The ADA double standard for sidewalk accessibility

Before blocking access to the disabled, an entity needs to look for simple, low-cost alternatives to accomplish the accommodation

By Doreen Kushner

Bill had been battling dementia for years. This once well-respected pharmacist was now too confused to even manage his own medications. While just a few years earlier Bill was a local tennis champion, a cane had now become his constant companion. But despite his disabilities, Bill was determined to attend his grandson's wedding. This joyous event was to be the highest point in the twilight of Bill's life – but the City of Culver City put up a blockade.

On the day of Culver City's annual vintage car show, the largest public street happening of the year, the show organizers decided that it was ok, just this once, to block the only handicap curb ramp leading to the front door of Bill's hotel. The City of Culver City allowed a vendor to straddle the access ramp with tables, vehicles and displays. So on this day, when Bill returned to his hotel to dress for wedding festivities, and seeing no curb ramp, he was forced to negotiate the curb. But Bill did not make it. He tripped and fell face first onto the concrete sidewalk. There he lay prone and bleeding until an ambulance arrived.

Surely, the City of Culver City violated Title II of the Americans with Disabilities Act, (hereinafter "ADA"), which prohibits discrimination by public entities. (42 U.S.C. 12131, *et seq.*) After all, they eliminated Bill's equal access to the public sidewalk in front of his hotel. But the U.S. District Court for the Central District of California disagreed. It concluded that, even though able-bodied persons were able to take a direct route from the street to the hotel, Bill should have wandered nearly the length of two football fields to use an alternate ramp that he didn't even know existed. This seemed ludicrous. The very goals of the ADA include assuring independent living for disabled persons. (42 U.S.C. 12101(a)(7).) Yet, without assistance, Bill's dementia would have certainly caused him to get lost in the crowds.

Was it ok – just this one time? Or did this public entity fail to acknowledge the rights of disabled persons to enjoy the event without needing to choose between searching for unknown access and taking the risk of serious injury? We sought to find out how this obstruction, albeit temporary, held up against the ADA. Ultimately, the Ninth Circuit Court of Appeals elucidated an ADA double standard for accessibility and thereupon reversed District Court's grant of summary judgment. (*Cohen v. City of Culver City,* 754 F3d 690, 701 (9th Cir. 2014).)

The first standard – marginally longer alternative route

The *U.S. Code of Federal Regulations* (CFR), which effectuates the ADA, clearly placed the burden on the City to prove that its activities and services (*Cohen v. City of Culver City,* 754 F3d 690, 701 (9th Cir. 2014) were "readily accessible" to disabled individuals in the "most integrated setting appropriate. (*Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 (1st Cir. 2000) (citing 28 C.F.R. § 35.150(b)(1)), 6.) And yet despite numerous indicators to the contrary, the U.S. District Court for the Central District of California found that the City had met its burden. The Court based its decision on the lenient "marginally longer alternative route" standard. This standard instructs that alternative routes to the sidewalk are acceptable where disabled individuals need only to travel a "marginally longer route." (*Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1339 n. 11 (S.D. Cal. 1997), aff'd, 172 F.3d 876 (9th Cir. 1999) (citing ADA Technical Assistance Manual II-5.3000). The City argued that if Bill had just set out to find another ramp, he would have found an alternate access way. Yet the reality was that mentally-impaired Bill might not have even remembered what he was looking for. He would surely have gotten lost among the hordes of people, vendor booths and vehicles parked everywhere, especially since the City posted no signs to direct him to his hotel via another route.

The Court's reliance on this "marginally longer alternative route" standard is problematic. This is because the ADA does not give public entities unfettered discretion to provide mere physical access. (*Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 857 (10th Cir. 2003).) The ADA requires more. Access must be "meaningful." (348 F.3d at 857.) In *Chaffin v. Kansas State Fair Bd.*, the 10th Circuit Court considered whether a seat in an overly crowded wheelchair section of a fair grandstand violated the ADA. (*Id.* at 854.) The Court held that, although the plaintiff had physical access to a seat, he was denied meaningful equal access because he could not reach the restroom or food vendors through the crowds. (*Ibid.*) Similarly, Bill could not reach his hotel safely without searching through the obstacle course that was the car show.

While public entities are not required to construct a curb ramp at every intersection (*Schonfeld* at 1339 n. 11 (S.D. Cal. 1997).), they must give priority to walkways serving places of accommodation. (28 C.F.R. § 35.150(d)(2)) Indeed, Bill's hotel was a per se place of public accommodation. (42 U.S.C. 12181(7)(A)) Additionally, ramps must be available "where necessary to provide access along highly-trafficked routes." (*Schonfeld* at 1341.) On this wedding day, a continuous stream of pedestrians, including Bill's relatives and friends, were seen taking the most direct route to the hotel by walking around the obstructed curb ramp and stepping up the curb to the sidewalk. Lastly, where a curb ramp is blocked, the CFR requires posted signage directing disabled persons to a usable ramp. (28 C.F.R. § 35.163) The City of Culver City posted no signs whatsoever. How does the ADA reconcile these contradictions with application of the "marginally longer alternative route standard"? We asked the Ninth Circuit Court of Appeals.

The second standard – Structural impracticability

The ADA aims to "provide clear, strong, consistent, enforceable standards to eliminate discrimination in community life against individuals with disabilities"– not to reduce or even minimize, but to eliminate. (42 U.S.C. § 12101(b)(1-2); *Parker v Universidad de Puerto Rico*, 225 F.3d 1, 4, 8 (1st Cir. 2000)) But what about the above unexplained inconsistencies presented by the "marginally longer alternative route" standard? In *Cohen v. City of Culver City* the Ninth Circuit Court considered this Catch-22. Bingo! In its opinion, the Court unearthed and illuminated a second standard – "structural impracticability." (*Cohen v. City of Culver City*, 754 F3d 690, 696 (9th Cir. 2014).

The Court explained that the very lenient "marginally longer alternative route" standard applies *only where alterations are made for the purpose of bringing a site into compliance with the ADA*. (754 F3d 690 at 697.) In Bill's case however, the sidewalk and curb ramp were already compliant. (*Ibid*) The City did not modify the curb ramp to satisfy the ADA. (*Ibid*) Instead, the City took away the ADA-required curb ramp in order to maximize vendor space in the show's center. (*Id.* at 697-98.)

The Court, in this landmark decision, explained that the test for ADA compliance where a modification is made for reasons unrelated to ADA requirements is a strict one. It asks: *Was there a simple, low-cost, reasonable measure available to accommodate persons with disabilities?* (*Id.* at 700.) *Or were all available measures structurally impracticable?* In Bill's case, the Court decided that a jury could have concluded that the City of Culver City failed to take any of several practical measures available. (*Id.* at 700-01) For instance, the City could have reviewed and approved the placement of the vendors' displays before the car show. (*Ibid*.) The City could have required vendors to avoid positioning their displays in front of disabled access ramps, or to set their displays back a few feet from the curb to allow disabled pedestrians to pass. (*Id at 701*.) The City could have posted a temporary sign in front of this particular display directing pedestrians to an alternative curb ramp. (*Ibid.*) The City took none of these modest measures to avoid the type of injuries Bill suffered on this day of his grandson's wedding. The case ultimately settled for $50,000, three months after Bill passed away from the complications of dementia.

Kushner

Doreen L. Kushner is a solo practitioner in Huntington Beach where she is a relentless advocate of civil rights for the disabled community. She is admitted to the bars of California, as well as the federal courts, including the Ninth Circuit Court of Appeals. Ms. Kushner is also certified by the U.S. Veterans Administration to represent those who strive to keep us free. Ms. Kushner can be reached at KushnerLaw@socal.rr.com.