Special Report

Class Action Suit Claims ADA Requires Public Accommodation to Prevent Spread of COVID-19 at Facility

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Despite significant legal obstacles, on May 4, 2020, a group of plaintiffs filed a class action complaint alleging the Queens Adult Care Center (QACC) violated Title III of the Americans with Disabilities Act (Title III) and its precursor, Section 504 of Rehabilitation Act (Section 504), by failing to provide a level of care to safeguard their health and safety at its assisted living facility during the COVID-19 pandemic.

The plaintiffs seek to certify a class under Federal Rules of Civil Procedure Rule 23(b)(2) or (b)(3) of all current or future residents of QACC during the course of the COVID-19 pandemic who have disabilities that require assistance with activities of daily living.

The proposed class action lawsuit, *Schoengood, et al. v. Hofgur LLC d/b/a Queens Adult Care Center and Gefen Senior Group*, No. 1:20-cv-02022 (E.D. N.Y.), is the first of its kind seeking to hold a place of public accommodation liable under Title III or Section 504 for not taking adequate measures, in the plaintiffs' estimation, to prevent or mitigate the spread of COVID-19.

Plaintiffs' Claims, Relief Sought

Title III prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Title III applies to virtually any business that sells its goods and services directly to consumers.

Section 504 prohibits discrimination on the basis of a disability, providing that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [federal] Executive agency ...." 29 U.S.C. § 794.

The plaintiffs base their claims on two more specific obligations under Title III and Section 504. The first requires a public accommodation to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities. The second prohibits the use of criteria or other eligibility standards that have the effect of discriminating on the basis of a disability.

The plaintiffs seek declaratory and broad injunctive relief, as well as the appointment of a Special Master at the defendants' cost to oversee the facility and to make recommendations on preventing the spread of COVID-19 at the facility. They also seek reasonable attorneys' fees and costs, which are generally mandated by these statutes to a prevailing plaintiff. While damages are not available under Title III, compensatory damages

are available under Section 504. The plaintiffs have not expressly claimed relief in the form of awards for compensatory damages.

Potential Problems with Claims

The plaintiffs appear to face an uphill battle with their novel claims. They contend Title III requires QACC to adopt policies or have better policies during the COVID-19 pandemic to safeguard the health and safety of its disabled residents.

However, Title III has not been held to require public accommodations to adopt any policies, let alone the litany of policies the plaintiffs cite in their complaint, including testing, social distancing, isolation measures, and other policies recommended or required by the Centers for Disease Control and Prevention (CDC), the Department of Health and Human Services Centers for Medicare & Medicaid Services (CMS), and other federal and state regulations governing long-term care facilities, nursing homes, and assisted living facilities.

Section 504 regulations require covered entities and programs to have anti-discrimination policies, grievance procedures, and other procedural requirements in place. *See, e.g.*, 45 C.F.R § 84 (HHS Section 504 regulations). However, the applicable regulations do not expressly impose the kinds of policies and procedures the plaintiffs contend Section 504 requires.

Further, to the extent that the complaint alleges QACC has policies concerning COVID-19, it does not allege a policy resulted in the denial of the services QACC offers based on an individual's disability status.

Likewise, the plaintiffs' contention that QACC used eligibility criteria that violates Title III and Section 504 would appear to fare no better. The complaint does not appear to allege what eligibility criteria QACC applied to the residents other than the eligibility criteria required by applicable New York law.

The complaint also does not appear to allege that any eligibility criteria screened out or tended to screen out persons with disabilities from using the services QACC offers, which is a requirement to establishing a Title III violation based on the use of unlawful eligibility criteria. The complaint appears to allege precisely the opposite. QACC provides its services mainly to disabled residents and, therefore, the plaintiffs contend that Title III and Section 504 require the facility to provide certain services the plaintiffs allege QACC does not currently provide.

However, by its plain terms, Title III's prohibition against discrimination on account of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" regulates *access* to the goods and services of a public accommodation, but not the *type* of goods or services offered by the public accommodation. *See McNeil v. Time Ins. Co.*, 205 F.3d 179, 188 (5th Cir. 2000); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115-16 (9th Cir. 1999); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999);*Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 457 (6th Cir. 1998);*Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998);*Funches v. Barra*, No. 14-cv-7382, 2016 WL 2939165, at *4 (S.D.N.Y. May 17, 2016). An owner denies the full and equal enjoyment of offered goods or services if they deny or inhibit access to those goods and services. However, "[t]he goods and services that the business offers exist *a priori* and independently from any

discrimination. Stated differently, the goods and services referred to in the statute are simply those that the business normally offers." Thus, the plaintiffs' contention that Title III or Section 504 requires QACC to provide different and additional services than it allegedly currently provides would not appear to be an issue that Title III or Section 504 was meant to regulate.

Potential Problems with Class Certification

Regarding the plaintiffs proceeding as a putative class, Rule 23(b)(2) classes are well-known to civil rights lawyers and apply where the party opposing the class certification has acted or refused to act on grounds generally applicable to the class, *so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole*.

Certification under Rule 23(b)(2) is unique in its requirements, as compared to other bases for class certification under Rule 23. A plaintiff seeking to certify a 23(b)(2) class must establish, in addition to the Rule 23(a) prerequisites (numerosity, commonality, typicality, and adequacy), that a *single* injunction can be issued that applies to the whole class and complies with Rule 65(d) — namely, the injunction "state its terms specifically; and describe in reasonable detail … the act or acts restrained or required." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) ("Rule 23(b)(2) applies only when a *single* injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.").

The wide-ranging and evolving recommendations and guidance offered by the CDC and other state and local governmental agencies, makes crafting a single injunction applicable to hundreds of residents with varying medical impairments and care needs problematic.

Given the individual nature of care residents typically need and their varying disabilities the complaint alleges they have, individual questions also appear more likely to predominate over common questions. This makes the plaintiffs' claims unsuitable for class certification under Rule 23(b)(3) and failing to provide a superior method over proceeding and adjudicating on their individual claims.

Moreover, under the Rules Enabling Act, the plaintiffs' decision to proceed as a class action cannot diminish the defendants' substantive right to prove their defenses under Title III and Section 504 with respect to any member of the class. *See* 28 U.S.C. § 2072(b). Certain defenses, such as undue burden or fundamental alteration of the nature of services offered, tend to be fact-specific and may raise individual issues sufficient for a court to deny class certification.

This is not to suggest that the plaintiffs can establish all Rule 23(a) prerequisites. Numerosity would appear problematic for the plaintiffs because joinder of absent putative class members would not be impracticable. They are all residents at the facility, readily identifiable, and the court likely has personal jurisdiction over each of them. Aggrieved residents presumably have incentives to bring an individual action like the one filed by the plaintiffs given the potential individual stakes and the availability of an award of attorneys' fees and costs if they prevail.

Merely identifying a common contention is insufficient for a plaintiff to establish commonality under Rule 23(a)(2) after *Dukes*. The U.S. Supreme Court explained in *Dukes*:

> [The] common contention … must be of such a nature that it is capable of class-wide resolution — which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. "What matters to class certification … is not the raising of common questions — even in droves — but rather the capacity of the classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."

In order for a "contention" to constitute a "common question," it must yield the same answer with respect to each member of the proposed class. Even if the plaintiffs pled valid claims under Title III or Section 504, the answer to the common question of whether QACC committed discrimination under these statutes may be that it *depends* on the resident, given a host of individual factors, including the resident's care needs, disability, and level of assistance with daily activities. The resolution of such individual issues has a higher probability of yielding different answers for each of the putative class members, thereby defeating commonality.

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This case has potentially far-reaching implications for all places of public accommodation and we will continue to monitor it.

Jackson Lewis has a dedicated team tracking and responding to the developing issues facing employers as a result of COVID-19. Please contact a team member or the Jackson Lewis attorney with whom you regularly work if you have questions or need assistance.