

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02757-WYD-KMT

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit corporation;
ANITA HANSEN; and
JULIE FARRAR,

Plaintiffs, on behalf of themselves and all others similarly situated,

v.

ABERCROMBIE & FITCH CO.;
ABERCROMBIE & FITCH STORES, INC.; and
J.M HOLLISTER LLC, d/b/a HOLLISTER CO.,

Defendants.

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND ENTRY OF INJUNCTION AND ENTRY OF JUDGMENT**

Plaintiffs, by and through undersigned counsel, hereby submit their Motion for Summary Judgment and Entry of Injunction. This Court has held that the Elevated Entrances at two Hollister stores in Colorado violate Title III of the Americans with Disabilities Act (“ADA”) and has certified a nationwide class of individuals who use wheelchairs who have encountered discrimination based on Elevated Entrances. Because it is undisputed that approximately 249 Hollister stores nationwide have such entrances, Plaintiffs move for summary judgment holding that all such entrances violate the ADA, entry of a nationwide injunction remedying the violations, and entry of judgment in favor of Plaintiffs.

CERTIFICATE OF COMPLIANCE WITH D.C.COLOLCivR 7.1(A)

Undersigned counsel hereby certifies that he conferred with counsel for Defendants.

Defendants oppose this motion.

As further grounds for this motion, Plaintiffs state the following:

1. On August 31, 2011, this Court granted Plaintiffs' Motion for Partial Summary Judgment. *See* Order, [ECF No. 109] ("Summary Judgment Order"). The Summary Judgment Order holds "the center front entrances at the Hollister stores at Park Meadows mall and Orchard Town Center mall violate Title III of the Americans with Disabilities Act." *Id.* at 12.

2. On April 9, 2012, this Court held a hearing on Plaintiffs' Motion for Class Certification [ECF No. 125]. The Court entered its written Order on April 20, 2012 [ECF No. 161] ("Class Cert. Order"). Pursuant to Fed. R. Civ. P. 23, the Court certified a class defined as

all people with disabilities who use wheelchairs for mobility who, during the two years prior to the filing of the Complaint in this case, were denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any Hollister Co. Store in the United States on the basis of disability because of the presence of an Elevated Entrance.¹

3. Plaintiffs now move for summary judgment with respect to all of Defendants' Hollister Stores in the United States that have Elevated Entrances.

4. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Equal Employment Opportunity Comm. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000).

5. It is undisputed that Defendants own and operate approximately 249 Hollister stores nationwide that have Elevated Entrances. Robertson Decl. Ex. 3 [ECF No. 125-1], submitted in connection with Plaintiffs' Motion for Class Certification [ECF No. 125].

6. It is also undisputed that all Hollister stores were constructed after January 26, 1993, the date after which all newly constructed public accommodations were required to comply with the ADA. 42 U.S.C. § 12183(a)(1); Defs.' Supplemental Resps. to Pls.' Interrogos and Requests for Production of Documents at 4 (Robertson Decl., Exs. 1 & 3); *see also* Answer to Fourth Am. and Class Action Complaint [ECF No. 122] ¶ 5 (admitting "Defendants created and designed all Hollister Co. stores, one of Defendants' store brands, after the passage of and the effective date of the ADA").

7. The Elevated Entrances are constructed pursuant to a common architectural design. Class Cert. Order at 7-8.

8. Hollister stores' Elevated Entrances are not accessible to people in wheelchairs. Summary Judgment Order at 3.

9. The ADA requires that all newly constructed places of public accommodation be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1).

10. Also under Title III,

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or **accommodation that is different or separate** from that provided to other individuals, **unless such action is necessary** to provide the individual or class of individuals with a good, service, facility, privilege,

¹ Elevated Entrance refers to a raised porch-like platform that is two steps above ground level. Summary Judgment Order at 3.

advantage, or accommodation, or other opportunity that is as effective as that provided to others.

Summary Judgment Order at 11 (quoting 42 U.S.C §12182(b)(1)(A)(iii) (emphasis in Order)).

11. “The thrust of Defendants’ ADA violation is that the main Elevated Entrances violate the ADA’s prohibition on different or separate accommodations and its requirement of integration.” Class Cert. Order at 7; *see also* 42 U.S.C. § 12182(b)(1)(A)(iii), (b)(1)(B). That ADA violation exists at every Hollister store that has an Elevated Entrance.

12. “[B]ecause [the statute] sets forth the criteria necessary for injunctive relief, the traditional equitable factors, including a showing of irreparable harm, need not be proved.”

United States v. Morris, 09-cv-02381-WYD-KMT, 2011 WL 588060, at *5 (D. Colo., Jan. 14, 2011) (citing *Atchison, Topeka & Santa Fe R.R. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981)); *see also Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1175 (9th Cir. 2010) (Title III case holding that “[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief.”), *cert. denied*, 131 S.Ct. 2113 (2011). ““When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown.”” *Star Fuel Marts, LLC v. Sam's East, Inc.*, 362 F.3d 639, 651 (10th Cir. 2004) (internal citations omitted).

13. Injunctive relief is the only remedy for violations of Title III of the ADA. 42 U.S.C. § 12188(a)(1). In cases such as the present, where a public accommodation has violated the new construction provisions of § 12183(a)(1), “injunctive relief *shall* include an order to alter

facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter.” 42 U.S.C. § 12188(a)(2) (emphasis added).

14. As Defendants are engaged in practices prohibited by the ADA, Plaintiffs are therefore entitled to an injunction ordering removal of the Elevated Entrances.

15. Because this motion resolves all remaining issues in the case, Plaintiffs respectfully request that this Court enter judgment in Plaintiffs’ favor in accordance with this motion, as required by -- and in a separate paper pursuant to -- Fed. R. Civ. P. 58(a). *See* Plaintiffs’ proposed Final Judgment filed concurrently with this motion.

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request this Court hold that the center front entrances at all Hollister stores with Elevated Entrances violate Title III of the Americans with Disabilities Act and enter summary judgment in favor of Plaintiffs and against Defendants on Plaintiffs’ claim under Title III (the only remaining claim in the case). In addition, Plaintiffs respectfully request this Court issue an injunction ordering Defendants to remove the Elevated Entrances from any Hollister store that has one and enjoining Defendants from designing and constructing Elevated Entrances at Hollister stores now and in the future. Finally, Plaintiffs respectfully request this Court enter final judgment in favor of the Plaintiffs as set forth in this motion.²

² Entry of judgment in Plaintiffs’ favor entitles Plaintiffs to recover their reasonable attorneys’ fees, litigation expenses and costs. 42 U.S.C. § 12205. Should the Court enter such a judgment, Plaintiffs respectfully request that the Court set a schedule for briefing Plaintiffs’ fee petition.

Dated: April 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2012, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

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