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3. What information would you try to obtain through discovery in the following cases? What methods of discovery would you use to obtain that information?
- A. A child was riding on the Ferris wheel at an amusement park. Something malfunctioned and the seat in which the child was riding dropped 40 feet to the ground with the child in it. The fall seriously injured the child. Assume you are the child's parent.
- B. Inez is a guest at a hotel. She returns to the hotel after an evening out. While she is walking to her hotel room she trips in the lobby. She claims to have suffered two broken ribs, a painful injury to her back and a broken ankle. She further claims the hotel is at fault and sues for \$1,000,000. Assume you are the vice president of the hotel and are responsible for overseeing legal cases.

Web Sites

Web sites that will enhance your understanding of the material in this chapter include:

<http://www.courtstv.com> Court TV maintains this exciting and interactive site. It includes clips of gavel-to-gavel coverage of newsworthy trials and provides information about current legal cases covered by the media.

<http://www.findlaw.com> This site contains updates on legal news and many links to sites covering a variety of legal topics including how to find a lawyer and mediation.

<http://www.adc.org> This is the site for the American Arbitration Association, which organizes arbitrations for disputants who wish to utilize this method of alternative dispute resolution.

<http://www.lectlaw.com> Once on this site, write in the search box "alternative dispute resolution" and then click on "Do It!" for a plethora of information about arbitration and mediation.

CHAPTER 2 Civil Rights and Hospitality Businesses

Chapter Outline

Introduction	Exempt Establishments
The Civil Rights Act of 1964	Extending Civil Rights Protection
Enforcing the Act	Rights of Proprietors

Introduction

Discrimination, the act of treating some people different from and less favorably than others, is manifested primarily in two circumstances:

1. Access to places of public accommodation; and
2. Employment.

This chapter addresses the first circumstance, while Chapter 14 addresses discrimination in employment.

A variety of business establishments open to the public are included within the definition of a **place of public accommodation**. While the various laws that protect against discrimination define "place of public accommodation" differently, virtually all such laws include hotels and restaurants within the definition.

According to common law, a hotel with a vacancy cannot refuse accommodations to any guest desiring to stay at the inn (a few exceptions are discussed in Chapter 10, "Rights of Innkeepers"). Because travelers need rooms in which to stay while they are away from home, hotel accommodations are viewed by the law as quasi-public, creating a duty on the part of innkeepers to accept all transients who come seeking accommodations.

The rule had its origin in earlier times when, unlike the large number of lodging facilities available in most localities today, hotels were few in number and

located at significant distances from each other. If a guest was not provided with a room at one hotel, the distance to the next could be considerable. Before the advent of the car, when travel was done by horse-drawn coach, a would-be guest denied accommodations at one inn might need to travel well into the night before reaching the next. The roads were rudimentary and fraught with robbers and other dangers. The rule mandating that innkeepers with vacancies accept all guests protected people from the vagaries of nighttime travel.

Until the 1960s, the common-law rule was largely ignored in southern hotels which regularly practiced discrimination, particularly against blacks. Most wronged guests were discouraged from bringing lawsuits, in part because of the expense involved.

This common-law rule did not apply to restaurants. Before the advent of civil rights laws—statutes that prohibit discrimination—a restaurant owner could refuse to serve any person, including blacks and other minorities, without violating the law. Many restaurant proprietors did discriminate.

In the aftermath of the Civil War, Congress passed the Civil Rights Act of 1866, which contained certain civil rights protections. The intent was to implement the constitutional mandate of equal protection of the laws. Relevant to hospitality law is section 1981, which reads as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... and to the full and equal benefit of all laws ... as is enjoyed by white citizens....

These early civil rights protections were seldom honored or enforced prior to the passage of the Civil Rights Act of 1964 a century later.

In the 1950s discrimination based on race was, regrettably, prevalent in our country, particularly in the South. Restaurants, hotels, theaters, schools, and many other public places withheld services from blacks; they were not permitted access to facilities available to whites. Blacks were denied the right to vote and were forced to ride in the back of buses and trains. It was not a proud time in the history of the hospitality industry or the United States.

In 1954, the United States Supreme Court decided the landmark case of *Brown v. Board of Education of Topeka, Kansas*. (A landmark decision is a ruling by a judge that sets an important precedent, sometimes marking a turning point in the interpretation of law.) In the *Brown* decision the Supreme Court declared school segregation unconstitutional. The ruling invalidated the practice of "separate but equal" accommodations, which in practice were rarely equal, and paved the way for integration of institutions open to the public.

Despite the court's ruling, many public facilities resisted integration. In response, blacks accelerated their enduring struggle to achieve freedom and equality. Some of their methods included freedom marches publicizing the black community's discontent with public facilities that disregarded the law mandating integration; sit-ins at lunch counters during which blacks occupied stools reserved for whites; freedom rides in which blacks occupied seats on buses and trains designated for whites; and voter-registration drives during which blacks were encouraged to challenge the practice of restricting the voting rights of minorities.

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The Civil Rights Act of 1964

Against this backdrop Congress passed the historic **Civil Rights Act of 1964** (hereafter "the Act").¹ Civil rights are the personal rights that derive primarily from the Constitution. These include freedom of speech, freedom of contract, privacy, and due process, to name a few. The Act as originally passed outlawed discrimination on the basis of four protected classes—race, color, religion, and national origin—in four types of establishments: hotels, restaurants, places of entertainment, and gas stations. A subsequent amendment added gender to the list of protected classes.

The general intent and overriding purpose of the Act was to end discrimination in hospitality facilities open to the public, thereby reducing the unfairness and humiliation of racial bigotry as well as eliminating the difficulty and inconvenience discrimination created for blacks who wished to dine out or travel. The Act set the stage for eventual desegregation and a new social order. It was the death knell of Jim Crow, the name given to the unequal treatment of blacks in education, social institutions, and transportation that until the Act was passed had been sanctioned by either law or tradition. No longer could hotel owners refuse to provide rooms to blacks. No longer could a restaurant provide sit-down service for whites and restrict blacks to take-out service. No longer could restaurants set aside a particular room or area and shepherd all black customers to it, keeping them separate from the white diners.

As far-reaching as the Act is, it left some gaps. For example, it did not originally cover discrimination based on gender, and it still does not protect marital status, disability, or sexual orientation. Bars are not expressly covered, nor are stores or schools. To remedy these omissions, most states have passed their own laws extending protection to groups and facilities not covered by the Act. Further, discrimination based on disability is now prohibited by the Americans with Disabilities Act, a federal law that became effective in 1992.

In addition to the Civil Rights Act of 1964 this chapter will discuss:

- What is protected by state statutes;
- The Americans with Disabilities Act;
- Exceptions to civil rights laws (permissible discrimination); and
- Implications of these statutes for service-industry managers.

Scope of the Civil Rights Act of 1964

The Act as originally passed by Congress outlaws discrimination in places of public accommodation based on any of four factors:

- Race;
- Color;
- Religion;
- National origin.

¹ 42 U.S.C. § 2000a et seq.

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To be illegal under the Act, the discrimination must occur in one of four types of establishments, and then only if the facility is engaged in interstate commerce. The four places covered are:

1. Lodging establishments for transients (as opposed to apartment buildings);
2. Dining facilities;
3. Places of entertainment; and
4. Gasoline stations.

Interstate commerce means business transactions between people or companies from two or more states. This requirement will be explored in more detail later in this chapter.

The term *discrimination*, as used by the Act, means denial of access to goods, services, facilities, and accommodations on the same terms as others enjoy.

To achieve the goal of ending discrimination, courts construed the Act broadly to include within its reach the maximum number of incidents of discrimination. A single circumstance of illegal discrimination violates the Act; a pattern of discriminatory conduct is not required.²

The following is a discussion of the places where the Act prohibits discrimination.

Lodging for Transients

Overnight accommodations covered by the Act include, "any inn, hotel, motel, or other establishment which provides lodging to transient guests." **Transients** are people passing through a place for only a brief stay or sojourn.

Court decisions have determined that the following establishments are covered by the Act: places that rent rooms not only by the night but also weekly (but not the more permanent relationship of landlord and tenant), YMCAs which traditionally have offered overnight accommodations, trailer parks that rent to short-term guests, and cottages at beach resorts.

Dining facilities

The dining facilities covered by the Act are "any restaurant, cafeteria, luncheon, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises ... if its operation affects [interstate] commerce."

Court decisions have determined that the following establishments are included: drive-in restaurants, retail-store lunch counters, sandwich shops, lunch counters at golf courses, food facilities at hospitals, and similar establishments. On the other hand, a food store such as 7-11, which sells ready-to-eat food but does not provide facilities for on-premises consumption, is not covered by the Act. Likewise, Domino's Pizza, which does not sell food primarily for consumption on the premises but rather is in the business of delivering pizzas to be eaten in customers' homes, is not covered.

² *Hughes v. Minor's Big Boy*, 479 F.Supp. 834 (WVa, 1979).

Places of Entertainment

The Act prohibits discrimination in "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment" that "affects commerce." The catch-all phrase "places of entertainment" includes both establishments that present shows for viewing by an audience, such as a sports stadium or an auditorium staging a rock concert, and establishments that provide recreational or other activities in which patrons actively participate, such as bowling alleys. Also included are health spas, beach clubs, and golf clubs.

Not included as a place of entertainment is an airplane. In one case a black plaintiff claimed to have received inferior service from the flight attendant. Plaintiff alleged that her request for a pillow was ignored by the attendant who nonetheless provided a pillow for a Caucasian passenger. Plaintiff also claimed that she was excluded from in-flight beverage service. She reported the problem to the supervising attendant. When the supervisor confronted the allegedly offending attendant, the latter reportedly responded, "I am so tired of those uppity Niggers." The plaintiff sued, claiming discrimination outlawed by the Act. The court held that the airline was not one of the entities expressly referenced in the Act. Said the court, "[T]he airline is in the transportation business, not the food service industry. Any food sales are ancillary to [the airline's] transportation business."

In another case an Iranian airline passenger was subjected to a manual search of his luggage because, per the ticketing agent, he had an Iranian passport. He sued claiming a violation of the Act. The court dismissed the claim noting that the statute clearly delineates the entities covered as places of public accommodation and they are limited to lodging facilities, eateries, places of entertainment and vehicle service stations. Said the court, "[N]one even remotely resembles an airline, or indeed any other vehicle or mode of transportation."

Note: While the law may not protect the plaintiffs in these suits, ethics and good customer relations should dictate courteous and equal treatment for all.

Businesses Affecting Interstate Commerce

A hospitality business must affect interstate commerce to be covered by the Act. Why is this so? As we discussed in Chapter 1, when our country was formed the states were very jealous of a strong central government. The Founding Fathers had their disastrous experiences under England's autocratic rule in mind when they crafted the Constitution. As a result they gave a great deal of lawmaking authority to the states. The only powers given to the federal government are specifically listed in the Constitution and are called the *delegated powers*. Congress, the legislative body of the federal government, can only pass laws that address the delegated powers.

One of these areas of authority delegated to Congress is interstate commerce, which is business done between people or companies from two or more states. Although Congress can pass laws dealing with interstate commerce, it does not have the authority to outlaw discrimination in businesses that are purely local. Those establishments are governed by state or local law.

TRAVELERS

Most of the guests at a hotel are travelers and some will undoubtedly be from out of state. Thus, hotels normally satisfy the requirement of affecting interstate commerce.

RESTAURANTS

A restaurant affects interstate commerce if it serves interstate travelers or if a substantial portion of the food it serves was transported from out of state.

SERVING INTERSTATE TRAVELERS

Unlike hotels, food establishments normally do not inquire whether their patrons are residents of the state or from another state. The courts have devised certain rules to determine whether a restaurant serves interstate travelers, including the following. A dining facility located near a federal highway and a coffee shop in a hotel have been deemed to serve interstate travelers. In one case, a restaurant in Puerto Rico argued that it was not engaged in interstate commerce, noting that it was not located at an airport or on an interstate highway. However, the restaurant was located in a primary tourist area near several large hotels. The court held that the restaurant's location was sufficient evidence that it serves interstate travelers.³ If an eatery advertises in a magazine delivered to hotels and motels for distribution to guests, or advertises on the radio, the facility qualifies because the magazine and radio advertisements typically reach out-of-state readers and listeners.

FOOD MOVED IN INTERSTATE COMMERCE

A dining facility that does not serve interstate travelers will nonetheless be covered by the Act if a substantial portion of the food it serves is imported from another state. Although the Civil Rights Act does not provide a test for determining "substantial," precedents provide guidelines. Cases have held that, where ingredients in three of four food items sold by a snack bar (hot dogs, hamburgers, milk, and soft drinks) were from out of state, the "substantial portion" test was satisfied.⁴ In another case the requirement was met because 46 percent of an establishment's purchases consisted of meat bought from a local supplier who purchased it from outside the state.⁵ Also qualifying as substantial was the purchase by a snack bar at a beach club of syrup from outside the state that was used in Coca-Cola beverages. Many of the purchases at the snack bar were for cold drinks, and Coca-Cola was the most popular.⁶

PLACES OF ENTERTAINMENT

A theater or stadium affects interstate commerce if it regularly presents movies, performances, exhibits, athletic teams, or other sources of entertainment that originate

³ *Brownlee-Zoom v. Restaurant Company, Inc.*, 790 F.Supp. 41 (D.R. 1992).

⁴ *Daniel v. Paul*, 395 U.S. 208, 23 L. Ed. 2d 318, 89 S.Ct. 1697 (1969).

⁵ *Katzbach v. McClung*, 379 U.S. 294, 13 L.Ed.2d 290, 85 S.Ct. 377 (1964).

⁶ *United States v. Landonwine-Saleh Club*, 894 F.2d 83 (Tenn. 1990).

in other states. A theater group importing traveling shows qualifies. Golf courses that purchase out-of-state carts, pro shop inventory, rental equipment, or related items likewise qualify. Similarly, in one case the facility of a youth football association was determined to be a covered place of entertainment because all its sports equipment was manufactured outside the state.

A bar or lounge qualifies as a place of entertainment if it provides recreational facilities such as a piano, jukebox, shuffleboard court, pool table, or television set. If these items are manufactured outside the state, the bar or lounge will be bound by the Act.

Relief

The Act provides limited relief for people who have been denied equality of services. Money is not recoverable as a remedy under the Act. (However, a mistreated plaintiff may qualify for monetary remedies under other antidiscrimination laws.) The possible remedies under the Act include only the following:

1. *Injunctive relief.* An injunction is a court order that requires a defendant to refrain from doing a particular act. In civil rights cases, an injunction usually orders the offending person or business to stop discriminating. It is a preventive measure that guards against future injuries rather than affording a remedy for past wrongs.
2. *Reasonable attorney's fees* charged by the attorney for a successful plaintiff. This is unusual in the law; in most lawsuits the parties pay for their own attorneys. Even a successful plaintiff is normally not entitled to collect attorney's fees from the defendant. The reason for allowing reimbursement for lawyer's fees in cases involving civil rights violations is the legislature's recognition of the importance of eradicating discrimination. By eliminating attorney's fees as a deterrent for bringing a civil rights lawsuit, victims of discrimination are more likely to pursue the wrongdoers.



Enforcing the Act

Many facilities that had discriminated before the passage of the Act failed to comply with the new law. Many sought to challenge the Act's legality. Indeed, the constitutionality of the Act was tested immediately after its passage in two landmark cases involving recalcitrant proprietors who resisted the law.

Establishing Jurisdiction

The first case challenging the Act involved a motel. The plaintiff, a 216-room motel in Atlanta, Georgia called the Heart of Atlanta Motel, refused to rent rooms to blacks. When charged with violating the Act, the motel claimed it was not engaged in interstate commerce and therefore application of the Act to its business

⁷ *Heart of Atlanta Motel, Inc. v. United States*, 394 U.S. 281, 20 A.L.R.2d 1091 (1969).

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exceeded congressional power. The evidence established that the motel in question did solicit guests from outside the state of Georgia through various national advertising media and that it also maintained over 50 billboards and highway signs within the state. The motel accepted convention trade from outside Georgia, and approximately 75 percent of registered guests were from out of state. The court held the application of the Act to the motel was constitutional, noting that the evidence proved the motel served interstate travelers.⁸

The second test case of the Act's constitutionality involved a family-owned restaurant in Birmingham, Alabama—Ollie's Barbecue—which catered to a family and business trade with only take-out service available for blacks. The restaurant was accused of violating the Act, and in response denied that it was engaged in interstate commerce. The restaurant purchased much of its meat and other products from out of state. The court upheld the application of the statute to the eatery, concluding that Congress acted within its power to protect and foster interstate commerce by extending the coverage of the Civil Rights Act to restaurants that either serve interstate travelers or purchase food from out of state.⁹

The hotel and restaurant involved in these landmark cases both argued that if they were required to serve blacks they would lose a substantial amount of business from whites who did not wish to dine with blacks or stay in a hotel that accommodated them. The district (lower) courts accepted this argument and barred government officials from enforcing the Civil Rights Act against the businesses. The United States Supreme Court, which granted certiorari in both cases and heard the appeals, rejected loss of business as a justification to avoid the mandates of the Act. The high court noted that enforcement of the Act should instead increase business by enlarging the potential clientele. Enforcement would also achieve the desirable outcome of expanding interstate commerce. As the court said,

A comparison of per capita spending by Negroes in restaurants, theatres, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. . . . This diminutive spending, springing from a refusal to serve Negroes and their total loss as customers has . . . a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys. Moreover there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food, served on the premises while on a trip, except in isolated and unkempt restaurants, and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred, and thereby caused industry to be reluctant to establish there.

As discussed in the following sections, the Act continues to be vigorously enforced.

⁸ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 13 L. Ed.2d 258, 85 S.Ct. 348 (1964).
⁹ *Katzbach v. McChesney*, 379 U.S. 204, 13 L. Ed.2d 290, 85 S.Ct. 377 (1964).

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Racial Discrimination

Refraining to permit anyone to enter an establishment because of race constitutes a violation of the Act. In a 1996 settlement of a Louisiana case, a Louisiana nightclub owner admitted the club discriminated against blacks. The case arose when a white woman, out for the evening with two friends—one black and one white—walked to the entrance of the nightclub to see if it was open. Meanwhile, her two friends waited in the car. When the bouncer advised her the bar was open, she and her friends parked the car and sought entry. They were then advised they would not be admitted because the club was hosting a private party. Later that evening the white woman returned to the club alone and was admitted. After she reported the incident to law enforcement, the government sent two pairs of FBI agents, one white couple and one black couple, to the nightclub. The latter was denied entry while the former was admitted.

In the settlement of the case, the bar owner agreed to stop violating the Civil Rights Act of 1964, train employees in civil rights law requirements, and advertise three decades ago, Congress spoke for all decent Americans by making it illegal to exclude people from [restaurants and bars] because of their skin color. . . . America must have zero tolerance for racial discrimination.¹⁰

In another case, several blacks claimed to have been victims of discrimination of the admission policies of a well-attended restaurant and nightclub called the Glass Menagerie. The plaintiffs claimed they were kept waiting in line outside the club while white people were admitted ahead of them. The plaintiffs' protests to employees were ignored. Two former doormen testified they had been instructed to discourage black customers from coming to the facility because the owner believed they did not spend as much money as white customers, they bothered white female patrons, and they were not big tippers. The court, finding that this constituted discrimination, stated,

The court would like to believe that these discriminatory acts occurred through shortsightedness rather than malice. The court is optimistic that voluntary corrective action will be promptly taken to eliminate all vestiges of discrimination at the Glass Menagerie. Even so, however, and even though the discrimination was sporadic, compelling public interests require the immediate issuance of injunctive relief [a court order prohibiting any further discrimination].¹¹

Action by a restaurant manager in refusing to serve a group of racially mixed customers, escorting them out of the restaurant, locking the door behind them, and then allowing Caucasians to enter likewise constitutes illegal discrimination.¹²

The Civil Rights Act was violated by a restaurant that required blacks, but not others, to prepay for their meals while the customary practice was for customers to

¹⁰ 1996 WL 66969 (1996); Department of Justice News Release, "Two Louisiana Nightclubs Agree with the Department of Justice to Open Their Doors to African-Americans."

¹¹ *U.S. v. Glass Menagerie, Inc.*, 702 F.Supp. 139 (Ky. 1988).

¹² *Lamonte v. Dean's, Inc.*, 62 F.Supp. 2d 1375 (Fla. 1999).

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pay after the meal had been consumed.¹³ However, requiring *all* customers to prepay for their dinners does not constitute illegal discrimination, even though prepayment is contrary to normal practice.¹⁴

In another case the evidence was sufficient for the plaintiff to avoid summary judgment in favor of the defendant restaurant where plaintiffs, who were African American patrons, were not greeted when they entered, and were ignored for a half hour while white patrons were readily greeted and seated.

CAUCASIANS ARE ALSO PROTECTED

The Act protects not just minorities, but rather all people. This is demonstrated in a case in which a Korean restaurant refused to seat and serve plaintiff O'Connor, "a male of European descent." When O'Connor sought service, he was advised by the restaurant host that the restaurant was a private club and since O'Connor was not a member he could not enter. O'Connor returned a month later with "another white male" and was again refused service. Thereafter on two occasions of which the plaintiff was aware, Korean males who were nonmembers were seated and served at the restaurant. On other occasions, two white males and a black female sought service and were denied because they were not members.

In response to the plaintiff's lawsuit claiming a violation of various civil rights laws, the restaurant argued that only members of a racial minority are protected and therefore the white plaintiff could not sue. The court rejected this claim, holding that "a white person, just as a nonwhite," is protected by the statutes. The restaurant's motion to dismiss plaintiff's case was denied.¹⁵

POOR CUSTOMER SERVICE

Case law also teaches that the Civil Rights Act does not remedy all perceived wrongs. Instead, it protects only against discriminatory denial of the right to enter a covered facility and receive service. Certain indignities resulting from inferior service are not covered.

In one case the plaintiff, a black male, entered a Burger King and ordered breakfast. He was the first in line. Several white men entered the line behind him. The employee serving the food stopped waiting on the plaintiff and attended to the others. When the plaintiff complained to the assistant manager, he left his office and prepared the plaintiff's order. Upon receiving his order, the plaintiff paid and left. In this action, the plaintiff claims the delay in his service was the result of racial discrimination.

The court dismissed the plaintiff's case stating, "In the instant case, plaintiff was not denied admittance or service—his service was merely slow. While inconvenient, frustrating, and all too common, the mere fact of slow service in a fast-food

restaurant does not, in the eyes of this Court, rise to the level of violating one's civil rights."¹⁶
In Case Example 3-1 the court similarly finds that bad service does not constitute discrimination.¹⁷

CASE 4:03-cv-00141-E-S-1

Sherman v. Marriott Hotel Services, Inc. 317 F.Supp.2d 609 (Md., 2004)

The Plaintiff, Marcus Sherman, who is African-American, was locked out of his room at a Baltimore hotel while attending a professional conference in March 2003 when his room key became demagnetized. Unhappy with the treatment he received from hotel employees in obtaining a new key (and in later complaining about it), he filed this action for damages and injunctive relief ... pursuant to ... the Civil Rights Act of 1964....

(The facts are as follows ... Plaintiff attended a professional conference at the hotel from on or about March 5 through March 7, 2003. On the evening of March 5, plaintiff worked out in the hotel gym until about 11:00 p.m. When he returned to his room from the gym, his electronic key card had become demagnetized and would not unlock the door. Plaintiff, dressed in athletic garb and sweating from his workout, went to the front desk to obtain assistance and/or a new key. At the front desk, plaintiff interacted with a white employee, Darren Kerr.

It is undisputed that defendant's lock-out policy requires that a guest display identification matching the name in hotel records in order to obtain a new key. Under circumstances such as those facing plaintiff on March 5, in which the guest's identification is in his (locked) room, the policy requires that the guest be escorted to the room by hotel security to obtain the identification.

According to plaintiff, the interaction between plaintiff and Kerr at the front desk was not pleasant. Plaintiff alleges that it took up to 19 minutes or so for Kerr to obtain assistance from a

security officer to escort plaintiff to his room, regards certain statements of Kerr ("You could have come in off the street...") to have manifested a racially insensitive, if not racially discriminatory, attitude. In any event, an African-American security officer eventually escorted plaintiff to his room. Kerr had apparently instructed plaintiff to return to the front desk after he had produced identification to the security officer to retrieve a replacement key; however, the security officer left plaintiff in his room and returned alone to the front desk to retrieve a new key for plaintiff. The replacement key was delivered to plaintiff's room.

Apparently, plaintiff's decision to sue for damages based on the March 5 incident was made as a result of what he learned the next night during dinner with some of his professional colleagues. Specifically, plaintiff learned that a white female professional acquaintance had checked in to the hotel the day before plaintiff checked in, i.e., on March 4, 2003. Later on March 4, that colleague had locked herself out of her room. When she went to the front desk for assistance, the same front desk employee who had checked her in immediately reissued an additional key to her, without demanding identification, and in violation of the hotel's written lock-out policy....

As a matter of law, plaintiff enjoyed the benefits and privileges, on the very same terms and conditions of the contractual relationship offered by the defendant to any prospective guest. As a matter of law, the fact that an individual employee of the hotel deviated from the undisputed policy of the hotel in respect to lock-outs (by reissuing a key to a guest who had recently checked in and who was recognized by the employee) is not remotely probative of a claim of race discrimination based on proof that such an exception or deviation from the

(continued)

¹³ *Robbette v. Roper, Inc.*, 19 F.Supp2d 512 (N.C. 1998). See also *Jackson v. Waigle House, Inc.*, 413 F.Supp. 1338 (Ga. 2000).

¹⁴ *Severson v. Steak 'N Shake, Inc.*, 35 F. Supp.2d 882 (Pa. 1998).

¹⁵ In *O'Connor v. 11 West 30th Street Restaurant Corp.*, 1995 WL 354909 (N.Y. 1995).

¹⁶ *Robbette v. Roper, Inc.*, 19 F. Supp. 28 (La. 1994). See also *Jackson v. Waigle House, Inc.*, 413 F.Supp. 2d 1338 (Ga. 2000).

¹⁷ *Carroll v. Dine Co. v. Sherman's, Inc.*, 98 F. Supp. 2d 609 (Md. 2000).

policy was not made (by a different hotel employee) when plaintiff was locked out of his room. However, unpleasant plaintiff's interactions with hotel staff on the night of his lock-out might have been ... no reasonable jury properly instructed on the law could reasonably conclude that application of a facially neutral lock-out policy, which requires that a guest be escorted to his room for identification, as applied to plaintiff on March 5, 2003, constituted an act of racial discrimination ... Moreover, this

conclusion is not remotely called into question by undisputed proof that on some occasions, whether pursuant to an unofficial or informal policy exception," or through the ad hoc and episodic deviations from the policy by individual employees, which common sense suggests are virtually certain to occur, some guests are provided replacement keys without displaying identification. Accordingly, defendant is entitled to summary judgment.

CASE QUESTIONS

1. What facts did the Court consider to be most important in reaching its determination that the plaintiff was not discriminated against based upon his race?
2. Do you agree with the decision? Why or why not?

PROPRIETOR'S DISCRETION ON MUSIC SELECTION

In another case the plaintiff, a black patron of a dance bar, claimed the bar's owner discriminated against blacks by discontinuing rap music and playing rock-and-roll to induce black patrons to leave. Employees of the restaurant testified that the manager would tell the disc jockeys that it was "too dark in here" when it was thought there were too many blacks in the bar. In response, the disc jockeys allegedly began playing "hard rock-and-roll" music, which was not the favored music of many blacks. The court dismissed the case, noting that the manager did not refuse the plaintiff admittance to the bar or service while he was there. Said the court, "A bar's music selection cannot be grounds to find that it engages in discriminatory conduct."¹⁸

REFUSAL OF SERVICE BECAUSE WOULD-BE CUSTOMERS CAUSED A DISTURBANCE IS NOT DISCRIMINATION

If a customer is refused service for reasons other than race, religion, color, or national origin, the refusal does not violate the Civil Rights Act of 1964. Three black sisters were dissatisfied with the service they received at a Burger King and left. They later returned with their mother to complain to the manager. While doing so the mother became contentious, manifested by yelling, screaming, waving her arms, and grabbing the manager's arm. To avoid further disturbance the manager called the police and refused to serve them. The mother sued for discrimination

but the court rejected the claim. The manager had the right to refuse service because of the disturbance the mother caused.¹⁹

NATIONAL ORIGIN DISCRIMINATION

A restaurant that refuses to serve would-be customers based on national origin, or a hotel that denies a room for that reason, is engaged in illegal discrimination. **National origin** refers to the country from which one's ancestors came. For example, a person's national origin might be French, Canadian, or Puerto Rican.

To sue successfully for national origin discrimination, plaintiff must show that defendant treated plaintiff differently from others who did not share the same ethnicity. In a recent case practitioners of Falun Gong, a spiritual belief system whose members are persecuted by the People's Republic of China (hereinafter PRC), learned that the former president of PRC intended to visit Houston, Texas. They made reservations at the same hotel, causing it to overlook. By necessity, on the date of the PRC president's arrival, the hotel instituted its "walk policy," whereby it moved some guests to nearby hotels. Plaintiffs were among those transferred. The plaintiffs claimed discrimination on the basis of national origin. Denying the claim, the court noted that the former president's staff were Chinese and at least some of them too were moved from the booked hotel. Further, plaintiffs presented no evidence that the hotel did not "walk" non-Chinese patrons, nor was evidence presented that the hotel offered plaintiffs unequal alternate accommodations.

Language Discrimination

A person's primary language is an important part of, and flows from, his or her national origin. Therefore, discrimination based on language is often viewed as discrimination based on national origin in violation of the Civil Rights Act of 1964. The following case involves discrimination against Spanish-speaking bar patrons. Since the Act does not cover bars, the court could not rely on the Act to stop the tavern from discriminating. Instead, the court creatively used different federal laws that grant all citizens of the United States equal rights to enter contracts and purchase property. The proprietor in this case violated those laws by limiting the rights of the Spanish-speaking patrons to purchase beer.

CASE EXAMPLE 3-2

Hernandez v. Eienbusch **368 F.Supp. 752 (Ore. 1973)**

the same—a community of approximately 8,500 persons in which more than 2,000 Mexican-Americans have been living for at least the last four years. The plaintiffs in these cases are all U.S. citizens, most of them native born. Some two years

(continued)

¹⁸ *Servino v. Bar's Open House, Inc.*, 788 F. Supp. 375 (Ill. 1992), dismissed on other grounds, 3 F.3d 1142 (Ill. 1993); *Phillips v. Interstate Hotels Corp.*, 974 S.W.2d 680 (Tenn. 1998). See also *Nguyen v. Seven Seasons HB Philadelphia Corp.*, 2004 WL 1699331 (Pa. 2004).

¹⁹ *Yellin v. Burger King Corp.*, 40 F.Supp.2d 1366 (Fla. 1998).

ago, the defendants, owners of the Taffrail Tavern (Tavern), issued these orders to their bartenders:

quantity tried and convicted in state court for battering Gonzalez over the right eye with a fire extinguisher. (Gonzalez was the only plaintiff who was physically struck.)

11. Do not allow a foreign language to be used at the bar, if it interferes with the regular trade. If there should be a chance of a problem, ask the "Problem" people to move to a table and turn the juke box up. (Use house money).

Defendant Krausnick testified that she agreed with and willingly enforced Rule 11. Clary, Dunn and Salisbury concurred, saying they knew of the rule and wholeheartedly endorsed it. John Eienbusch testified he adopted the policy simply to avoid trouble and to preserve his license.

CONCLUSIONS OF LAW

The rationale for this policy as explained by its formulators and enforcers, is that the tavern has many Anglo and Chicano patrons, with attendant friction between the two groups caused by the dislike by some of the local white populace of the "foreigners" in their midst. According to the Eienbusches, the tavern's owners, the language rule as carried out by them and their employees served everyone's interests by accommodating both Anglo and Chicano customers and ensuring peaceful continuance of the tavern business. The complaints concerning Spanish spoken at the bar allegedly stem from fear on the part of the white clientele that the Chicanos are talking about them. It was in this atmosphere, ridden with mistrust and apprehension that the following incidents occurred.

... In examining the practical effect of the tavern's policy against the speaking of foreign languages at the bar, it is obvious that it amounts to patent racial discrimination against Mexican-Americans who constitute about one-fourth of the tavern's trade, regardless of an occasional visit by a customer able to speak another language. The rules' results are what count, the intent of the framers in these circumstances is irrelevant. ... In the instant case, Rule 11, as intended and applied, deprives Spanish-speaking persons of their rights to buy, drink and enjoy what the tavern has to offer on an equal footing with English-speaking consumers.

On August 23, 1972, Gilberto Hernandez and Abel and Alfredo Maldonado went to the tavern where defendant Krausnick, the bartender, served them beer. While drinking, the three men began conversing in Spanish, their native tongue. Anglo customers, who were also sitting at the bar, were "frightened" and complained to Krausnick. She advised the Chicanos that if they persisted in speaking Spanish, they would have to go to a booth or leave the premises.

Hernandez and the Maldonados took issue with these orders and an argument ensued. Krausnick poured out their remaining beer and refused to refund any money. The police were called, the plaintiffs left peacefully.

Plaintiffs rights ... to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens have been violated. Likewise, plaintiffs have been denied their ... guarantee that [all] citizens of the United States shall have the same right ... to ... purchase ... personal property. ... Just as the Constitution forbids banning blacks to the back of the bus so as not to arouse the racial animosity of the preferred white passengers, it also forbids ordering Spanish-speaking patrons to the "back booth" or "out" to avoid antagonizing English-speaking beer-drinkers.

Two days later, the scene was reenacted with different plaintiffs and an additional three antagonists. Krausnick "pulled" the beers of Gonzalez, Perez and Vasquez, who were then followed out of the tavern and assaulted by defendants Salisbury, Dunn, and Clary, three Anglo regular customers. Clary was subse-

The lame justification that a discriminatory policy helps preserve the peace is as unacceptable in taverns as it was in buses. Catering to prejudice out of fear of provoking greater prejudice only perpetuates racism. Courts faithful to the Fourteenth Amendment will not permit, either by camouflage or cavalier treatment, equal protection so to be profaned.

CASE QUESTION

1. What can the Eienbusches do legally to address the friction between the Anglo and Chicano Patrons?

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Religious Discrimination

Similar to racial discrimination, a successful case of religious discrimination requires a showing that service was refused. Where service is offered but a requested accommodation of one's religious practices is refused for good reason unrelated to religion, the Act has not been violated.

In an Idaho case, the plaintiff was a tournament golfer and member of the Church of Jesus Christ of Latter-day Saints. Due to religious beliefs, the plaintiff did not play golf on Sunday. The club's tournaments were customarily played on Saturday and Sunday. He requested an alternate playing schedule, but the club refused. He sued, claiming a violation of the Act. The club claimed that to give the plaintiff an alternate schedule would create complications and expense, making the administration of the tournament more difficult. Among the problems would be an increased workload for the tournament marshals and umpires, a delay of the public's access to the course, and possible disruption of the practice of the lowest-scoring golfers playing at the end of the tournament, which serves economic purposes.

The court dismissed the plaintiff's action, noting that the club had "legitimate business reasons, completely unrelated to religious considerations, for scheduling its final round of play on Sunday." Further, the club had never denied the plaintiff entry to a tournament or access to the course. The court thus concluded that the club's denial of an alternate tournament date was based on the stated administrative concerns and not on hostility toward his religious beliefs.²⁰

Similarly, judo competitors brought a lawsuit against judo organizations seeking to stop the latter's requirement of bowing to inanimate objects prior to matches. Plaintiffs objected to the bowing on religious grounds. Rules of the sport require that contestants bow to such items as portraits and tatami mats. The justification for such mandates include promoting fair and safe start of matches particularly where participants and officials may not all speak the same language, preserving the etiquette and traditions of judo, and promoting the unique identity of the sport. The court determined the bowing requirement did not violate the competitors' religious rights, noting that the organizations had legitimate business reasons for adopting the rule that were unrelated to religious considerations.

Broad Enforcement through the Unitary Rule

The Act covers only lodging facilities, dining facilities, places of entertainment, and gasoline stations. Other businesses, such as stores, barber shops and beauty parlors, transportation facilities, bars, and colleges are not covered (although discrimination in these locations may be prohibited by state statute). However, if a covered business is physically located within another facility not otherwise covered by the Act, such as a snack bar in a store or a food car on a train, the food facility and the store or train are *both* covered. Similarly, if a business not covered by the Act is located within a covered business, both are subject to the Act's provisions. For example, a barber shop, which is not covered by the Act, will be bound by its provisions if located within a hotel. This principle is known as the **unitary rule**,

²⁰ *Boyle v. Jerome Country Club*, 883 F.Supp. 1422 (Idaho 1995).

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Exempt Establishments

which means that if a covered facility is located within a noncovered business, or vice versa, both the covered and noncovered businesses are subject to the Act.

The Act excludes from its coverage certain establishments, including bed-and-breakfast operations and private clubs. These businesses are not barred from discriminating by the Act.

"Mrs. Murphy's Boarding House"

The Act exempts tourist homes, known today as bed-and-breakfasts, that have five or fewer rooms and are occupied by the proprietor. This exception, sometimes referred to as the "Mrs. Murphy's boarding house clause," allows proprietors who admit tenants into their home to retain discretion and control over who sleeps in their house.

Private Clubs

The Act's ban on discrimination does not apply to "private clubs or other establishments not in fact open to the public." The law recognizes that people customarily affiliate with a private club because of common interests among the members; the Act supports the perpetuation of those shared agendas. The Act does not clearly define what constitutes a private club, so the courts have interpreted the statute when the issue has been raised. It usually arises when a club claiming to be private excludes someone on the basis of race, color, religion, or national origin and that person challenges the legality of the exclusion. In considering whether a club is private, the courts examine the following:

1. Is the club selective in choosing its members? A private club usually has a limited number of members. The more selective the club is, the more likely it will qualify as a private club.
2. Are new members sought discreetly? If the club publicly advertises for members it likely is not a private club.
3. Does the club have clearly designated criteria for choosing members and do members participate in the selection process? A private club typically has specific traits it seeks to perpetuate in its members. The more specific the criteria, the more likely the club will qualify as private. Also, by participating in the selection process, members help to ensure that the interests they share with other members will continue to bind the membership in the future.
4. Do members govern and control the club's operations? A private club is usually owned and governed by its members. If the "club" is simply a business operated for profit, it will not qualify as a private club.
5. To what extent are club facilities available for use by nonmembers? The more access by nonmembers, the less likely it is a private club.
6. Is the primary purpose of the club social or business? If the primary purpose is business, it likely will not be a private club.

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The following two case examples illustrate private clubs. A bridge club (bridge is an intricate card game played with a partner; tournaments are held throughout the country) was found to be private for the following reasons:

[T]he club is dedicated to the promotion of bridge and other games of skill.... Club facilities are open only to members and their guests.... Prospective members must be sponsored by a current member and seconded by another member. They are subject to evaluation of their ethical reputation at the bridge table, their skill and knowledge of the game, their standards of dress and deportment, and their ability to meet their financial commitment to the Club. Members are admitted only if they are approved by the Board of Directors.²¹

A black man was refused service by a Moose Lodge, a local branch of the national fraternal organization. He sued claiming illegal discrimination. The court held the club was private for the following reasons:

Moose Lodge is a private club ... It is a local chapter of a national fraternal organization having well-defined requirements for membership. It conducts all of its activities in a building that is owned by it. It is not publicly funded. Only members and guests are permitted in any lodge of the order; one may become a guest only by invitation of a member or upon invitation of the house committee.²²

Many clubs have sought exemption from application of the Act on the basis of being a private club. The issue in many discrimination cases is whether the defendant club is, in fact, private.

Assailing "Private-in-Name-Only" Clubs

If a club claimed by its members to be private is really a place of public entertainment, it will be subject to the Civil Rights Act, as Case Example 3-3 shows. The case also illustrates the unfortunate practice, which arose soon after passage of the Civil Rights Act, of groups forming "quickie" private clubs in an attempt to avoid serving blacks and other minorities.

CASE EXAMPLE 3-3

Daniel v. Paul
359 U.S. 298 89 S.Ct. 1697,
23 L.Ed.2d 318 (1969)

Petitioners, Negro residents of Little Rock, Arkansas, brought this class action to enjoin respondent from denying them admission to a

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²¹ *Baptist v. Chevrolet Club, Inc.*, 670 F.Supp. 108 (N.Y. 1987).
²² *Moose Lodge v. Davis*, 407 U.S. 163, 92 S. Ct. 1965 (1972).

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Court, although finding that respondent had refused petitioners' admission solely because they were Negroes, dismissed the complaint on the ground that Lake Nixon Club was not within any of the [enumerated] "public accommodations" covered by the 1964 Act....

Lake Nixon Club, located 12 miles west of Little Rock, is a 232-acre amusement area with swimming, boating, sunbathing, picnicking, miniature golf, dancing facilities, and a snack bar. The Pauls purchased the Lake Nixon site in 1962 and subsequently operated this amusement business there in a racially segregated manner.

... [The Civil Rights Act of 1964 enacted a sweeping prohibition of discrimination or segregation on the ground of race, color, religion, or national origin at places of public accommodation whose operations affect commerce. This prohibition does not extend to discrimination or segregation at private clubs. But, as both courts below properly found, Lake Nixon is not a private club. It is simply a business operated for a profit with none of the attributes of self-government and membership traditionally associated with private clubs.]

It is true that following enactment of the Civil Rights Act of 1964, the Pauls began to refer to the establishment as a private club. They even began to require patrons to pay a 25-cent "membership" fee, which gains a purchaser a "membership" card entitling him to enter the Club's premises for an entire season and, on payment of specified additional fees, to use the swimming, boating, and miniature golf facilities.

But this "membership" device seems no more than a subterfuge designed to avoid coverage of the 1964 Act. While persons are routinely provided "membership" cards, and some 100,000 whites visit the establishment each season, Negroes on the other hand are uniformly denied "membership" cards, and thus admission, because of the Pauls' fear that integration would "run the business." The conclusion of the courts below that Lake Nixon is not a private club is plainly correct—indeed, respondent does not challenge that conclusion here.

We, therefore, turn to the question whether Lake Nixon Club is "a place of public accommodation" as defined by ... the 1964 Act, and, if so, whether its operations "affect commerce" within the meaning of ... that Act.

Petitioners argue first that Lake Nixon's snack bar is a covered public accommodation ... and that as such it brings the entire establishment within the coverage.... Clearly, the snack bar is "principally engaged in selling food for consumption on the premises." Thus, it is a covered public accommodation if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves ... has moved in commerce." We find that the snack bar is a covered public accommodation under either of these standards.

The Pauls advertise the Lake Nixon Club in a monthly magazine called "Little Rock Today," which is distributed to guests at Little Rock hotels, motels, and restaurants, to acquaint them with available tourist attractions in the area. Regular advertisements for Lake Nixon were also broadcast over two area radio stations. In addition, Lake Nixon has advertised in the "Little Rock Air Force Base," a monthly newspaper. This choice of advertising media leaves no doubt that the Pauls were seeking broad-based patronage from an audience which they knew to include interstate travelers. Thus, the Lake Nixon Club unquestionably offered to serve out-of-state visitors to the Little Rock area. And it would be unrealistic to assume that none of the 100,000 patrons actually served by the Club each season was an interstate traveler. Since the Lake Nixon Club offered to serve and served out-of-state persons, and since the Club's snack bar was established to serve all patrons of the entire facility, we must conclude that the snack bar offered to serve and served out-of-state persons.

The record also demonstrates that a "substantial portion of the food" served by the Lake Nixon Club snack bar has moved in interstate commerce. The snack bar serves a limited fare—hot dogs and hamburgers on buns, soft drinks, and milk. The District Court took judicial notice of the fact that the "principal ingredients going into the bread were produced and processed in other States" and that "certain ingredients [of the soft drinks] were probably obtained ... from out-of-State sources...." Thus, at the very least, three of the four food items sold at the snack bar contain ingredients originating outside of the State. There can be no serious doubt that a substantial portion of the food served at the snack bar has moved in interstate commerce.

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The snack bar's status as a covered establishment automatically brings the entire Lake Nixon facility within the ambit of ... [the] Civil Rights Act of 1964.

Petitioners also argue that the Lake Nixon Club is a covered public accommodation under [other provisions of the statute].... These sections proscribe discrimination by "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition, or entertainment" which "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." Under any accepted definition of "entertainment," the Lake Nixon Club would surely qualify as a "place of entertainment." And indeed it advertises itself as such. Respondent argues however, that ... "place of entertainment" refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment

takes the form of direct participation in some sport or activity. We find no support in the legislative history for respondent's reading of the statute. The few indications of legislative intent are to the contrary....

The remaining question is whether the operations of the Lake Nixon Club "affect commerce...." We conclude that they do. Lake Nixon's customary "sources of entertainment" ... move in commerce. The Club leases 15 paddle boats on a royalty basis from an Oklahoma company. Another boat was purchased from the same company. The Club's jukebox was manufactured outside Arkansas and plays records manufactured outside the State. The legislative history indicates that mechanical sources of entertainment such as these were considered by Congress to be "sources of entertainment" within the meaning of [the Act].

Filing of the Court: Reversed.

CASE QUESTIONS

1. Summarize the two separate grounds the court used to determine that Lake Nixon was a place of public accommodation and thus covered by the Act.
2. Can you think of any business within the hospitality/entertainment industry that is not covered by the Civil Rights Act?

Summarizing Admission Policies

Many cases involve clubs that claim to have sufficiently selective admission policies to qualify as a private club. In these cases the court will carefully review those policies to determine if in fact they are adequately selective.

In a Virginia case, a golf club was accused of violating the Civil Rights Act by ejecting a foursome because one golfer, who was invited to the club by a member, was black. The club defended on the ground that it was a private club and so could discriminate on the basis of race. The club's requirements for membership included a \$750 initiation fee, the signature of two members on a written application, and approval of the application by the club's board of directors. The club adopted a membership ceiling of 450. The club did not routinely investigate the background and character of its applicants, nor did it measure applicants against any moral, religious, or social standards. The evidence presented indicated that only four white applicants

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had been rejected in the previous 15 years. The court ruled that these admission procedures, while "official and formal," were not sufficiently selective to render the club private.

Said the court, "If only four white applicants have been denied membership [in the last 15 years], the club cannot fairly be described as truly selective about its members."²³

Another case raised the issue of whether the Lions Club, a service organization with a worldwide membership of 313,000, was a private club. The application process for new members was as follows: they had to be sponsored by a current member; they were required to complete an application form; the club was supposed to investigate applicants' backgrounds thoroughly, but customarily no investigation was done; the board of directors then voted on the applicants; if approved by a majority of the board, applicants were asked to join. No proposed member had been rejected in 18 years. Noting that the screening process for new applicants was " cursory and operates to allow vast numbers of members," the court rejected the club's claim that it was private.²⁴

A similar case involved the Jaycees, another service organization. The local chapter in question had 430 members. The club did not use any criteria for judging applicants for membership. New members were routinely admitted with no background inquiry. The court denied the club's claim that it was a private club, stating, "[T]he local chapters of the Jaycees are neither small nor selective."²⁵

Unlike the service clubs, the Disabled American Veterans Association (DAV) was found to be a private club notwithstanding a national membership that exceeds 1,000,000. One of its primary objectives is to advance the interests and work for the betterment of all wounded, injured, and disabled American veterans. It has national and regional offices that provide services to all veterans, whether or not disabled. While admission is restricted to individuals disabled in the line of duty during war time in service of the United States armed forces or its allies, entry is not otherwise subjected to review. The court weighed against the broad membership criteria and the large number of members the fact that the military expertise that admits one to membership is "profoundly meaningful for almost all who go through it. It defines not simply an interest group, but a group for whom a very special social intimacy is possible. Encouragement of such intimacy is among DAV's express purposes."²⁶

Case Example 3-4 illustrates the application of the private club rules to a swimming club.

²³ *Brown v. Lambda Golf & Country Club, Inc.*, 573 F.Supp. 399, 403 (Va. 1983).

²⁴ *Rogers v. International Association of Lions Clubs*, 636 F.Supp. 1476 (Mich. 1986).

²⁵ *Roberts v. United States Jaycees*, 468 U.S. 609, 82 L. Ed.2d 462 (1984). For a similar holding, see also *Kiwasi International v. Ridgewood Kiwanis Club*, 627 E.Supp. 1381 (N.J. 1986).

²⁶ *Kramer v. Disabled American Veterans*, 33 S.W.3d 170 (Ky. 2000).

CASE EXAMPLE 3-4

U.S. v. Lansdowne Swim Club **894 F.2d 83 (3rd Cir. 1990)**

The Lansdowne Swim Club (LSC) ... a nonprofit corporation, is the only group swimming facility in the Borough of Lansdowne, Pennsylvania. Since its founding in 1957, LSC has granted 1400 full family memberships. Every white applicant has been admitted, although two as limited members only in that time, however, LSC has had only one nonwhite member.

The uncontroverted experiences of the following Lansdowne residents are significant. In 1976, the Allison's wrote to LSC requesting an application but LSC did not respond. Dr. Allison is black, his three children are part-black. In 1977, the Allison's twice again wrote for an application but LSC did not respond. The following year, the Allison's repeated the procedure with similar results. In 1983, the Allison's filed a timely application and otherwise qualified for membership but were rejected. The following year, the Ryans filed a timely application and otherwise qualified for membership. Nonetheless, they were rejected. Two of the Ryans' adopted children are black. The Ryans then complained to the media and picketed LSC, joined by the Allison's. In 1986, the Iverys, who are black, filed a timely application and otherwise qualified for membership. Nonetheless, they were rejected (as were the Ryans and Allison's who had again applied).

The United States alleges that LSC is a place of public accommodation ... which has engaged in a pattern or practice of discrimination by refusing membership to blacks because of their race or color, in violation of the Civil Rights Act....

LSC's first argument is that it is a private club. Under the Civil Rights Act, "a private club or other establishment not in fact open to the public" is exempt from the statute.... LSC has the burden of proving it is a private club.... Although the statute does not define "private club," cases construing the provision do offer some guidance. The district court distilled eight

factors from the case law as relevant to this determination, three of which it found dispositive of LSC's public nature: the genuine selectivity of its membership process, its history, and use of its facilities by nonmembers. LSC disputes these findings.

First, the court concluded that LSC's membership process was not genuinely selective. Essential to this conclusion was the court's finding that "LSC possesses no objective criteria or standards for admission." The court identified four "criteria" for admission to LSC: being interviewed, completing an application, submitting two letters of recommendation and tendering payment of fees. We agree, and LSC apparently concedes, that these criteria were not genuinely selective. Nonetheless, LSC challenges the court's failure to consider membership approval a criterion for admission. ... [A] formal procedure requiring nothing more than membership approval is insufficient to show genuine selectivity.... In addition, LSC stipulated that the only information given to the members prior to the membership vote is the applicants' names, addresses, their children's names and ages, and the recommenders' identities. In such a situation, the court was correct to conclude that LSC "provides no information to voting members that is useful in making an informed decision as to whether the applicant and his or her family would be comparable with the existing members." Therefore, even if membership approval were considered a fifth criterion, it would not make the process any more genuinely selective in this case.

The district court also found the yields of the membership process indicative of lack of selectivity. Since 1959, LSC has granted full memberships to at least 1,400 families while denying them to only two non-black families. LSC contends that emphasizing the few instances of non-black applicant rejection "misconstru[es] the significance of selectivity. The crucial question should be whether the members exercised their right to be selective rather than the statistical results of the exercise

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of that right". {Formal membership require-
ments have little meaning when in fact the club
does not follow a selective membership policy...

We find the evidence of lack of selectivity
convincing

CASE QUESTION

1. What would the club need to do differently to qualify as a private club?

In the following case, a country club was found to be private. It developed
sufficiently selective membership criteria, limited nonmember use of its facilities,
assigned management of the club to its members through appointments to the
board of trustees, and was organized for social purposes.

The underlying complaint in Case Example 3-5 resonates in numerous coun-
try clubs throughout the country. Female members are often discontented that
their male counterparts receive more favorable services. While this case does not
provide any details on the dissimilar opportunities, common complaints are that
desirable ice times and preferred days to play are foreclosed to women.

CASE EXAMPLE 3-5

Barry v. Maple Bluff
Country Club, Inc.

629 NW2d 24 (Wis. 2001)

Maple Bluff Country Club is [a] nonprofit
organization that provides its members and
guests with a clubhouse, pool, tennis courts, golf
courses and other recreational facilities. Plaintiff is
a member of the Club. She alleges that the Club
engaged in sex discrimination by providing more
advantageous services and opportunities to men
than to women club members [no additional detail
on the alleged disparity of service was provided].
... The club must be a public place of
accommodation or amusement for Barry's claim
of discrimination to lie....

The Club has a plan that is consistently
employed in determining who will obtain
membership. First, a prospective member must
be proposed and seconded by two members

who must vouch for the nominee's moral and
financial character. If the prospective member is
not a resident of the village in which the Club is
located, two letters must be sent to the
membership committee supporting the
nomination. If the nominee resides in the
village, the Club requires one letter. Second,
the membership committee interviews all
nominees and makes recommendations to the
Club's board of directors. Third, no one may be
admitted to the membership except through the
unanimous vote of the board....

The membership owns the Club's property and,
through its board, which is elected by the
membership, decides what programs and
facilities will be provided and the hours of use.
The board's control of the Club's facilities is an
important factor....

Furthermore, the history of the Club shows
its purpose has always been that of a private

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country club established to provide social and
recreational services and facilities to its members
and guests ... The use that nonmember residents
make of the facility is limited ...

We conclude that the club is a private
organization [and therefore it can continue to
provide enhanced opportunities and services to
male members].

CASE QUESTION

1. What specific facts led the court to hold that the country club was private?

Extending Civil Rights Protection

The Act represented a major step forward in this country's attempt to eliminate dis-
crimination. As we have seen, however, the classes of people protected and the types
of facilities covered are limited. Other federal, state, and local laws help to fill the gaps.

State Civil Rights Laws

Virtually every state has a civil rights law that, in part, duplicates the Act and, in
part, expands its coverage. The differences are as follows.

COVERAGE

The state laws include within their coverage businesses that are purely intrastate in
nature—that is, businesses not involved in interstate commerce. Remember, the
Civil Rights Act of 1964 applies only to businesses engaged in interstate commerce.

COVERED FACILITIES EXPANDED

Whereas the Act applies only to lodging facilities, dining facilities, gasoline sta-
tions, and "places of entertainment," most state laws encompass a large number of
additional "places of public accommodation." These include bars, stores, clinics,
hospitals, barber and beauty shops, libraries, schools, colleges, public halls, public
elevators, public institutions for the care of neglected or delinquent children,
garages, and public transportation.

Thus, if a store refused to sell merchandise to customers because they were
Buddhist, Chinese, Hispanic, or black, the store would be in violation of the state
(but not federal) civil rights act. However, where a store displayed novelties for
sale that demeaned people of Polish extraction, the state civil rights act was not
implicated. Said the court, "The novelty items, although offensive and in poor
taste, were not communications to the effect that any of the accommodations, ad-
vantages, facilities, and privileges of the shop would be refused, withheld from or
denied to any person on account of national origin."²⁷

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²⁷ *State Division of Human Rights v. McIntosh Gift Center*, 419 N.Y.S. 2d 405 (1979).

PROTECTED CLASSES INCREASED

As we studied, the protected classes in the Act were originally race, color, religion, and national origin. The state statutes customarily expand the categories of protected classes and frequently include marital status and disability. Some statutes and local government ordinances also outlaw discrimination on the basis of sexual orientation, thereby protecting lesbians and homosexual men. Transgendered people are protected in several states and dozens of localities.

ADVERTISEMENTS

Many state statutes prohibit advertisements that contain statements or suggestions, whether express or implied, that accommodations will be denied because of a protected characteristic, such as race, religion, or gender.

This issue arose in a 1974 New York State case in which female plaintiffs objected to the name and exterior sign of a bar because it implied women would not be served. The objectionable name was "Silent Woman Tavern" and the exterior sign depicted a headless woman. The owner conceded that the sign and name were intended to attract male patrons. The court refused to require the bar to remove the sign or change its name, and said,

The law does not prohibit appealing by signs or trade name to one sex or another. Rather, the prohibition is against displaying notice of advertisement to the effect that any of the facilities or privileges will be refused or withheld from or denied a person on account of sex.... There is nothing about the name or the exterior sign, in the form used here, that would suggest that women would be refused the use of the facilities.²⁸

REMEDIES

Under the Act, which is a federal law, remedies are limited and include primarily injunctive relief and attorney's fees. The state remedies are more expansive. One important redress available for violation of many state civil rights laws is damages (money), so an establishment that wrongfully denies services may be liable to pay money to the would-be patron. In addition, violation of many state civil rights laws is deemed a crime, which can result in jail and fines.

The Americans with Disabilities Act

The **Americans with Disabilities Act** (hereinafter "Disabilities Act"),²⁹ a federal law passed by Congress in 1991, is a far-reaching commitment to the rights of the disabled. Its purpose is "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; and (2) to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities."

The Disabilities Act prohibits places of public accommodation from discriminating against individuals on the basis of disability. The statute's definition of "places of

public accommodation" is significantly broader than that in the Civil Rights Act of 1964. In addition to the hotels, restaurants, places of entertainment, and service stations covered by the latter Act, the Disabilities Act applies to bars, stores, service establishments such as barber and beauty shops, laundromats, banks, public transportation, and schools and colleges. Also included are cruise ships including those operated under foreign flags located in United States waters.³⁰

The Disability Act defines "discrimination" as including a failure to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to provide goods, services, or accommodations to disabled people. Thus the Disabilities Act requires establishments to adjust their policies and adapt their practices within limits to the needs of their handicapped clientele. When determining whether a specific modification is reasonable, and therefore required, courts consider the cost of the action needed, the overall financial resources of the facility, the effect on expenses and resources, the size of the business, and the type of operation.³¹

"Disabled" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [the disabled person]." A "major life activity" refers to an activity of central importance to most people's daily lives and includes conduct such as walking, seeing, hearing, speaking, breathing, working, or caring for oneself.³² For example, a person who uses a wheelchair or prosthetic limb may be mobile but still disabled because of a substantial limitation on the ability to walk or run. The Disabilities Act does not apply to private clubs, which are defined in the same manner as under the Civil Rights Act of 1964.

INTEGRATED SETTINGS

A goal of the Act is to ensure that goods, services, and facilities are provided to disabled persons in the most integrated setting possible. Thus, a restaurant cannot place all wheelchair-accessible tables in an isolated corner of the dining room. Instead, they must be placed throughout the dining area. Similarly, a resort that offers exercise classes could not require a wheelchair-bound patron to attend a separate class for the disabled. Instead, that guest must be permitted to join the class offered to able-bodied patrons.³³

In one case, plaintiffs complained that only six of nine poolside cabanas at a casino were accessible by wheelchair. All nine had similar amenities. On this claim the court held for the casino, noting that not all facilities in a place of public accommodation need to be accessible.³⁴

In another example, a court held that not all seats at a stadium are required to accommodate wheelchairs. However those that do must be interspersed throughout

²⁸ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 S.Ct. 2169 (2005). Note: If, by removing barriers to enable use of the facilities by disabled passengers, the vessel fails to comply with international law relevant to safety at sea, the Disabilities Act would not apply.

²⁹ 42 USC § 12181(9); *Wilson v. Per-T Impex, Inc.*, 2006 WL 947709 (Ca. 2006).

³⁰ 42 USC § 12102(2)(A); CFER 1630.2(f); *Hubbard v. Rice Adl Corp.*, 2006 WL 1359630 (Ca. 2006); *Toyota Motors Mfg., Inc. v. Williams*, 534 US 184, 122 S.Ct. 681 (2002); *LaBrecque v. Sodeximo*, 287 F.Supp.2d 100 (Mass. 2003).

³¹ *Long v. Court Reports, Inc.*, 32 F.Supp. 2d 1203 (Nev. 1999).

³⁴ *Long v. Court Reports, Inc.*, 267 F.3d 918 (Nev. 2001).

²⁹ *Reynolds v. Saint Thomas Right's Appeal Board*, 45 A.D. 2d 29, 357 N.Y.S.2d 335 (1973).

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the facility. A sports arena with 55 wheelchair seats violated the Disabilities Act by locating all 33 on the same level. The Disabilities Act requires that disabled seating be dispersed throughout the stadium.³⁵

MANDATES NOT PERMITTED FOR DISABLED GUESTS ONLY

The Disabilities Act is violated if the provision of services to people with disabilities is conditional upon requirements that are not imposed on others. For example, a restaurant that requires patrons in wheelchairs to be accompanied by a companion but seats single, able-bodied customers violates the Disabilities Act.

MODIFYING RULES TO ACCOMMODATE THE DISABLED

Where the policies or practices of a place of public accommodation have the effect of discriminating against people with disabilities, the place of public accommodation must change its policies or practices unless the modification would fundamentally alter the nature of the goods or services provided. For example, a place of public accommodation may have a rule prohibiting pets, but must modify that rule by permitting entrance to a service dog.

Three cases addressed the issues associated with guide dogs for blind customers. In the first, a brewery that provided public tours of its facilities but refused to permit a guide dog to accompany a blind patron violated the Disabilities Act. Allowing the animal to accompany its owner would not fundamentally alter the nature of the brewery tour nor jeopardize safety to others.³⁶ Another case was based on a restaurant's refusal to allow a service dog inside. The parties settled the case with the restaurant, which agreed to give full and equal access to blind people and their guide dogs, to post the new policy conspicuously throughout the establishment, and to insert the statement into its policy manual for all the restaurant's employees, agents, and representatives.³⁷ The third case involved a Days Inn that refused to provide accommodations to a legally blind traveler with a service dog because of a no-pets policy. The court held such refusal constituted a violation of the motel's legal duty to accommodate disabled guests.³⁸

Another modification applies to bars that have a rule requiring a customer or dering a drink to present a driver's license as proof of age. To accommodate persons with disabilities that prevent them from driving, the bar must modify the rule to accept an alternative form of identification.

Case Example 3-6 illustrates another circumstance that may require changes to a facility's policies.

³⁵ *Indefatigable Living Resources v. Oregon Arena Corporation*, 982 F.Supp. 698 (Or. 1997), *supra* note 1, 1 F.Supp. 2d 1159 (Or. 1998).

³⁶ *Johnson v. Spectator Brewery*, 116 F.3d 1062 (Tex. 1997).

³⁷ *Fisher v. Cedar Creek Inn*, 214 F.3d 1115 (Ca. 2000).

³⁸ *Amick v. RV & KM, Inc.*, 275 F.Supp. 2d 1578 (Ca. 2003).

Demar v. Chicago White Sox 2006 WL 200640 (Ill. 2006)

Plaintiff Robert Demar ("Demar") alleges that due to severe polio and post-polio-induced paralysis in his abdomen, he is substantially limited in his ability to "ambulate, stand upright and erect, and walk." Demar claims that on September 7, 2003, he attended a Chicago White Sox ("CWS") game at U.S. Cellular Field in Chicago, Illinois. According to Demar, as the game ended, he saw people begin to exit the seating area in the stadium and form long lines. Demar claims that he thought that the restroom facilities and elevators at U.S. Cellular Field could not adequately accommodate the large lines that would be forming as people left their seats. Demar contends that he planned to use the restrooms and elevators at the ballpark once the crowd had dispersed.

Demar claims that while he waited for the crowd to disperse, security personnel from Defendant SDI Security, Inc. demanded that he leave the seating area and Demar explained that he was disabled and was waiting for the crowd to thin out. At that point, the security personnel allegedly proceeded to take possession of Demar's walking cane and forcibly removed him

from the seating area. The security personnel then allegedly brought Demar to an ambulance on the ground level. Demar claims that the ambulance was operated by Defendant Superior Air-Ground Ambulance Service, Inc. ("Superior") and that he was taken by ambulance to a hospital where he refused to be examined or treated.

Demar further alleges that he "was forced to fend for himself" in order to return to U.S. Cellular Field and retrieve his vehicle. Demar also claims that Superior subsequently sent him a bill for its services. In the complaint Demar includes an Americans with Disabilities Act of 1990 ("ADA") claim....

In the instant action, Demar clearly does contend that CWS should have altered its regular policy of requiring spectators to vacate seating areas after games and allow a disabled person, such as Demar, to remain in the seating area until the lines at the restrooms and elevators subsided before requiring the person to leave the seating area. Demar does allege that CWS failed to make what Demar contends is a reasonable modification to CWS's policies and procedures for the purpose of accommodating people with disabilities. Thus, Demar has alleged sufficient facts to state an ADA claim....

CASE QUESTION

1. What reasonable modifications to its policies could the defendant have made in this case that would have accommodated the plaintiff's alleged disability?

In a case against the Professional Golf Association Tours (PGA), the plaintiff was a talented golfer who qualified for the tournament. He had a degenerative circulatory disorder that prevented him from walking golf courses. The PGA sought to enforce its rule requiring competitors to walk the course. The player sought an accommodation enabling him to use a golf cart during tournaments. The PGA claimed that allowing a golfer to ride a cart fundamentally altered the nature of a PGA competition. The court rejected this argument noting that the essence of golf is short-marking, not walking. In response to the PGA's concern that walking induces fatigue, thus giving a rider an unfair advantage, the court concluded that the evidence presented established that "fatigue from walking during a

tournament cannot be deemed significant." The PGA was thus required to permit the plaintiff to use a cart.³⁹

If an accommodation would alter the essential nature of a business, the accommodation is not required. For example, a nightclub that regularly hosts live bands is not required to dispense with the music to accommodate a hearing impaired server who requires low background noise to understand customers' orders. Likewise a fitness club was not required to modify the rules of tournament racquetball to permit a wheelchair player to participate. The disabled player's request to allow him two bounces rather than just one would substantially alter the fundamental character of the game.

PROVIDING AUXILIARY AIDS AND ALTERNATIVE SERVICES

To accommodate disabled individuals, the Disabilities Act requires places of public accommodation to provide auxiliary aids and services where necessary, unless such aids or services would fundamentally alter the nature of the goods or services offered, or would result in an undue burden. For example, while a restaurant is not required to provide Braille menus for blind patrons, it will be required to provide someone to read the non-Braille menu to the visually impaired diner. Other examples include a hotel providing a hearing impaired guest with a flashing-light device to denote emergencies, since an alarm would not be heard, and an alarm-clock mechanism that causes the bed to vibrate at a designated waking time.

STRUCTURAL MODIFICATIONS FOR EXISTING BUILDINGS

The Disabilities Act contains requirements concerning accessibility of facilities. Structural obstacles often preclude access by disabled persons to buildings open to the public. For example, a second floor reachable only by steps is not available to a person in a wheelchair. Blind persons may be unable to use an elevator because they cannot determine which button to push. The requirements to remove obstacles vary depending on whether the inaccessible building is an existing one, an existing one that is being altered, or a new one under construction.

For existing buildings not undergoing renovations, the Disabilities Act requires places of public accommodation to undertake the removal of barriers if doing so is "readily achievable." **Readily achievable** is defined as "easily accomplished without much difficulty or expense." When drafting the Disabilities Act, Congress sought to protect the business community from incurring undue costs. Examples of barrier removal that are considered readily achievable include:

- Ramping a few steps (such as those in the entryway of a building or leading to a sunken area of a dining room in a restaurant);
- Lowering telephones;
- Adding raised letters and Braille markings on elevator control buttons;
- Adding grab bars in bathrooms, provided only routine reinforcement of the wall is required;

³⁹ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 149 L. Ed.2d 904 (2001).

- Rearranging tables in a restaurant to permit wheelchair passage;
- Properly designating handicapped-accessible parking spaces;
- Replacing door handles that are not easy to grasp with one hand or that require tight grasping or twisting of the wrist to operate; and
- Similar modest corrections.

Where removal of a barrier is readily achievable, failure to remove it constitutes illegal discrimination. In one case a disabled patron was unable to open the entrance door because of its difficult-to-use mechanism. The customer was able to gain access only with the aid of another patron who assisted in opening the door. The facility claimed that the design of the door was not a barrier because the plaintiff was able to gain access. Said the court, "This is exactly the sort of situation the [Disabilities Act] seeks to prevent: the need for a disabled person to rely upon the help of more able-bodied persons in order to go about day-to-day activities." If, however, the removal of the barrier is not readily achievable, its continued presence does not violate the Disabilities Act. For example, installation of an elevator for access to a second floor would be quite costly and would therefore not be required for existing buildings.

Case Example 3-7 illustrates the significant detail required for a plaintiff to prove that a requested barrier removal is readily achievable.

CASE EXAMPLE 3-7

Disabled Patriots of America, Inc. v. ODCO Investments, Ltd. **2006 WL 792725 (Oh, 2006)**

In their complaint and motion for summary judgment, Plaintiffs allege that defendant ODCO Investments, Ltd. (ODCO) committed a litany of violations of the Americans with Disabilities Act ("ADA") at the Days Inn. Specifically, Plaintiffs assert that Miles, a disabled Ohio resident, visited the Days Inn operated by ODCO but was unable to avail himself of the goods and services offered. Plaintiffs further assert that Miles intends to return to the property once it becomes accessible to him. Finally, Plaintiffs contend that ODCO's failure to remove barriers to Miles's access interfered with his enjoyment of the goods and services offered to the public in violation of the ADA. Plaintiffs seek a grant of summary judgment in their favor finding ODCO liable for failing to maintain its property in

compliance with the ADA, requiring ODCO to make all readily achievable repairs and alterations to bring the property into full compliance with the ADA, and awarding Plaintiffs attorneys' fees and litigation expenses. ODCO has not opposed Plaintiffs' motion for summary judgment....

The ADA prohibits discrimination against persons with disabilities in public accommodation.... Public accommodation is defined, *inter alia*, as "an inn, hotel, motel, or other place of lodging...." The Days Inn ODCO operates in Perryburg, Ohio, falls squarely within this definition. "To succeed on an ADA claim of discrimination on account of one's disability due to an architectural barrier, the plaintiff must also prove that: (1) the existing facility at the defendant's place of business presents an architectural barrier prohibited under the ADA, and (2) the removal of the barrier is readily achievable."

Under the ADA, an owner or operator of a place of public accommodation violates the ADA by

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failing to remove, "architectural barriers, and communication barriers that are structural in nature, in existing facilities. . . . Where such removal is readily achievable, and where an entity can demonstrate that the removal of the barrier is not readily achievable, [the ADA is violated by failing] to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable."

Readily achievable is defined as, "easily accomplishable and able to be carried out without much difficulty or expense." To determine whether removal of a barrier is readily achievable, the ADA sets forth several factors to consider: (A) the nature and cost of the action needed under this Act; (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources; or the impact otherwise of such action upon the operation of the facility; (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (D) the type of operation or operations of the covered entity, including the compensation, structure, and functions of the workforce of such entity, the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

Here, Plaintiffs' evidence suffers from . . . defenses. While Plaintiffs do provide a detailed list of alleged violations at the Days Inn, they do not provide a complete and precise cost to remove all barriers . . . For example, Plaintiffs assert that the entry stairs do not have closed risers, and estimate the "readily achievable solution and cost" as "\$2500 for each stair. . . ." However, Plaintiffs do not note how many stairs there are in the entry staircases. Whether the entry is two stair steps or ten stair steps would affect the overall cost and

thus would be a factor in whether the cost is readily achievable. . . .

In other portions of the estimate, Plaintiffs assert that handrails must be installed at a cost of "\$3800 dollars for each set of stairs. . . ." However, again Plaintiffs fail to note how many sets of stairs are non-compliant. Similarly, Plaintiffs allege other violations, [such as] improper mounting of the restroom signs, and [putting] tables in various areas that are not wheelchair accessible, without indicating the number that will need to be altered or whether the estimated cost is for one or all of the occurrences of the violation.

This Court's bare minimum estimate of the cost of barrier removal is approximately \$50,000. However, this only includes what Plaintiffs have listed and does not account for the cost of barrier removal that is missing from Plaintiffs' estimates. Without specific cost estimates the Court cannot say that Plaintiffs have met their duty to proffer evidence showing barrier removal is readily achievable.

Additionally, and more importantly, Plaintiffs have failed to provide any information regarding ODCO's overall financial resources. Without this evidence, there is no basis from which the Court or a jury could find that Plaintiffs' proposed alterations are "readily achievable" by ODCO. While ODCO agreed to provide such information in its answers to Plaintiffs' interrogatories, it has failed to do so. The Court cannot evaluate the cost of renovations in a vacuum, and without evidence of ODCO's ability to pay for them, the Court cannot conclude that Plaintiffs have shown the renovations are "readily achievable." Plaintiffs have therefore failed to make out a prima facie case of disability discrimination. On the facts before it, the Court cannot say that a jury could only find for the Plaintiffs. Summary judgment in favor of Plaintiffs would be inappropriate at this time. [So the case will proceed to trial if it is not settled.]

CASE QUESTIONS

1. What information could the plaintiffs have provided to the Court regarding whether barrier removal was readily achievable by the defendants?
2. In the last paragraph the court referenced interrogatories, which we studied in the previous chapter. What are interrogatories?

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Where removal of a physical barrier is not readily achievable, the obligation to accommodate disabled persons is not thereby eliminated. Instead, the Act requires the facility to make its goods or services available through an alternate method if one is readily achievable. For example, it may not be easily doable for a restaurant to alter the location of a bar positioned one level above the dining area. To accommodate wheelchair patrons, such a restaurant would be required to modify a house rule requiring customers who want to drink but not order food to sit at the lower-level bar. Instead, the restaurant must permit disabled persons to order drinks from a table on the main floor.

STRUCTURAL REQUIREMENTS DURING CONSTRUCTION

The Disabilities Act does not mandate that facilities undertake major alterations or new construction. However new facilities and buildings undergoing renovation must be constructed in such a way that they can be approached, entered, and utilized easily and conveniently by people with disabilities. New construction and alterations must comply with the Disabilities Act's accessibility guidelines. These regulations contain technical standards for most aspects of a building, including entryways, door sizes, layout, bathroom construction, and more. If, however, the cost to make the new or altered building accessible would be disproportionate to the overall cost and scope of the alteration or construction, alternative methods can be pursued. The requirement of barrier removal imposed when making alterations is not triggered by minor repairs such as painting or wallpapering; more extensive remodeling is required.

For a new hotel, the Disabilities Act requires the following: all doors and doorways must be designed to allow passage by a wheelchair; bathrooms need to be sufficiently wide to allow use by people in wheelchairs; a percentage of each class of hotel rooms must be fully accessible, including grab bars in the bathroom and at the toilet; audio loops are required in meeting areas; emergency flashing lights or alarms are needed in hotel guest rooms; Braille or raised-letter words and numbers are required on elevators and signs; and handrails must be installed on stairs and ramps.

If a person with a disability needing a fully accessible room makes a reservation without informing the hotel of the need for such a room and, when the person arrives, an accessible room is not available, the hotel has not violated the Disabilities Act. While the hotel must make an effort to provide disabled persons accessible rooms, it can rent those rooms to nondisabled persons if an identified disabled person has not sought a reservation and other rooms are occupied.

TRANSPORTATION AND TELECOMMUNICATIONS

The Disabilities Act also requires that businesses offering transportation attempt to make their facilities accessible to the disabled. A hotel that provides a hospitality van must remove barriers to its use provided removal is readily achievable.

The Disabilities Act also requires that companies offering telephone service provide telecommunication devices for the deaf that will permit a hearing-impaired person to communicate with anyone in this country who has a telephone.

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LEGAL ACTION DIRECTED AT NONCOMPLIANCE

Two types of lawsuits can be brought under the Disabilities Act for noncompliance. One is a private action by individuals and the other is a lawsuit by the Department of Justice, a division of the federal government headed by the Attorney General.

A private lawsuit can be brought by a disabled person who is subjected to discrimination on the basis of disability or who has reason to believe that he is about to be subjected to discrimination. For example, construction of a new hotel is being planned, but the specifications are not in compliance with the Disabilities Act. Remedies for a private lawsuit include an injunction requiring compliance with the Disabilities Act, a court order requiring alteration of facilities to comply with the Disabilities Act, or a court order requiring an auxiliary aide or service be provided, a policy be modified, or an alternate method of barrier removal be undertaken. A money as a remedy to compensate a plaintiff for any losses or for inconvenience or humiliation is not recoverable in a private suit. A successful plaintiff can, however, collect attorney's fees plus litigation expenses and costs (such as expert witness fees and court filing fees).

The second type of lawsuit can be brought only by the United States Attorney General, the chief law-enforcement officer of the country. This type of action is pursued against a violator where a pattern or practice of discrimination exists or where the discrimination raises an issue of general public importance (where the discrimination impacts many people). In addition to the remedies available in a private action, a court in a case brought by the Attorney General may award monetary damages. Punitive damages cannot be awarded, although a court may assess a civil penalty not exceeding \$50,000 for the first violation and not exceeding \$100,000 for any subsequent violation. Like the Civil Rights Act of 1964, the Disabilities Act withstood constitutional challenge early in its history. Just as the courts in the *Harr of Atlanta Motel* and *Oliver's Barberian* upheld the Civil Rights Act, a court rejected claims by the House of Panackes that the Disabilities Act was unconstitutional.

In a case against an International House of Panackes, restaurant the court rebuffed the restaurant's claim that it was not engaged in interstate commerce, noting that the restaurant was located within two miles of two interstate highways, and within walking distance of three hotels. The court likewise repudiated the Panacke House's claim that the term *readily achievable*, used as the standard for determining when a modification must be made, was too vague to guide those bound by the Disabilities Act. The court commented that the statute provides direction by listing examples of what qualifies as readily achievable—including rearranging tables and chairs, installing small ramps, and installing grab bars in restrooms. Further, federal regulations explaining the statute clarify the term.

The Panacke House also claimed that the phrase *most integrated setting appropriate*, used by the statute to describe the goal for accommodating disabled patrons, was too vague to be enforceable. The court rejected this assertion as well, noting that the statute contains two pages of examples and explanations, and thus was sufficiently clear.⁴⁹

⁴⁹ *Panacke v. International House of Panackes Franchise*, 844 F. Supp. 574 (Cal. 1993).

Case Example 3-8 highlights the Disabilities Act's requirement that restaurants make readily achievable modifications to enable disabled patrons to utilize the establishment's facilities, including the bathrooms. Note the Court's concern with the "quality of access."

CASE EXAMPLE 3--8

Boemio v. Love's Restaurant
954 F.Supp. 204 (Cal. 1997)

This is an action based upon claims of discriminatory practices by a public accommodation... The allegations surround Mr. Boemio's visit to the Love's Restaurant in San Diego on or about April 19, 1996. Plaintiff suffers from a medical condition which requires that he use a motorized wheelchair. On the date in question, Plaintiff attempted to use the restrooms at the premises owned and operated by Defendant and alleges that he was unable to do so because the restrooms were inaccessible to wheelchair users. As a result of the inaccessibility, Plaintiff alleges that he was forced to urinate in the restaurant parking lot...

The issues at trial were whether Plaintiff could access the bathroom facilities at the premises... Having heard the oral testimony produced by parties, and the argument of counsel, and after reviewing the documentary evidence, the Court now makes the following findings.

- 1) On or about April 19, 1996 Defendant, Love's Restaurant, operated the restaurant facility in San Diego.
- 2) On or about April 19, 1996, Defendant's restaurant was a public accommodation as contemplated by law and required to be accessible to physically handicapped persons.
- 3) On or about April 19, 1996 Plaintiff, Ralph Boemio, was lawfully on the premises of Defendant's restaurant.
- 4) Plaintiff, Ralph Boemio, is a qualified handicapped individual as provided in the relevant sections of the Americans with Disabilities Act.
- 5) Plaintiff, Ralph Boemio, suffers from a medical condition which requires that he use a motorized wheelchair.
- 6) On or about April 19, 1996, while on Defendant's premises, Plaintiff, Ralph Boemio, attempted to

use the restroom facilities, but was unable to do so because the restrooms were inaccessible to him.

- 7) The men's restroom at Love's Restaurant was totally inaccessible to wheelchair patrons.
 - 8) The ladies' restroom was historically used by some disabled individuals with assistance from the restaurant staff.
 - 9) The ladies' restroom entry door from the corridor provided a clear opening of 28 and 1/2 inches and the door from the foyer to the toilet area provided a clear opening of 28 inches, both in violation of the ADA Accessibility Guidelines (32 inches required).
 - 10) The doorway size and configuration and layout of the corridor to the restroom prevented reasonable access to the restroom facilities on Defendant's premises.
 - 11) As a result of the inaccessibility, Plaintiff Ralph Boemio had to urinate in the parking lot.
 - 12) Plaintiff, Ralph Boemio, suffered actual damages in the form of mental anguish and humiliation as a result of the discrimination associated with the inaccessible bathrooms on Defendant's facility.
 - 13) Plaintiff's actions in the parking lot were unwarranted by third parties and unaccompanied by any mishap, injury, physical harm or property damage.
- The ADA (Americans with Disabilities Act) prohibits discrimination against any individual "on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases or operates a place of public accommodation." A restaurant is clearly a public accommodation under the ADA....
- The remedies for an ADA violation include injunctive relief and attorney's fees. Monetary

(continued)

damages are not recoverable by private Plaintiffs under the ADA.

Based upon the Findings of Fact previously set forth, it is clear that Plaintiff, as a qualified individual, has met his burden of proof with regard to the discrimination experienced in this action. While the operators and employees of Love's Restaurant made attempts to accommodate disabled individuals who needed to use the restroom on the facilities, Plaintiff was denied reasonable access in this case.

While the defense offered that with additional time, patience, and jockeying of the wheelchair, access could have been achieved, this was not reasonable nor consistent with the public policy interest in providing physically handicapped persons with equal access to public facilities and warrants a finding for Plaintiff in this action. The standard cannot be "is access achievable in some manner." We must focus on the quality of access.

CASE QUESTION

1. Why is "quality of access" a concern of the Disabilities Act?

Also constituting a violation of the Disabilities Act is failing to provide handicapped parking at a restaurant or hotel.⁴¹ To satisfy the ADA, a facility does not need to provide disabled customers with all the options available to able-bodied patrons. Rather, the requirement is to provide at least one means of access to the services. For example, plaintiffs complained that the cashier counter at a restaurant did not have a lowered section for wheelchair accessibility. It was the practice for all patrons of the eating facility to pay the server at the table, rather than at the cashier counter. Under these circumstances, the absence of an accessible cashier did not violate the Disabilities Act. Said the court, "The plaintiff's argument that perhaps a wheelchair user might elect to pay the bill directly, rather than to the server, is without merit. The present situation provides wheelchair users the same services as those provided to and utilized by the general public."⁴²

Age Discrimination

Age is a classification not protected in places of public accommodation by the Act or most state civil rights laws. Thus, it is normally not illegal to treat varying age

If a finding that ultimate access could have been achieved provided a defense, the spirit of the law would be defeated. It is clear that the legislative purpose behind these disability access laws would not support such a finding....

The restaurant's past practice of rendering assistance to disabled persons also supports the lack of any animus toward disabled individuals in the community. On the night in question, however, the clear violation of access standards, and the practical preclusion of Plaintiff from reasonable access to the restroom facilities is undeniable. The physical location and layout of the restroom interfered with full and equal access to the Plaintiff. Plaintiff's standard sized wheelchair, and the necessary attachments and configuration are not something that present some atypical anomaly.... Judgment is hereby entered in favor of Plaintiff and against Defendant.

Gender Discrimination

group working in such place. For example, a large discount department store, concerned about the high rate of shoplifting in the electronics department, barred school-age youths from entering the store after school hours on weekdays unless accompanied by an adult. Although this amounts to treatment of young people differently from others, discrimination in places of public accommodation on the basis of age is not illegal. Similarly, a skating rink that wishes to promote a Saturday-evening session as an event for teens can exclude from the rink people who are younger or older.

While discrimination on the basis of age in places of public accommodation is generally permissible, discrimination on the basis of age in employment decisions is restricted, as we will discuss in Chapter 14.

Another type of discrimination not outlawed by the Civil Rights Act of 1964 is discrimination based on gender. In a 1968 case, a woman was refused service at an all-male bar operated by a hotel. She was forced to leave although she was sitting quietly and not disturbing other patrons. She sued the bar, challenging its discriminatory policy. The court noted that the Civil Rights Act of 1964 did not cover gender discrimination and dismissed the case, suggesting that the plaintiff address her complaint to Congress, which has the authority to change the law, and not to the courts.⁴³

Although the Civil Rights Act does not protect women in places of public accommodation, under some circumstances they can obtain redress for discrimination through the Fourteenth Amendment to the Constitution. That amendment states, "[N]or shall any state ... deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). The operative word is state, meaning the government. The amendment does not prohibit private discrimination. How does a place of public accommodation qualify as the state? It qualifies only if it is subject to considerable supervision and control by the government. Is a bar or restaurant with a liquor license issued by the state subject to the necessary degree of state supervision and control, and therefore bound by the Fourteenth Amendment prohibition against unequal protection of the laws?

That question was answered in the affirmative in a New York case. Two female members of the National Organization of Women (NOW) entered the defendant establishment, a bar primarily engaged in serving beverages. They were told by the bartender that the facility did not serve women and that it had consistently adhered to this practice throughout all of its 114 years of existence. The two women sued the bar claiming illegal discrimination on the basis of the Act and the Fourteenth Amendment. The court denied their Civil Rights Act claim, stating that Congress did not outlaw discrimination based on gender. Concerning the Fourteenth Amendment claim, the Court noted that a liquor licensee is restricted by state law in who it can sell alcohol to and when it can sell. Further, the licensee

⁴¹ *Boston v. Paul McNulty Realty*, 216 F.3d 827 (Haw. 2000); *Association for Disabled Americans, Inc. v. Koy-Largo Bay Beach, LLC*, 407 F.Supp. 2d 1324 (Fla. 2005).

⁴² *Long v. Coast Resorts, Inc.*, 32 F.Supp.2d 1203 (Nev. 1999), aff'd in part, rev'd in part, 207 F.3d 1203 (Nev. 2001).

⁴³ *DoCur v. Hotel Syracuse Corp.*, 288 F.Supp. 530 (N.Y. 1968).

is subject to inspection or its premises by the State Liquor Authority, which can suspend or revoke the license. The court held this to be sufficient supervision and control to qualify the bar as an instrumentality of the state.⁴⁴

Supplementing the Constitution, virtually all states now have state statutes that prohibit discrimination in places of public accommodation based on gender. As we have discussed, the phrase *place of public accommodation*, as used by state law, customarily covers more establishments than does the federal Act. The phrase includes almost every place open to the public, including, for example, stores and schools.

In a case involving the New York statute, a tavern refused to serve women at the bar during certain hours. The plaintiff sought a court order barring the owners from continuing that practice. Based on state law, the court granted plaintiff's request and ordered the bar to cease and desist its discriminatory practice.⁴⁵

In another case involving Michigan's civil rights statute, the court barred the Lions Club, an all-male service organization, from denying women membership. The club had refused to accept a woman who met all membership requirements except gender.

Like the Civil Rights Act of 1964, most state civil rights acts exempt private clubs. As with the Act, the issue arises whether an establishment is public or private. The right of an allegedly private golf club to refuse to grant membership to women was at issue in a California case.⁴⁶ Plaintiff wife and her husband had a family membership at defendant golf club. When they divorced, the plaintiff was awarded the couple's membership. A rule of the club provided that family memberships "shall be issued only in the name of adult male persons . . . and shall not be approved for females or minors."⁴⁷ The rule further provided that where a family membership was awarded to the wife in a divorce and the husband failed to purchase it from the wife, the board of directors of the country club could terminate the membership.

The board cancelled plaintiff's membership accordingly and the plaintiff sued based on gender discrimination. The club claimed it was a private club and so was not bound by the California state statute that prohibited discrimination by "business establishments" based on gender.

The court rejected the golf club's argument that it was a private club and held for the plaintiff wife.⁴⁸ Pivotal to the decision was the significant use of club facilities by nonmembers. While as a general rule the club's facilities were open only to members, many exceptions existed.

In another case, male bar patrons challenged a "ladies drink free" promotion that defendant bar sponsored weekly. Defendant also featured a weekly "Men's Night Out" which offered reduced drink prices and free dart games for male patrons. On other nights of the week, promotions were offered to all patrons.

⁴⁴ *Schindler v. Messer's Old Ale House, Inc.*, 308 F.Supp. 1253 (N.Y. 1969).

⁴⁵ *Rosenberg v. State Human Rights Appeal Board*, 357 N.Y.S.2d 315 (1974).

⁴⁶ *Reger v. International Association of Lions Clubs*, 656 F.Supp. 1476 (E.D. Mich. 1986). See also *Brown v. National Proctere Order of the Elk v. Remuda*, 863 F.Supp. 529 (Mich. 1994).

⁴⁷ *Marfield v. Peninsula Club v. Country Club*, 896 P.2d 776 (Cal. 1995).

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Nights of Proprietors

The Wisconsin state statute in issue promoted a place of public accommodation from giving preferential treatment because of gender. The court held that ladies' night promotions gave preferential treatment to women on the sole basis of gender, therefore violating the law. Said the court, "Our interpretation of [the law] does not prohibit [defendant bar] from offering a wide array of promotions in the form of reduced or no prices for food, drinks, and entertainment. It prohibits only those promotions that base price differentials on the categories specified in the statute [which include gender]."⁴⁹

One of the bar's arguments was that, since it gave men promotional benefits on another night, ladies night was not discriminatory. The court responded, "Preferential treatment to men on other nights does not correct the violation." Had female patrons challenged the men's night promotions, the outcome would have been the same; those promotions likewise violated the law.

Gender discrimination in access to places of public accommodation is less prevalent today. Such discrimination in employment is more widespread. While the federal Act does not protect against gender discrimination in places of public accommodation, it does protect against gender discrimination in employment, as we will discuss in Chapter 14.

The law does not prohibit discrimination against categories of people not included in the protected classes. For example, no law offers protection against discrimination in places of public accommodation to people who are dressed in jeans or males not wearing shirts. Thus, a restaurant's policy of refusing to serve anyone in jeans is legal even though it discriminates against people wearing denim pants.

Another case involved a casino's election of a patron who was a counter—that is, someone who keeps track in blackjack of what cards have been played. When certain cards that tilt the odds in favor of the player remain to be played, the counter bets the house limits and frequently wins, to the chagrin of the casino.

The expelled counter challenged the casino's right to evict him. The court held the counter was not protected by the Civil Rights Act because his exclusion was not based on race, color, religion, or national origin.⁴⁹

Linkspers, unlike restaurateurs, have a common-law obligation to provide accommodations to all who seek them. However, even this rule has exceptions that allow an innkeeper to refuse accommodations to a guest who is unable to prove ability to pay, a guest who is disorderly, or a guest who has a contagious disease. These exceptions and others will be discussed in Chapter 10.

⁴⁹ *Moore v. Madison Motel Associates*, 525 N.W.2d 123 (Wis. 1994).

⁴⁹ *Levin v. Airport Casino, Inc.*, 564 P.2d 1216 (Cal. 1977). Note: Updated blackjack dealer devices, when used, render counting obsolete because the dealer refuses and reshuffles the cards after virtually every hand.

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REMOVAL OF A RESTAURANT PATRON WHO IS ACTING DISORDERLY DOES NOT VIOLATE THE CIVIL RIGHTS LAWS. Although the unruly diner may be a member of a protected minority, ejection based on conduct does not violate the Civil Rights Act. Case Example 3-9, involving a McDonald's restaurant, illustrates this point. As you read the case, note how the customer sought to prove racial discrimination and the reasons why the court rejected that proof.

CASE EXAMPLE 3-9

Alexis v. McDonald's Restaurants of Massachusetts, Inc. 67 F.3d 341 (Mass.)

... Alexis and her family, who are African Americans, entered a McDonald's restaurant, proceeded to the service counter, placed their order, and paid in advance. When the food was placed before them at the service counter, it became apparent that [their server] Alfredo Pascacio, whose native tongue is Spanish, had mistaken their order. During the ensuing exchange between Alexis and Pascacio, defendant-appellee Donna Dornina, the "acting manager," intervened on behalf of Pascacio, which prompted Alexis to say: "You take care of the people in front of you. He's taking care of me, and we're sorting this out." Dornina nonetheless persisted for several more minutes.

Ultimately, Dornina said to Alexis, "I don't have to listen to you." Alexis replied, "If you're damn right, you don't have to listen to me. I was not speaking to you. I was speaking to him." Dornina then instructed Pascacio: "Just put their stuff in a bag and get them out of here." Turning to Alexis, Dornina retorted: "You're not eating here. If you [do], we're going to call the cops." Alexis responded: "Well, you do what you have to do because we plan to eat here." Notwithstanding Dornina's instructions, Pascacio placed the food order on a service tray, without begging it. The entire incident at the service counter had lasted approximately ten minutes.

After the Alexis family went into the dining area, Sherry Toham, a managerial employee, summoned defendant Michael Leporelli into the restaurant. Leporelli, a uniformed off-duty police sergeant, had been patrolling on foot outside the restaurant by prearrangement with the Town of

Frammingham, but had witnessed no part of the earlier exchange among Alexis, Pascacio, and Dornina.

Upon entering the restaurant, Leporelli was informed by Dornina that Alexis had been yelling, creating a "scene," and an "unwarranted disturbance" over a mistaken food order, and directing abusive remarks at Pascacio. Dornina informed Leporelli that Alexis had argued loudly with her and another employee; that she "just wasn't stopping"; and that Alexis was still in the dining area though Dornina had asked her to leave. Finally, Dornina told Leporelli: "I would like her to leave."

Without further inquiry into the "disturbance" allegedly caused by Alexis, Leporelli proceeded to the dining area where Alexis and her family were seated, and informed the entire Alexis family that the manager wanted them to leave and that they would have to do so. Alexis immediately asked why, denied causing any disturbance, and claimed a right to finish eating in the restaurant. When she urged Leporelli to ask other restaurant customers whether there had been a disturbance, Leporelli simply reiterated that the family would have to leave. ...

Approximately ten minutes later, Officer William Flier arrived, and Alexis was told by Leporelli that she was being placed under arrest. ...

Alexis eventually was charged with criminal trespass, a misdemeanor. Following her acquittal by a jury, Alexis and her family filed the present action ... asserting civil rights claims. ... The district court granted summary judgment for the defendants. ...

Alexis submitted deposition testimony of six witnesses—the five Alexis family members and Karen Stauffer, an eyewitness to the events—each of whom opined, in effect, that had Alexis

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been a "rich white woman," she would not have been treated in the same manner. The court found that the proffered testimony was "not supported by sufficient factual undergirding" to permit a reasonable inference that either Dornina or McDonald's discriminated against Alexis on the basis of her race. ... The six deponents based their inferences of racial animus on their personal observations that Dornina reacted "angrily" toward Alexis and with a "negative tone in her voice," was "unfriendly," "uncooperative," "high strung," "impolite," "impatient," and had "no reason" to eject Alexis. Although these observations may be entirely compatible with a race-based animus, there simply is no foundation for an inference that Dornina harbored a racial animus toward Alexis or anyone else, absent

CASE QUESTION

1. On what basis did the court find that the restaurant was not liable for discrimination?

some probative evidence that Dornina's petulance stemmed from something other than a race-neutral reaction to the stressful encounter plainly evidenced in the record, including Alexis' persistence (however justified). ... As Alexis points to no competent evidence that Dornina and McDonald's intentionally discriminated against her on account of her race, the district court correctly ruled that this claim should be dismissed. Disputes generally arise out of mutual misunderstanding, misinterpretation, and overreaction, and without more, such disputes do not give rise to an inference of discrimination. Accordingly, the summary judgment entered in favor of Dornina and McDonald's must be affirmed. ...

Reasonable Rules of an Establishment

The management of a service establishment, like any other business enterprise, typically adopts rules to maintain order and express the philosophy of its management. Often these rules result in different treatment of different groups. If the rules are reasonable and do not result in illegal discrimination against protected classes, they are enforceable even though the result may be that some people will be treated differently than others.

In Case Example 3-10, the management of a restaurant had a rule that excluded any person who was barefoot. A woman, ejected from the restaurant because she had removed her shoes, unsuccessfully challenged the legality of the rule.

CASE EXAMPLE 3-10

Feldt v. Marriott Corporation 322 A.2d 913 (D.C. 1974)

[Appellant], about 26 years of age, and her male escort had attended a dance at a fraternity house and after leaving the dance went to a Junior Hot Shoppe, owned and operated by appellee. They

went through a canteen line, selected and paid for some food and then sat at a table and began to eat. The manager of the shop approached the table and told appellant she would have to leave because she was not wearing shoes. [Appellant left her shoes in her escort's automobile parked near the entrance.] No sign to that effect was

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posted, but the manager said it was the company's policy to serve no one who was not wearing shoes. She replied she would leave as soon as she finished eating. The manager did not offer to refund her money, and she asked for no refund. [There was testimony that the manager offered to get a bag so she could take the food—a hamburger and french fries—with her.] He continued to insist that she leave, and she continued to insist she would leave only when she had finished eating. The argument continued and she finally said to the manager: "Will you, please, go to hell." He walked outside and returned with a police officer. The manager again asked her to leave, and the officer told her she would be violating the unlawful entry statute if she refused to leave after the manager had asked her to leave. She replied she would leave when she had finished eating. The officer took her arm and said unless she left he would arrest her. She arose and walked to the door and then, observing the officer behind her, began struggling with him and hit him.

Appellant was then placed in a patrol wagon, taken to a precinct station, and later taken to the Women's Detention Center. Hours later she was released on her personal recognizance and told to appear in court the next day. When she appeared in court, she was told the charge against her would be dropped and she was free to leave.

It is clear that appellant entered the premises lawfully, but it is also clear that under our unlawful entry statute ... one who lawfully enters may be guilty of a misdemeanor by refusing to leave after being ordered to do so by the person lawfully in charge of the premises. Our question is whether the police officer was justified in arresting appellant when she, in his presence, refused to leave after being ordered to do so by the manager.

At common law, a restaurant owner had the right to arbitrarily refuse service to any guest. Absent constitutional or statutory rights, the common law still controls in this jurisdiction. This is not a case of racial discrimination or violation

of civil rights. We do have a statute making it unlawful for a restaurant to refuse service to "any quiet and orderly person" or to exclude anyone on account of race or color; but, as we have said, there was no racial discrimination here and we do not think the requirement to serve any quiet or orderly person prevents a restaurant from having reasonable requirements as to the dress of its customers, such as a requirement that all male customers wear coats and ties, or, as here, that all customers wear shoes. Had the restaurant manager observed that appellant was not wearing shoes when she first entered the restaurant, he could have properly and lawfully refused to serve her and requested her to leave. Our question narrows down to whether the fact that the restaurant had served appellant food and received payment for it prevented the restaurant from ordering appellant to leave when her shoeless condition was observed.

The status of a customer in a restaurant, as far as we can ascertain, has never been precisely declared. It is not the same as a guest at an inn....

The nearest analogy we have found in the reported cases to the one here is that of a patron of a theater, racetrack, or other place of public entertainment, who, after having purchased a ticket, is ordered to leave. It has been generally held that such a patron has only a personal license, which may be revoked at any time, leaving him only with a breach of contract claim [against the proprietor].

We think that is the applicable rule here. When appellant was ordered to leave, her license to be on the premises was revoked, whether legally or illegally, and she had no right to remain. Her remedy, if any, was a civil action for breach of contract....

Our conclusion is that when appellant, in the presence of the police officer, refused to leave on the demand of the restaurant manager, the officer was justified in arresting her for violation of the unlawful entry statute....

What should hoteliers and restaurateurs do if an individual they have asked to leave refuses to go? The best response is to call the police to handle the matter. Ideally, a confrontation like the one described in *Edel v. Marriott Corp.* will be avoided. The rights of the proprietor in this type of situation will be discussed at more length in Chapter 10.

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Retaliatory Exclusion

Often when a customer sues a hotel or restaurant she is disinclined to return to the establishment for service. In cases where a plaintiff does seek service after commencing the lawsuit, the facility is not obligated to accommodate the would-be patron.

In one case a plaintiff sued a bar claiming unspecified illegal discrimination. While that case was pending, the plaintiff returned to the defendant's bar intending to purchase drinks. She was denied admission by the doorman and informed that the reason for the exclusion was that she had sued the bar. She filed a second suit, claiming that denial of services because of her lawsuit constituted illegal discrimination. The court dismissed the action on the ground that discrimination based on retaliation for bringing a lawsuit was not a protected class. Said the court, "[A]n exclusion based on a customer's conduct, whether or not the customer was a member of a [protected] class, was reasonable as a matter of law."⁵⁰

Ejection of Objectionable Persons and Trespass

Patrons who enter the premises despite a warning not to may be guilty of criminal trespass. Even if the patrons enter the premises lawfully, they may be guilty of trespass if they fail to obey a lawful order to leave made by the owner or the owner's designee. To commit this crime, patrons must first be informed they are not welcome on the premises. For example, where an organization's meeting was restricted to members of the Board of Governors (the association's governing body), others could be legally excluded. Removal of an attendee who was not a board member and who failed to leave when asked did not constitute illegal discrimination.⁵¹

Key Terms

Americans with Disabilities Act	landmark decision
civil rights	national origin
civil rights laws	place of public accommodation
Civil Rights Act of 1964	readily achievable
discrimination	transients
injunction	unitary rule
interstate commerce	

⁵⁰ *Geyer v. Galtich, Inc.*, 282 Cal. Rptr. 556 (1991). See also *Canary v. Grant v. Peer*, 353 N.W.2d 734, 183

W.L. 161,872 (Wn., 1983).

⁵¹ *Miranda v. Redfern and Directors of Georgetown College*, 818 F.Supp. 16 (D.C. 1993), aff'd 43 F.3d 712 (D.C. 1994).

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Summary

Sadly, discrimination was a practice quite prevalent in the hospitality industry before the passage of the Civil Rights Act of 1964. Today, many laws prohibit discrimination. The common law prohibits innkeepers from refusing accommodations to anyone who seeks them, unless certain exceptions apply. The Civil Rights Act of 1964 prevents hotels, restaurants, gas stations, and places of entertainment engaged in interstate commerce from refusing to provide services or accommodations on the basis of race, color, religion, or national origin. The Americans with Disabilities Act prohibits discrimination on the basis of disability and requires various accommodations for handicapped patrons. State civil rights laws fill in the gaps by preventing discrimination within the state in a large class of facilities on the grounds not just of race, color, religion, and national origin, but also gender, marital status, disability and in some locales, sexual orientation.

We have seen in this chapter how the law can be used as a tool to deter discrimination and encourage hospitality facilities to provide their services to all equally.

Preventive Law Tips

- *Do not refuse a hotel room to anyone on the grounds of being in a protected class.* Failure to provide a room based on race, color, religion, or nationality violates the Civil Rights Act of 1964 and can result in an injunction and judgment for attorney's fees in favor of the plaintiff. Discrimination based on disability may violate the Americans with Disabilities Act. Refusal to provide a room based on gender or marital status may violate a state civil rights law and subject the innkeeper to criminal penalties. If the hotel is situated in a locality that forbids discrimination based on sexual orientation, refusal to provide a room to someone who is homosexual will result in liability. In addition to the legal penalties, discrimination contradicts the basic principle of equal opportunity upon which our country was founded, and violates a basic tenet of the hospitality industry to treat customers well and make them feel comfortable. *Note:* If a legitimate reason exists to refuse accommodations (for example, violation of reasonable house rules, disorderly conduct, or trespassing) an innkeeper can legally decline to provide a room.
- *Do not refuse a hotel room to anyone who shows ability to pay* unless there is a legitimate reason for the refusal (for example, violation of reasonable house rules, disorderly conduct, or trespassing). The common law requires that hotels provide rooms for everyone requesting accommodations. Failure to provide a room to a would-be guest with the financial means to pay can result in liability.

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- *Do not refuse restaurant service to someone on the grounds of race, color, religion, or nationality.* The Civil Rights Act of 1964 outlaws discrimination on these grounds; it does not prohibit a restaurant from refusing service on any other grounds. *Note:* If a legitimate reason exists to refuse accommodations to a would-be patron in a protected class (for example, violation of reasonable house rules, disorderly conduct or trespassing) the restaurateur can legally decline to provide a table.

- *Do not refuse restaurant services to someone on the grounds of gender, marital status, or disability.* State civil rights laws customarily outlaw discrimination on these grounds, and the federal Americans with Disabilities Act outlaws discrimination against disabled persons. Failure to abide by these laws can result in civil and criminal liability. Also, local ordinances may prohibit discrimination on the basis of sexual orientation. These types of discrimination can be as hurtful to the guest and damaging to the hospitality industry as discrimination based on race, color, religion, and nationality. *Note:* If a legitimate reason exists to refuse accommodations to a would-be patron in a protected class (for example, violation of reasonable house rules, disorderly conduct, or trespassing) the restaurateur can legally decline to provide a table.

- *Do not refuse access to places of entertainment on the grounds of race, color, religion, or nationality.* The Act prohibits discrimination in places of entertainment based on race, color, religion, or nationality. The word *entertainment*, as used by the Act, includes enterprises such as theaters and stadiums that offer entertainment to a viewing audience, as well as places where the patron actively participates in the activity such as a ranch offering horseback riding or an amusement park.

- *Do not refuse access to places of entertainment on the grounds of gender, marital status, or disability.* State civil rights laws customarily outlaw discrimination on these grounds, and the federal Americans with Disabilities Act outlaws discrimination against disabled persons. Violation of these laws can result in civil and criminal liability. Also, local ordinances may prohibit discrimination on the basis of sexual orientation. *Note:* If a legitimate reason exists to refuse service to a would-be customer in a protected class (such as violation of reasonable house rules, disorderly conduct, or trespassing), the proprietor can legally deny admission.

- *Concerning disabled patrons, eliminate barriers to accessibility if the removal is readily achievable.* Places of public accommodation are required to remove hindrances that can be eliminated easily and without a lot of expense. Barrier removal that would be costly or difficult to achieve is not required. If new construction or alterations are undertaken, more extensive obstacle removal will be required. However, accessibility is not required where the cost to remove barriers is out of proportion with the cost or scope of the alteration or construction project.

- *A private club wishing to retain that status should limit membership, develop clear selection criteria, ensure that control and ownership of the club rests with*

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members, and refrain from strictly adhering for members. The courts have developed rules to determine which clubs are private—and therefore not bound by the Act—and which clubs are not. Unless those rules are followed closely, a club will not be deemed private.

Review Questions

1. According to the common law, to whom can a hotel refuse to provide accommodations?
2. Why did Congress pass the Civil Rights Act of 1964 (the "Act")?
3. Who is protected by the Act?
4. What facilities are covered by the Act?
5. What is interstate commerce and why is it relevant to the Act?
6. What remedies are available to a plaintiff suing for a violation of the Act?
7. Name three types of businesses not covered by the Act.
8. Identify three differences between the Act and state civil rights laws.
9. In addition to prohibiting the denial of a hotel room or restaurant services to certain persons, what conduct is outlawed by state civil rights laws?
10. Identify three tests used by the courts to determine whether or not a club is private.
11. What is a restaurant required to do under the Americans with Disabilities Act to remove barriers to accessibility?
12. Can a restaurant legally require that all wheelchair-bound customers eat in the same area of the dining room?

Discussion Questions

1. Some localities have laws that require restaurants to seat smokers in an area separate from nonsmokers. Does this constitute illegal discrimination? Why or why not?
2. Why do you think Congress did not include gender as a protected class in the Act?
3. Why is a successful plaintiff in most lawsuits unable to collect attorney's fees from the defendant, while a successful plaintiff suing under the Act can?
4. Why do you think the Act outlaws even single acts of discrimination rather than requiring a pattern of discriminatory conduct?
5. A train station has a snack bar located in it. What additional information would you need to know to determine if the train station is covered by the Act? Why would you need that additional information?

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6. Why do you think Congress omitted many bed-and-breakfast operations from the Act (the "Mrs. Murphy's Boarding House" clause)?
7. If you were devising an expansion of the civil rights laws, would you include any additional protected classes? Who and why?
8. What distinguishes the establishments covered by the Americans with Disabilities Act from those covered by the Civil Rights Act of 1964?

Application Questions

1. Devise an operating plan for a private club that would pass muster if its status as private was challenged.
2. A community college, primarily serving residents of the local county, has a candy shop on campus. Of 20 varieties of candies it sells, only one ingredient of one variety was purchased from out of state. Is the college governed by the Act? Why or why not?
3. Identify whether each of the following constitutes illegal discrimination and explain your reasoning:
 - a. A restaurant refuses to serve someone who is Swiss.
 - b. A restaurant refuses to serve someone who arrives for dinner two minutes before the kitchen closes.
 - c. A restaurant refuses to serve a person in a wheelchair with a service dog because the restaurant does not allow pets in the dining area.
 - d. A hotel refuses to provide a room to a couple because they are not married.
 - e. A movie theater refuses to sell a ticket to someone who is carrying a weapon.
 - f. A private club refuses to admit a couple because they are Protestant.
 - g. A hotel refuses to provide a room to a person who is deaf because he is unable to provide proof of ability to pay.

Web Sites

Web sites that will enhance your understanding of the material in this chapter include:

<http://www.law.cornell.edu> This is a good site for explanations about civil rights laws.

<http://www.eeoc.gov> This is the official site of the Equal Employment Opportunity Commission, the federal agency that enforces discrimination laws. Among the site's features are access to federal laws that prohibit job discrimination, information on how to file a claim, and use of mediation to settle claims.

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