NO OBJECTION TO ORAL ARGUMENT

No. 00-1303

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEVIN W. WILLIAMS,

Plaintiff-Appellant

v.

HERMANSON FAMILY LIMITED PARTNERSHIP I,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

BILL LANN LEE
Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3728

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (CON'T)

TABLE OF AUTHORITIES

CASES **PAGE**

CASES (CON'T) **PAGE**

STATUTES

STATUTES (CON'T) **PAGE**

REGULATIONS **PAGE**

STATEMENT OF RELATED CASES

There are no prior or related appeals to this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 00-1303

KEVIN W. WILLIAMS,

Plaintiff-Appellant

v.

HERMANSON FAMILY LIMITED PARTNERSHIP I,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Plaintiff uses a wheelchair and cannot enter a store because of a six-inch step from the sidewalk to the front door. He seeks removal of that "barrier" under Title III of the Americans with Disabilities Act (ADA). Title III prohibits discrimination against persons with disabilities in places of public accommodation, including by failing to remove an architectural barrier where such removal is "readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv). This case presents important issues concerning the nature of the parties' burdens of proof under that provision -- more

specifically, the nature of plaintiff's initial burden to demonstrate a readily achievable barrier removal method, and whether plaintiff or defendant has the ultimate burden of proof on whether barrier removal is, or is not, readily achievable.

The Attorney General has substantial enforcement responsibilities under Title III. 42 U.S.C. 12188(b). The Department has also issued regulations and a Technical Assistance Manual interpreting Title III. See 42 U.S.C. 12186(b) & 12206(c)(3). The Court's decision in this case could have a significant effect on the Department's enforcement of Title III.

QUESTION PRESENTED

Whether, under 42 U.S.C. 12182(b)(2)(A)(iv), plaintiff meets his burden of demonstrating that removal of an architectural barrier is "readily achievable" if he demonstrates that barrier removal is generally readily achievable in the circumstances of the case by suggesting a reasonable method to remove the challenged barrier.

STATEMENT OF THE CASE

1. Plaintiff, Kevin W. Williams, is paralyzed from the chest down and uses an electric wheelchair for mobility. He frequently eats and shops in Larimer Square in downtown Denver, Colorado, an historic block of shops and restaurants.

In October 1996, Williams attempted to enter the Nine West shoe store, located at 1439 Larimer Street, in a building known as the Crawford Building. He was unable to do so because of the approximately six-inch step at its front entrance, which was the only public entrance to the store. See generally App. 263-264, 439.[1/]

The store property was purchased by defendant Hermanson Family Limited Partnership I ("Hermanson") in the fall of 1993. App. 550. Nine West Group, Inc. leased the store property from Hermanson in September 1994, and operated its shoe store from shortly after that time until it moved out after the trial in this case. App. 610.

2. In October 1996, plaintiff filed suit against defendants Hermanson and Nine West Group, Inc. alleging, in part, that defendants violated Title III (public accommodations) of the Americans With Disabilities Act (ADA) by failing to remove an architectural barrier where such removal was "readily achievable".[2/] See

---

[1/]References to "App. __" are to page numbers in the Appendix of Appellant Kevin W. Williams, filed along with appellant's opening brief. References to "R. __" are to docket numbers on the district court docket sheet, included on pages 1-29 of the Appendix. References to "Br. __" are to page numbers in appellant's opening brief.

[2/]Plaintiff originally brought separate (and similar) lawsuits against a number of other stores and buildings in Larimer Square, and the cases were consolidated before trial. See, e.g., R. 56. In this appeal, plaintiff is pressing his claim only against the property where the Nine West Store was located. Hermanson is the

(continued...)

R.1. The applicable statute provides, in relevant part:

> [D]iscrimination [by a person who owns or leases a place of public accommodation] includes * * * a failure to remove architectural barriers * * * that are structural in nature, in existing facilities, * * * where such removal is readily achievable.

42 U.S.C. 12182(b)(2)(A)(iv) (emphasis added). The statute defines "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense," and lists factors to be considered, including the nature and cost of the action needed and the financial resources of the covered entity. 42 U.S.C. 12181(9). Plaintiff alleged that ramping the single step at the entrance to the store would be readily achievable given defendants' financial resources and the fact that other establishments in Larimer Square had installed ramps. See App. 30-34. Plaintiff sought injunctive relief ordering defendants to comply with the ADA by installing a ramp at the entrance to the store. App. 43.

In April 1998, the court held a bench trial on plaintiff's claims. See, e.g., R. 200. At the end of plaintiff's evidence, the defendants moved for judgment as a matter of law, arguing, as relevant here, that plaintiff did not present sufficient evidence to establish that the barrier removal was readily achievable. App. 658-

---

[2/](...continued)
only appellee because the Nine West store has moved out of the building. See Br. 2.

659. Plaintiff's evidence included proof that there was just one six-inch step and that the sidewalk was 23 ½ feet wide at the entrance to the store (App. 439); the testimony (along with a conceptual drawing) of an architectural expert that the sidewalk could be "warped" from the top of the step to create a ramp, and that this could be easily accomplished (App. 333-335, 742); evidence that defendants' expert agreed that warping the sidewalk to the top of the step was a valid approach (App. 334)[3/]; expert testimony that warping the sidewalk would not affect the historic fabric of the building (App. 334-335); expert testimony that the ramping approach would cost approximately $10,000 (App. 335-336)[4/]; and expert testimony that Hermanson had ample financial resources to "warp" the sidewalk in this manner (App. 468-469, 485-486). Plaintiff also relied on the Title III Department of Justice regulations and commentary, which provide that ramping a single-step will "likely be readily achievable." 28 C.F.R. 36.304(b)(1); 28 C.F.R.

[3/]Plaintiff's expert initially proposed that just a portion of the sidewalk be warped from the top of the step toward the street. App. 417, 742. The evidence showed that defendants' expert agreed that this approach was valid, but that he would recommend warping the sidewalk all the way to the curb. App. 334. Plaintiff's expert testified that either approach would be relatively easy to accomplish. App. 335.

[4/]Plaintiff's expert testified that his initial approach would cost approximately $4,300. App. 335. He further testified that defendants' expert's recommendation of warping the sidewalk all the way to the curb would cost about 2 ½ times as much, i.e., approximately $10,000. App. 336; see also Br. 5.

Pt. 36, App. B at 646 (1999); see App. 689-690. As a legal matter, plaintiff argued that his burden was simply to present evidence that removing the step by ramping was "generally readily achievable," or reasonable "in the run of cases," and that once he has done so it is defendant's burden to prove that it in fact would not be readily achievable to remove the architectural barrier. App. 107, 181, 186-187.

Defendants argued that plaintiff presented only evidence of a "concept," i.e., that ramping could be used. E.g., App. 659-661. Defendants asserted that plaintiff did not present sufficiently detailed information (such as construction and elevation plans) to satisfy his burden of showing that ramping in this case was readily achievable. App. 659-661. In their trial brief, defendants argued that plaintiff must show that barrier removal is readily achievable by putting forth evidence of a "specific, readily achievable design/solution for removal of the barrier[]," and that once plaintiff has done so it is defendant's burden to produce evidence demonstrating that the proposed barrier removal method is not readily achievable (i.e., defendant has the "burden * * * of production only"). App. 173, 177. Defendants further argued that once defendant presented evidence showing that barrier removal was not readily achievable, the burden shifted back to plaintiff to rebut defendant's evidence and prove that barrier removal is readily achievable. App. 177-178.

3. On April 22, 2000, the court, ruling from bench, granted defendants' motion for judgment as a matter of law. App. 720. The court recognized that the parties disagreed on the nature of the plaintiff's prima facie case and the burdens of proof. App. 721, 729-730. The court concluded that although the plaintiff need not come forward with a detailed set of drawings and permits from the city, he must come forward with a particular plan that is "defensible" and "workable" in the particular case, which, the court recognized, was a "tall order." App. 723.

On June 22, 2000, the court issued a written order granting defendants' motion for judgment as a matter of law (App. 189-204); judgment was entered on June 29, 2000.[5/] See R. 215. The court found that plaintiff had not met his burden of establishing a prima facie case that removal of the architectural barrier was readily achievable. App. 197-198. The court stated that plaintiff offered only a "speculative concept[]," and did not consider the particular circumstances of the location in presenting a "workable"option for wheelchair access. App. 198-200. The court stated that plaintiff did "not need to provide detailed drawings or permits, but * * * did need to present more than mere concepts, which is what occurred in this case." App. 200. More specifically, the court stated that plaintiff

---

[5/]The court's order also addressed other properties in addition to the Nine West location. See, e.g., App. 191.

did not consider the effect of his proposal on adjacent businesses, the engineering requirements for maintaining structural integrity, and who had the ultimate responsibility for constructing the proposed ramps (i.e., since it was a City sidewalk, "[a]ny exterior ramping proposal would have required approval and permits from the City"). App. 198 n.1. In short, the court concluded that plaintiff presented only the possibility of providing access; he did not demonstrate that the proposal was in fact readily achievable, and thus did not carry his burden proof. App. 198, 200.

4. On July 26, 2000, plaintiff filed a timely notice of appeal. App. 206-208.

SUMMARY OF THE ARGUMENT

This case presents an important issue concerning the burdens of proof when a plaintiff alleges that the defendant has violated Title III of the ADA by failing to remove an architectural barrier where such removal is "readily achievable." In our view, the burden placed on the plaintiff suggested by the district court, and urged by defendants, to put forth evidence of a specific design/solution for the removal of the barrier that addresses the full range of relevant concerns, goes beyond what the ADA requires. It is also inconsistent with the burdens placed on the parties in parallel provisions of Title III and the ADA.

We believe plaintiff satisfies his burden if he demonstrates that barrier

removal is generally readily achievable in the circumstances of the case by suggesting a reasonable method to remove the challenged barrier. This means that the plaintiff must present some evidence, which may (but need not) include expert testimony, outlining an approach (e.g., ramping) that appears reasonable in the particular circumstances, and is reasonable in view of general cost estimates and defendant's financial resources. It does not mean, however, as the court suggested, that plaintiff's burden includes offering specific evidence relating to such matters as engineering requirements to ensure structural integrity, the effect of the proposal on adjacent businesses, and the ability to obtain necessary governmental permits. Once the plaintiff has met this burden of showing that a particular method is, as a general matter, reasonable in the circumstances, the burden shifts to the defendant to prove that the proposed means of removing the barrier would not in fact be readily achievable.

ARGUMENT

PLAINTIFF ESTABLISHES A PRIMA FACIE CASE OF DISCRIMINATION UNDER 42 U.S.C. 12182(b)(2)(A)(iv) IF HE DEMONSTRATES THAT BARRIER REMOVAL IS GENERALLY READILY ACHIEVABLE IN THE CIRCUMSTANCES OF THE CASE BY SUGGESTING A REASONABLE METHOD TO REMOVE THE CHALLENGED BARRIER; DEFENDANT HAS THE ULTIMATE BURDEN OF PROVING THAT BARRIER REMOVAL IS NOT READILY ACHIEVABLE

A. The Statutory Framework

Title III of the ADA prohibits discrimination by a public accommodation against an individual "on the basis of disability in the full and equal enjoyment of the goods, services, [and] facilities * * * of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a); 28 C.F.R. 36.201. In subsection 12182(b)(2)(A) the Act more specifically defines discrimination to include:

> (iv) a failure to remove architectural barriers * * * in existing facilities * * * where such removal is readily achievable; and
>
> (v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, [and] facilities * * * available through alternative methods if such methods are readily achievable.

The ADA defines "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense," and notes relevant factors to be considered, including "the nature and cost of the action needed," the "overall

financial resources of the facility * * * involved," and the "overall financial resources of the covered entity." 42 U.S.C. 12181(9). This standard reflects congressional judgment that in existing facilities, where retrofitting may be expensive, the requirement to provide access is less stringent than in the case of new construction and alterations.[6/]

The parties do not disagree on the elements a plaintiff must establish to support a claim that a defendant has violated Title III by failing to remove a readily achievable architectural barrier: (1) that he is disabled; (2) that the defendant owns, operates, leases, or leases to a place of public accommodation; (3) that an architectural barrier exists at the place of public accommodation that discriminates against him based on his disability; and (4) that removing the barrier is "readily

---

[6/]The regulations explain that "[i]n striking a balance between guaranteeing access to individuals with disabilities and recognizing legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction. In existing facilities, * * * where retrofitting may prove costly, a less rigorous degree of accessibility is required than in the case of new construction and alterations * * * where accessibility can be more conveniently and economically incorporated in the initial stages of design and construction." 28 C.F.R. Pt. 36, App. B at 645 (1999). For existing facilities, the obligation to remove readily achievable architectural barriers began on January 26, 1992, eighteen months after the ADA was enacted. This delay was intended to give businesses adequate time "to become acquainted with the ADA's requirements and to take the necessary steps to achieve compliance." Statement by President George Bush Upon Signing S. 933 (the Americans with Disabilities Act of 1990), 26 Weekly Comp. Pres. Doc. 1165, 1166 (July 26, 1990). Hermanson purchased the Nine West store property at issue in this case in 1993.

achievable." The parties also do not disagree that plaintiff established the first three elements. App. 172-173. The dispute in this case is over what the parties must show with respect to proving that removing the barrier is, or is not, readily achievable.

B. Plaintiff Has The Initial Burden Of Presenting A Reasonable Method To Remove The Challenged Barrier; Defendant Has The Ultimate Burden Of Proving That Barrier Removal Is Not Readily Achievable

In challenging an architectural barrier under Section 12182(b)(2)(A)(iv), plaintiff establishes a prima facie case of discrimination if he demonstrates that barrier removal is generally "readily achievable" in the circumstances of the case by suggesting a reasonable method to remove the challenged barrier. This means that the plaintiff must present some evidence, which may (but need not) include expert testimony, outlining an approach that appears reasonable in the particular circumstances, and is reasonable in view of general cost estimates and defendant's financial resources. Once the plaintiff has met this burden, the defendant has the ultimate burden of proving that the proposed means of removing the barrier would not in fact be readily achievable. This allocation of the burdens of proof is consistent with the language of the statute, the language of the related provisions in Title III and the ADA, the regulations, and the legislative history. It is also consistent with logic.

1. First, the language of the statute supports the conclusion that plaintiff has the initial burden of proposing a reasonable barrier removal method, and defendant has the ultimate burden of proving that barrier removal is not readily achievable. As an initial matter, there is no question that under subsection (iv) of Section 12182(b)(2)(A) plaintiff must proffer some evidence showing that barrier removal is readily achievable, since it is the failure to remove a readily achievable barrier that constitutes the unlawful discrimination. Thus, under the language of the statute plaintiff clearly has the initial burden of showing that the barrier removal is readily achievable; i.e., that in the particular circumstances there is a reasonable method in terms of practicality and cost.

The language of the statute, however, does not suggest that the burden is more onerous. Although the language of the barrier removal provision itself (subsection (iv)) does not explicitly place the ultimate burden of proving that barrier removal is not readily achievable on the defendant, that is made clear when subsections (iv) and (v) are read together. Subsection (v) provides that where "an entity [the defendant] can demonstrate that the removal of a barrier under clause (iv) is not readily achievable[,]" it nevertheless must make facilities available through "alternative methods." Thus, the statute clearly contemplates that the defendant will have the ultimate burden of showing that, in the particular

circumstances of the case, barrier removal is not readily achievable.

Defendant argued below that subsection (v) simply creates a separate or alternative basis for finding discrimination. Although it certainly does that, by cross-referencing subsection (iv) in discussing the burden of proof it also informs the meaning of subsection (iv) by referring to circumstances where the defendant can demonstrate that barrier removal is not readily achievable. That language would not have been used if, for example, Congress intended that subsection (v)'s alternative basis of liability would be triggered only if plaintiff fails to meet his ultimate burden of proof that his proposed barrier removal method is readily achievable. Thus, the two provisions addressing barrier removal operate together, and make clear that showing that barrier removal is not readily achievable is an affirmative defense.

2. This conclusion is further reinforced when subsections (iv) and (v) are read in conjunction with the other provisions of Title III setting forth specific bases for discrimination, and the similar provisions in Titles I and II of the ADA. First, subsection (ii) of Section 12182(b)(2)(A) – perhaps the most commonly invoked provision of Title III – expressly provides that discrimination includes the failure to make "reasonable modifications" in polices, practices, and procedures "unless the entity can demonstrate that making such modification[s] would fundamentally

alter" the nature of the goods or services provided (emphasis added). Thus, under that provision, it is clear that it is the defendant's burden to prove that a suggested reasonable modification would result in a fundamental alteration. Similarly, subsection (iii) of the same section states that discrimination includes the failure to ensure that no individual with a disability is excluded because of the absence of auxiliary aids "unless the entity can demonstrate that taking such steps would fundamentally alter" the nature of the goods and services provided (emphasis added). Thus, subsections (ii), (iii), and (iv) parallel each other in spelling out "specific" examples of discrimination under the "general rule" set forth under Section 12182(a). It follows that Congress envisioned that, like proving a "fundamental alteration," establishing that a proposed barrier removal is not readily achievable is an affirmative defense. The contrary conclusion would make it far more difficult for a Title III plaintiff to prevail on a barrier removal claim than on a reasonable modification or failure to provide auxiliary aid claim, since, as this case illustrates, the allocation of the burden of proof in these cases can be dispositive.[7/]

[7/]If subsection (iv) were written to parallel subsections (ii) and (iii) it would have to say something like: "Discrimination includes the failure to remove readily achievable architectural barriers unless the entity shows that barrier removal is not in fact readily achievable." Congress wisely avoided that redundancy. But that does not mean that subsection (iv), alone among these related provisions, places the entire burden on the plaintiff. All of the provisions contemplate that the plaintiff

(continued...)

Other provisions of the ADA place similar burdens on the defendant. Under the employment provisions in Title I, discrimination includes "not making reasonable accommodations * * * unless [the] covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. 12112(b)(5)(A) (emphasis added). Similarly, the regulations implementing Title II, which addresses public services, provide that the programs and activities of public entities shall be "readily accessible" unless the "entity" can demonstrate that it would result in a "fundamental alteration" or an "undue financial and administrative burden[]." 28 C.F.R. 35.150 (emphasis added). Again, there is no reason why the defendant should have the ultimate burden in these contexts of showing that a proposed accommodation or modification is not reasonable, but be spared that burden in the context of barrier removal. In sum, the allocation of the burdens of proof we have

---

[7/](...continued)
has the initial burden of proposing an approach addressing whatever it is that precludes equal opportunity, and the defendant has the ultimate burden of proving that such an approach is too onerous. This follows from the notion, discussed below, that it will most often be the defendant, not the plaintiff, who is in the best position to present evidence relevant to this determination. Thus, just as subsection (ii) requires the plaintiff to suggest in the first instance a "reasonable" modification, which the defendant can then avoid if it shows that it would result in a fundamental alteration, under subsection (iv) the plaintiff must first suggest that there is a "readily achievable" barrier removal approach (read: reasonable in the circumstances), which the defendant can then avoid if it shows that removal would not in fact be readily achievable. Read this way, the two provisions impose similar obligations on both the plaintiff and the defendant.

outlined comports with the overall operation of the ADA.

Numerous cases addressing the burdens of proof under the related provisions of Title III, and the analogous mandates of Titles I and II, make clear that the defendant has the ultimate burden of proving that a suggested modification or accommodation is too onerous and thus need not be made. The central case on this issue is Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997), addressing a Title III reasonable modification claim. The court adopted the following burdens of proof: Plaintiff has the burden of proving that a modification was requested and that it is reasonable. He meets that burden by introducing evidence showing that the modification is "reasonable in the general sense, that is, reasonable in the run of cases. * * * If the plaintiff meets this burden, the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation." Ibid. (emphasis added). Other cases addressing that provision are in accord. See also Dahlberg v. Avis Rent A Car System, Inc., 92 F. Supp. 2d 1091, 1105-1106 (D. Colo. 2000) (following Johnson); Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 934 (N.D. Ind. 1999) (following Johnson), aff'd, 205 F.3d 1001 (7thCir. 2000), petition for cert. filed, No. 00-434 (Sept. 20, 2000); Martin v. PGA Tour, Inc., 994 F. Supp.

1242, 1248-1249 (D. Or. 1998) (following Johnson), aff'd, 204 F.3d 994 (9thCir. 2000), cert. granted, No. 00-24 (Sept. 26, 2000); Guckenberger v. Boston Univ., 974 F. Supp. 106, 146 (D. Mass. 1997) (following Johnson); Bowers v. NCAA, 974 F. Supp. 459, 465 (D.N.J. 1997) (defendant has burden of showing fundamental alteration under Section 12182(b)(2)(A)(ii)).

Cases addressing the parties' burdens in the employment context under Title I, and in the public services context under Title II, also make clear that the defendant has the burden of showing that a proposed accommodation is too onerous to be required under the Act. See, e.g., Rascon v. U S West Communications, Inc., 143 F.3d 1324, 1334 (10thCir. 1998) (Title I); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1526 (11thCir. 1997) (Title I); Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1491 (M.D. Ala. 1994) (Title I); Parker v. Universidad De Puerto Rico, 225 F.3d 1, 5 (1st Cir. 2000) (Title II); Tyler v. City of Manhattan, 157 F.R.D. 508, 510 (D. Kan. 1994) (Title II). Taken as a whole, these cases support the notion that the burden of proof rests with the public accommodation to prove that it cannot make its facilities accessible when a plaintiff has suggested a reasonable method to remove the challenged barrier.

3. The conclusion that defendant has the ultimate burden of proving that barrier removal is not readily achievable is also supported by Title III's regulations.

First, the regulations expressly refer to the "readily achievable defense" in comparing the notion of "readily achievable" to the "undue burden defense" in the auxiliary aid context of Title III, and the "undue hardship defense" in Title I. The regulations explain:

> The readily achievable defense requires a less demanding level of exertion by a public accommodation than does the undue burden defense to the auxiliary aids requirements of [28 C.F.R.] 36.303. In that sense it can be characterized as a "lower" standard than the undue burden standard. The readily achievable defense is also less demanding than the undue hardship defense in [Title I] of the ADA, which limits the obligation to make reasonable accommodation in employment.

28 C.F.R. Pt. 36, App. B at 646 (1999). Thus, the regulations not only refer to the "readily achievable defense," they explain that it is a lower "standard" than the "undue burden standard," plainly implying that these are parallel defenses under the ADA. Thus, this discussion makes clear that the defendant similarly has the burden of establishing that barrier removal is not readily achievable. Since the Department of Justice is the principal arbiter as to the meaning of Title III of the ADA, its regulations are, of course, entitled to deference. See, e.g., Bragdon v. Abbott, 524 U.S. 624, 646 (1998).[8/]

[8/]The legislative history on this point further supports the framework we have outlined. For example, House Report 101-485 explains, in discussing the notion of "readily achievable," that the analysis of the relevant factors "is the same as in title

(continued...)

4. The little case law addressing this point supports the conclusion that defendant, not plaintiff, has the ultimate burden of proving that barrier removal is not readily achievable. In Pascuiti v. New York Yankees, 1999 WL 1102748 (S.D. N.Y. Dec. 6, 1999), plaintiffs alleged that defendants violated Title III by failing to remove readily achievable architectural barriers in Yankee Stadium. In specifically addressing the burdens of proof, the court concluded:

> [P]laintiffs bear the initial burden of suggesting a method of barrier removal and proffering evidence that their suggested method meets the statutory definition of "readily achievable." If the plaintiffs meet this burden, the Yankees then bear the ultimate burden of proving that the suggested method of removal is not readily achievable.

Id. at *1. The court explained that the plaintiffs' burden is greater than merely suggesting "plausible accommodation[s]"; the plaintiffs must "proffer evidence, including expert testimony, as to the ease and inexpensiveness of their proposed

---

[8/](...continued)
I, when considering whether a reasonable accommodation in the employment context will impose an undue hardship." H.R. Rep. 485 (III), 101st Cong., 2d Sess at 55 (1990). House and Senate reports also refer to the readily achievable "standard" in comparing it to the undue burden and undue hardship standards. See, e.g., H.R. Rep. 485 (II), 101st Cong., 2d Sess at 109 (1990); S. Rep. 101-116, 101st Cong., 1st Sess. at 65 (1989). Finally, the House Report indicates Congress's intent to link subsections (iv) and (v). It explains that "[i]f an entity can demonstrate that removal of a barrier is not readily achievable, then there is an obligation to make goods [and] services available through alternative methods, if the alternative methods are readily achievable." H.R. Rep. 485 (III), 101st Cong., 2d Sess. at 62 (1990).

method of barrier removal" to show that their suggested method of barrier removal falls within the definition of "readily achievable," 42 U.S.C. 12181(9). Id. at 4-5. The court further explained that if the plaintiffs satisfy this burden, the defendant "bears the ultimate burden of convincing the trier of fact, by a preponderance of the evidence, that the suggested method of barrier removal is, more likely than not, too difficult and too expensive to be 'readily achievable.'" Id. at 5. The court stated that "this allocation of the burdens remains faithful to the text of the statute and places each burden upon the party in the best position to satisfy that obligation." Id. at 1. Importantly, the court also emphasized that placing the ultimate burden on the defendant "gives meaning to subsection (v) [of the statute], which contains the phrase 'where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable.'" Id. at 5.

We believe the Pascuiti decision is correct in so far as it places the ultimate burden of proof on the defendant, and in reading subsections (iv) and (v) together to support that conclusion. We do not agree, however, that in all (or even most) cases expert testimony will be necessary, if that is what the court meant, or that the plaintiff may not be able to satisfy his burden by suggesting a reasonable method to remove the challenged barrier, especially where a particular method may be obvious. In this regard, we also do not believe that plaintiff's burden to produce

evidence of the statutory "readily achievable" factors is onerous, particularly with respect to the overall costs and defendant's resources, matters the defendant is better situated to address.

Other cases addressing barrier removal claims do not squarely address the issue of the burdens of proof, but are consistent with this reasoning. In Guzman v. Denny's Inc., 40 F. Supp. 2d 930 (S.D. Ohio 1999), plaintiff challenged the restaurant's failure to make its restrooms wheelchair-accessible. Defendant moved for summary judgment arguing that it was not required to remove the architectural barriers because it was not readily achievable to do so. Although the defendant proferred various evidence supporting its argument that removal was not readily achievable, the court denied the motion, finding plaintiff had raised an issue of fact on this question. Implicit in this discussion is that it was defendant's burden to show that barrier removal was not in fact readily achievable. See also Lieber v. Macy's West, Inc., 80 F. Supp. 2d 1065, 1077 (N.D. Cal. 1999) (court states plaintiff bears burden of putting forward "reasonable modifications" to access barriers, then burden shifts to defendant to show the requested modifications would "fundamentally alter" the nature of its public accommodation)[9]; cf. Gilbert v.

---

[9]Curiously, the court uses the language of subsection (ii) of Section 12182(b)(2)(A), addressing reasonable modifications to "policies, practices, or

(continued...)

Eckerd Drugs, 1998 WL 388567 at *2 (E.D. La. July 8, 1998) (court states, with no discussion, that plaintiff has the burden of showing that there is an architectural barrier at defendant's facilities and that barrier removal is readily achievable).[10/]

5. Finally, the respective burdens of proof outlined here also make sense as a matter of logic. The "readily achievable" determination is to be made on a "case-by-case basis in light of the particular circumstances presented." 28 C.F.R. Pt. 36, App. B at 646 (1999). As a practical matter, a plaintiff will rarely be in the position to formulate, design, and present a plan that will satisfy the concerns of all of the

necessary parties, including the landlord, tenant, architect, contractors, engineers, and city permitting agencies. Nor will he be in a better position to address many of

---

[9/](...continued)
procedures," in addressing the burdens of proof for a claim under subsection (iv) asserting failure to remove readily achievable architectural barriers. In any event, the court places the ultimate burden of showing that the requested method is too onerous on the defendant.

[10/]The court below cited to a series of four Hawaii cases (see App. 197), all of which recite that plaintiff must prove there is an architectural barrier and that removal of the barrier is readily achievable, and also cite to Pascuiti. The limited discussion in these cases sheds little light on the issue. See Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1085 (D. Haw. 2000); Parr v. Kapahulu Investments, Inc., 2000 WL 687646 at *19 (D. Haw. May 16, 2000) (same); Parr v. Waianae L & L, Inc., 2000 WL 687655 at *19 (D. Haw. May 16, 2000) (same); Emerick v. Kahala L & L, Inc., 2000 WL 687662 at *21(D. Haw. May 16, 2000) (same).

the factors listed in the regulations relevant to the readily achievable determination, including, for example, "legitimate safety requirements that are necessary for safe operation." 28 C.F.R. 36.104. Further, since this matter will arise in the context of litigation in which the landlord and tenant likely oppose plaintiff's proposed approach, it is particularly unlikely that the plaintiff will be able to obtain all of the information and approvals needed to finalize a specific plan. Virtually all of the information relevant to a particular design plan, and to whether it is "readily achievable" in view of the relevant factors set forth in the regulations, will be in the possession of the defendant. Although the plaintiff may have some access to this information through discovery, the defendant, and a contractor or engineer that it retains, will have much more. The statute should not be read to force plaintiff into the role of a general contractor. See Pascuiti, supra, 1999 WL 1102748 at *1 (court's allocation of the burdens "places each burden upon the party in the best position to satisfy that obligation").[11/]

In addition, the underlying truth is that in these kinds of ADA cases the

---

[11/]Cf. Borkowski v. Valley Central Sch. Dist., 63 F.3d 131, 137 (2d Cir. 1995) (court, addressing a reasonable accommodation employment claim under Section 504 of the Rehabilitation Act, concluded that the defendant had the burden of proving that the requested accommodation would result in an undue hardship; court rested this conclusion in part on its view that "the employer has far greater access to information than the typical plaintiff, both about its own organization and, equally importantly, about the practices and structure of the industry as a whole").

plaintiff simply seeks access to a place of public accommodation. It is the defendant that has the greater concern about the particulars of how it is done, and the aesthetics of the final result. Thus, plaintiff's burden of proof should simply be to proffer a reasonable method for removal of the barrier, and it should be defendant's burden to prove that it would not, in fact, be readily achievable to remove the barrier. This allocation of the burdens is faithful to the notion that it is defendant's obligation to remove architectural barriers where it is readily achievable to do so.[12/]

[12/]Defendant below framed the matter this way: Once plaintiff puts on sufficient evidence that his proposal for providing access is readily achievable, defendant has the burden to produce evidence showing that the proposed method is not readily achievable; once defendant does so, plaintiff has the burden of proving that defendant's showing is pretextual, as well as the ultimate burden of proving that he has been a victim of discrimination based on his disability. App. 177-178. Although plaintiff, of course, does have the burden of proving illegal discrimination, he does so in this context by showing that an architectural barrier has not been removed where it would be readily achievable to do so. Again, plaintiff meets this burden by proferring a reasonable method to remove the barrier; it is then defendant's burden to show that barrier removal is not in fact readily achievable. At the same time, once defendant has presented evidence to show that the proposed barrier removal method is not readily achievable, plaintiff can challenge defendant's evidence by showing, e.g., that it is not relevant or credible, defendant's reasons are not legitimate, or, in any event, defendant's evidence is not sufficient to establish that the barrier removal is not readily achievable.

C. Plaintiff Introduced Sufficient Evidence To Satisfy His Burden That It Would Be Readily Achievable To Ramp The Step To The Nine West Property

Applying the burdens of proof outlined above, plaintiff introduced sufficient evidence to satisfy his burden of proposing a reasonable method to remove the challenged architectural barrier (the six-inch step) that is readily achievable, thereby shifting the ultimate burden to the defendant to prove that barrier removal is not readily achievable. As noted above (pages 5-6), this evidence included that the architectural barrier was just one six-inch step from the sidewalk to the entrance to the store; the sidewalk was 23 ½ feet wide at the entrance to the store; the testimony (along with a conceptual drawing) of an architectural expert that the sidewalk could be "warped" from the top of the step to create a ramp, and that this could be easily accomplished; evidence that defendants' expert agreed that warping the sidewalk to the top of the step was a valid approach; expert testimony that warping the sidewalk would not affect the historic fabric of the building; expert testimony that the ramping approach would cost approximately $10,000; and expert testimony that Hermanson had ample financial resources to ramp the sidewalk. This evidence demonstrates far more than "mere concepts," as the district court suggested. App. 200. Cf. Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d at 1088 (holding that replacing ramp at entrance to restaurant was "readily

achievable" considering "minimal cost and effort" involved).

In addition, plaintiff also relied on the Title III Department of Justice regulations, which list installing ramps as an example of a "modest measure[] that may be taken to remove barriers and that [is] likely to be readily achievable," and further explain that "[r]amping a single-step * * * will likely be readily achievable." 28 C.F.R. 36.304(b)(1); 28 C.F.R. Pt. 36, App. B at 646 (1999). In an analogous context, the Fifth Circuit relied on a Department of Justice regulation and commentary addressing the use of service animals in concluding that plaintiff met his initial burden of showing that the requested modification is generally reasonable. Johnson, supra, 116 F.3d at 1060-1064. Thus, following Johnson, the regulations and commentary addressing the use of ramps also support the conclusion that, in the circumstances of this case, plaintiff has met his burden of proferring a reasonable method to remove the architectural barrier.[13/]

In sum, this evidence should have been sufficient to shift the burden to the defendant to prove that ramping the step (really "warping" the sidewalk) is not readily achievable in the particular circumstances of this case. Thus, the district

---

[13/]See also H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. at 110 (explaining with respect to the "readily achievable" standard that "[t]he kind of barrier removal which is envisioned * * * includes * * * the simple ramping of a few steps"); S. Rep. 116, 101st Cong., 1st Sess. at 66 (same).

court should not have required plaintiff to put on evidence relating to such matters as the engineering requirements for maintaining structural integrity, the effect of the proposal on adjacent businesses, and whether the City would approve any permits that might have been necessary. See App. 198. It follows that the court should not have entered judgment as a matter of law at the close of plaintiff's evidence, and the case should be remanded to the district court for trial consistent with the burdens of proof outlined above.

CONCLUSION

The judgment of the district court should be reversed and the case remanded to the district court.

Respectfully submitted,

BILL LANN LEE
Assistant Attorney General

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3728

STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to Appellant's request for oral argument.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0, and contains 6,734 words.

_____

Thomas E. Chandler
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2000, two copies of the Brief for the United States as Amicus Curiae were served by first-class mail, postage prepaid, on the following counsel of record:

Amy F. Robertson, Esq.
Fox & Robertson, P.C.
910 16th Street, Suite 610
Denver, Colorado 80202

Joe L. Silver, Esq.
Martin Beier, Esq.
Silver & DeBoskey, P.C.
1801 York Street
Denver, Colorado 80206

_____

THOMAS E. CHANDLER
Attorney
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3728