Section 504 of the Rehabilitation Act of 1973; California Government Code §§ 11135 and 4450; and California Civil Code § 51;
2. Issuance of preliminary and permanent injunctions requiring each Defendant to undertake remedial measures to mitigate the effects of Defendants' past and ongoing violations of Title II of the ADA, Section 504 of the Rehabilitation Act, California Government Code §§ 11135 and 4450; and California Civil Code § 51; and the regulations promulgated under each of these statutes. At a minimum, Defendants should be enjoined to take the following actions:
 - a. Develop and implement a plan to ensure that the City's pedestrian rights of way in the subject area when viewed in their entirety are readily accessible to and useable by individuals with disabilities;
 - b. Develop and implement plans to ensure that all existing City facilities in the subject area comply with the more stringent of either the Americans with Disabilities Act Accessibility Guidelines or Title 24 of the California Code of Regulations, including, without limitation, enforcement of all parking laws insofar as is necessary and appropriate to ensure that Plaintiff and other persons with mobility disabilities are allowed to use all pedestrian rights of way in the subject area on an equal basis;
3. That this Court retain jurisdiction of this case until Defendants have fully complied with the Orders of this Court;
4. An award of damages according to proof and to the extent provided by law;
5. An award of Plaintiff's attorneys' fees and costs, as provided by statute; and
6. Such other relief as the Court finds just and proper.

DATED: September 1, 2010

ADAMS | NYE | BECHT LLP

By: <<signature>>

BRUCE NYE

Attorneys for Plaintiff

ANDREW GALPERN

DEMAND FOR JURY TRIAL

Plaintiff Andrew Galpern hereby demands a trial by jury.

DATED: September 1, 2010

ADAMS | NYE | BECHT LLP

By: <<signature>>

BRUCE NYE

Attorneys for Plaintiff

ANDREW GALPERN