

by Wayne C. Arnold and Lisa D. Herzog

How Many Lawsuits Does It Take To Declare An ADA Plaintiff Vexatious? Apparently More Than Judge Rafeedie Thought!

Robert, a disabled individual using a wheelchair, parks his van in a van-accessible disabled parking space at a shopping center. He notices that the disabled parking space signage is mounted too high and that the ramp to the store entrance seems a little steep. Once inside the store, Robert notices that the service counter seems tall. Robert tells the salesperson he can't see the point of sale display so the salesperson hands the machine to Robert. Robert uses the restroom and observes that there is no disabled signage on the restroom door. After leaving the retail store, Robert sues the retail store for discrimination pursuant to Title III of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101, et seq. ("ADA")) and related California statutes, claiming that he encountered architectural barriers during his visit to that store.

The retail store retains counsel and, after investigation, discovers that Robert, always represented by the same law firm, has filed over 300 lawsuits in the California federal courts under the ADA for similar complaints. The retail store's lawyer explains the costs of litigating the complaint versus the \$12,000 settlement demand. The retail store asks if Robert could be considered a vexatious litigant for filing so many lawsuits.

When discussing the flood of ADA lawsuits in Federal District Courts, which are amounting to a "cottage industry" in California, defense lawyers are often asked, "Why don't you have them declared vexatious litigants?" Well, that task is easier said than done – although many defense lawyers have tried.

Judge Rafeedie's ruling in *Molski v. Mandarin Touch Restaurant* (347 F. Supp. 2d 860 (C.D. Cal. 2004)) ("Molski I") gave ADA defense lawyers new hope of labeling other serial ADA plaintiffs and their counsel (in some cases filing hundreds of lawsuits in California federal courts) as vexatious litigants. California Federal District Court judges have been reluctant

to follow Judge Rafeedie's ruling and have refused to label ADA plaintiffs as vexatious, indicating that the number of lawsuits filed does not mean that an individual case does not have merit.

ADA Public Accommodation Litigation – A Growing Trend In California:

Title III of the ADA prohibits discrimination against individuals with disabilities in public accommodations. (42 U.S.C. § 12181, et seq. ("Title III").) To enforce Title III, the ADA contains both a private right of action (42 U.S.C. § 12188(a)) and a right of action for the Attorney General (42 U.S.C. § 12188(b)). The Attorney General may seek monetary damages on behalf of a plaintiff (42 U.S.C. § 12188(b)(2)(B)), but only injunctive relief, attorneys' fees, and costs are available under a plaintiff's private action. (42 U.S.C. § 12188(a)(1).) Because a violation

of the ADA also violates the California's Unruh Civil Rights Act (Cal. Civil Code § 51(f)) and the California Disabled Persons Act (Cal. Civil Code § 54(c)), plaintiffs can retain federal jurisdiction over these state claims by suing for injunctive relief under the ADA and adding the state law claims under the Unruh Civil Rights Act and/or the Disabled Persons Act for monetary damage claims.

Federal District Courts in California are dealing with increasing numbers of ADA Title III lawsuits. Many of these lawsuits are brought by a few plaintiffs represented by counsel specializing in Title III ADA claims. A sampling of ADA lawsuits, drawn from the U.S. Party/Case Index (PACER) Website for the District Courts of California, reveals the following numbers of ADA suits brought by individual plaintiffs: 223; 226; 198; 170; 199; 197; 80; 130; 993; 382; 288.

Some District Courts have become skeptical of these ADA Title III lawsuits by calling them a "cottage industry" driven by attorneys' fees claims. (See *Molski v. Mandarin Touch Rest.*, supra, 347 F. Supp. 2d at 863; *Doran v. Del Taco*, 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005); *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1280 (M.D. Fla. 2004); *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004).)

Defense lawyers have argued with some success that overburdening the federal courts with voluminous ADA lawsuits over minor deviations from ADA requirements (*White v. Divine Investments, Inc.* 2005 U.S. Dist. Lexis 23018 at **3, 18 (E.D. Cal. 2005)), filing hundreds of similar ADA suits sharing similar pleadings, discovery requests, and motions (*White v. Save Mart Supermarkets*, 2005 U.S. Dist. Lexis 24386 at *6 (E.D. Cal. 2005)), and asserting additional alleged barriers during the course of the case without amending the complaint (*Pickern v. Pier 1 Imports, et al.*, 339 F. Supp. 2d 1081, 1088-1091 (E.D. Cal., Sept. 30, 2004), affirmed by 2006 U.S. App. Lexis 9532 (9th Cir. 2006)) are merely ways to enrich plaintiffs and their counsel.

Plaintiffs respond that access to the courts is a basic constitutional right that should only be curtailed under the most exigent of circumstances. Plaintiffs assert that, by forcing businesses to comply with the ADA, they are doing a public service. They cite enforcement mechanisms for the ADA enacted by Congress "to provide a clear and comprehensive national man-

date for the elimination of discrimination against individuals with disabilities [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” (42 U.S.C. § 12101(b)(1) and (2).) They further argue that, in the case of a civil rights act, like the ADA, where private enforcement suits are the primary method of obtaining compliance with the act and where Congress defines discrimination broadly, Article III standing should be construed as broadly as possible. (*Wilson v. Pier I Imports (US), Inc.*, 413 F. Supp. 2d 1130, 1133 (E.D. Cal. 2006).)

All of these arguments have merit, and the federal courts must balance the interests of the parties while upholding the intent of the ADA and its protections of equal access for physically challenged Americans.

Vexatious Litigant Standard – Federal Court’s Analysis:

A party’s right of access to federal court is not absolute or unconditional. (*Green v. Warden*, 699 F. 2d 364, 369 (7th Cir. 1983).) A “vexatious suit” is a “lawsuit instituted maliciously and without good cause.” (Blacks Law Dictionary, 1596 (8th ed. 2004).)

According to federal case law and statutes, a court can prohibit a vexatious litigant from continuing to file actions in federal court. In dealing with abusive litigants, the federal courts possess “inherent power . . . to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances.” (*Johns v. Town of Los Gatos*, 834 F. Supp. 1230, 1232 (N.D. Cal. 1993) (quoting *Delong v. Hennessey*, 912 F. 2d 1144, 1147, (9th Cir. 1990).) The Ninth Circuit has noted that “frivolous claims by a litigious plaintiff may be extremely costly to defendants and can waste valuable court time.” (*Id.* (quoting *De Nardo v. Murphy*, 781 F.2d 1345, 1348 (9th Cir. 1986)).) “Under the inherent power of 28 USC § 1651(a), enjoining litigants with abusive and lengthy histories is one such form of restriction that the District Court may take.” (*Id.* (quoting *Delong v. Hennessey*, *supra*, 912 F. 2d at 1147).)

In deciding whether to restrict a litigant’s access to the court, “[u]ltimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass

other parties.” (*Safir v. United States Lines, Inc.*, 792 F. 2d 19, 23 (2nd Cir. 1986).) The federal courts conduct a five factor analysis including: “(1) the litigant’s history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant’s motive in pursuing the litigation” (does the litigant have an objective good faith expectation of prevailing – looking at plaintiff’s overall pattern of behavior and form complaints with identical allegations); “(3) whether the litigant is represented by counsel” (courts are less likely to protect plaintiffs represented by counsel); “(4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts or their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.” (*Molski v. Mandarin Touch Rest.*, *supra*, 347 F. Supp. 2d at 864 (citing *Safir v. United States Lines, Inc.*, *supra*, 792 F. 2d at 23).)

As a means of stemming abusive litigation, the Court may issue an order requiring a litigant to seek permission from a District Court prior to filing future suits. (*Id.*) A pre-filing review order may be imposed when four conditions are met: “(1) plaintiff is given adequate notice to oppose

a restrictive pre-filing order before it is entered; (2) the court provides an adequate record for review, including a list of all the cases and motions that led the court to conclude that a vexatious litigant order was needed; (3) the court makes substantive findings as to the frivolous or harassing nature of the litigant’s actions; and (4) the court order is narrowly tailored.” (*Jobs v. Town of Los Gatos*, *supra*, 834 F. Supp. at 1232. (citing *Delong v. Hennessey*, *supra* 912 F. 2d at 1147-1148).)

Judge Rafeedie’s Ruling in Molski v. Mandarin Touch

In *Molski I*, plaintiff Jarek Molski alleged that he had visited the Mandarin Touch restaurant and encountered architectural barriers resulting in discrimination and personal injury. Defendant Mandarin Touch asked the Central District Court of California to declare plaintiff Jarek Molski a vexatious litigant. Molski had filed approximately 400 ADA lawsuits – only one of which was actually litigated on the merits of the case. (*Molski v. Mandarin Touch Restaurant*, 359 F. Supp. 2d 924, 933 (C.D. Cal. 2005)) (“*Molski II*”). The types of architectural barriers asserted in each complaint were almost



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identical and each complaint sought injunctive relief and attorneys' fees under the ADA and damages under California statutes. (*Molski v. Mandarin Touch Restaurant, supra*, 347 F. Supp. 2d at 862-863.)

In *Molski I*, the District Court stated: "The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business

of the violations, and attempting to remedy the matter through "conciliation and voluntary compliance,"... a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter." (*Id.* at 863.)

Judge Rafeedie held that plaintiff Jarek Molski was a vexatious litigant and ordered him

to obtain leave of court before filing any other claims under the ADA. (*Id.* at 868.) The Court stated that such a requirement would prevent abuse of the ADA by "serial plaintiffs" like Molski (*Id.* at 863-868.) and concluded that Molski's voluminous suits were filed "maliciously, in order to extract cash settlements," that Molski had acted in bad faith for the improper purpose of extorting a settlement, and that Molski caused needless expense to defendants and to the courts. (*Id.* at 864-866.)

The Court noted that shotgun litigation used as means to extort attorneys' fees rather than increasing accessibility undermines the ADA. The issue was not whether the businesses sued were in compliance with the ADA (noting that in fact, many probably were not); instead the issue was whether Molski was filing these actions for the improper purpose of extorting settlements. (*Id.* at 865.) The Court found that, while an individual case might appear credible, there was "an overall pattern of behavior that demonstrates Molski's motivation is ultimately to extract a cash settlement." (*Id.* at 866.)

Subsequently, in *Molski II*, Judge Rafeedie ordered The Frankovich Group, Molski's lawyers, to obtain leave of court before filing **any** new Title III ADA complaints in the Central District of California. Finally, in *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042 (C.D. Cal. 2005) ("*Molski III*"), Judge Rafeedie dismissed Molski's claims for lack of standing because Molski had only visited defendant's restaurant once, lacked a history of past patronage negating future injury, and lived over one hundred miles away. Despite this dismissal, the District Court refused to award defendants attorneys fees as the prevailing party or as Rule 11 sanctions because summary judgment was granted on standing grounds, and there was no judgment on the merits. (*See Molski v. Mandarin Touch Rest.*, 2005 U.S. Dist. Lexis 40260 at **2-3 (C.D. Cal. 2005); *Molski v. Mandarin Touch, Rest.*, 2006 U.S. Dist. Lexis 6102 (C.D. Cal. 2006).)

Post-Molski Decisions

Subsequent to the *Molski* trilogy, District Courts have been reluctant to follow Judge Rafeedie's lead, and no additional ADA plaintiffs have been declared vexatious litigants in California federal courts.

Nonetheless, the labeling of Mr. Molski as a vexatious litigant was a factor in the dismissal of his complaints in two other federal court suits.

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In *Molski v. EOS Estate Winery* (2005 U.S. Dist. Lexis 39936 (C.D. Cal. 2005)), the Central District Court declined to exercise supplemental jurisdiction over plaintiff's state law claims because these state law claims raised novel and complex issues of state law regarding damages which substantially predominated over Molski's ADA Title III federal claims. The Court cited Molski's status as a vexatious litigant as one factor in its decision to dismiss his complaint. (*Id.* at 13-14.)

In *Molski v. Kabn Winery* (2005 U.S. Dist. Lexis 41768 (C.D. Cal. 2005)), the District Court declined to exercise supplemental jurisdiction over plaintiff's state law claims (in an earlier decision) and then dismissed plaintiff's federal claim for injunctive relief under the ADA for lack of standing (no likelihood of future injury) when he had visited the Winery only once before filing his complaint. The Court questioned Molski's credibility regarding his intent to return to the Winery partially due to his having been declared a vexatious litigant. (*Id.* at 10.)

A different result was reached in three other Molski cases. In *Molski v. Arby's Huntington Beach* (359 F. Supp. 2d 938 (C.D. Cal. 2005)), despite Molski's having been declared a vexatious litigant in the Central District, the Court concluded that it could not dismiss his ADA claims for lack of jurisdiction based on the plaintiff's motives for filing suit – "whether it be recovery of monetary damages under analogous state law and attorneys' fees or forcing public facilities to adhere to the ADA." (*Id.* at 945.)

In *Molski v. Rapazzini Winery* (400 F. Supp. 2d 1208 (N.D. Cal., April 6, 2005)), the Northern District Court declined to declare Molski a vexatious litigant, concluding that his specific filings, although numerous, were not frivolous or harassing. (*Id.* at 1210.) The Court reasoned that Molski had provided reasonable explanations for the number of violations he encountered and the number of injuries he suffered (including a declaration by his treating physician). (*Id.* at 1211.)

In *Molski v. Sport Chalet* (2005 U.S. Dist. Lexis 34307 (C.D. Cal. 2005)), the Court held that, "though the Court finds Plaintiff's testimony to be evasive, dishonest, deceptive, and contrived, the objective evidence introduced at the hearing shows extensive history of patronage at locations close to his home and is sufficient to establish the minimal requirements for standing to sue for violations of the ADA." The Court

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added that Molski was now represented by different counsel. (*Id.* at 1-3.)

District Courts have refused to find other ADA plaintiffs vexatious litigants. In *Harway v. Bardack* (2005 U.S. Dist. Lexis 34286, 4 (C.D. Cal. 2005)), Harway filed over 200 lawsuits alleging violations of the ADA. Despite this number, the Court held that there was no evidence that plaintiff lied about his visit to the establishment and that, although the volume of lawsuits was troubling, it was not proof that the complaints had been brought in bad faith. (*Id.* at 5-6) In *Doran v. Vicorp Restaurants, Inc.*, (407 F. Supp. 2d 1115 (C.D. Cal. 2005)), the Court refused to find plaintiff Doran a vexatious litigant, even though many of his lawsuits alleged the same facts and injuries, because his complaint was not entirely without merit, and the plaintiff had enjoyed some success in getting other named defendants to conform to the ADA.

Although the Court in *Harris v. Del Taco* (396 F. Supp. 2d 1107 (C.D. Cal. 2005)) dismissed plaintiff's suit for lack of standing (because he had not established an intent to return to the location) and declined to exercise supplemental jurisdiction over plaintiff's state

law claims, the Court declined to rule on defendant's motion to declare plaintiff a vexatious litigant. (*Id.* at 1116.)

In *Wilson v. Pier 1 Imports (US), Inc.*, (411 F. Supp. 2d 1196 (E.D. Cal. 2006)) the Court refused to find Wilson a vexatious litigant based on its view that *Molski I* had failed to use the Ninth Circuit's restrictive standard for issuing pre-filing orders. The Court held that defendants had failed to make adequate showing that plaintiff's filings were frivolous and that the number of lawsuits filed by plaintiff did not indicate that he was vexatious but, rather, that numerous defendants had failed to comply with the ADA. The Court further found that Wilson had tendered sufficient evidence that he had visited defendant's business, purchased items, encountered barriers, and was injured. (*Id.* at 10.)

Finally, the Court in *Louie v. Caricoff* (2006 U.S. Dist. Lexis 10783 (E.D. Cal. 2006)) denied defendant's request to find George Louie a vexatious litigant, although it dismissed Louie's complaint (alleging that Louie's deposition had been noticed at a non ADA compliant court reporter's office). The Court held that pre-filing orders are rarely justified, that *Molski v.*

Mandarin Touch had been "compellingly refuted" in *Wilson v. Pier 1 Imports*, that mere litigiousness is insufficient, and that defendants failed to show that plaintiff's lawsuits were frivolous. (*Id.* at 17-18.)

What About Bob?

From the line of cases after *Molski I* and the District Courts' reluctance to declare other ADA plaintiffs vexatious, Robert, our hypothetical plaintiff, and his counsel are probably safe in pursuing new lawsuits, if they are not before Judge Rafeedie, as long as Robert can show standing. Standing requires that (1) plaintiff has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. (*Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* 528 U.S. 167, 181 (2000).) Robert must show that he is disabled and suffered discrimination as a result of actually visiting defendant's store and encountering barriers, whose repairs are readily achievable, and that he has plans to return to defendant's store as of the date that he filed his complaint.

If Robert does these things, it is unlikely that any other District Courts will find him a vexatious litigant because they will not find evidence of bad faith or frivolous filings. Motivation toward quick settlements, using form style complaints and filing multiple lawsuits, will not be enough to find bad faith.



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