

## Retail Detail



### Retailer Fights Back Against Serial Plaintiffs Alleging Accessibility Discrimination

Eddie Bauer LLC, a national retailer, recently fought back against frivolous “accessibility discrimination” lawsuits that serial plaintiffs brought under the Americans with Disabilities Act (“ADA”) and similar state laws, such as the California Disabled Persons Act (“CDPA”) and Unruh Act. The company won summary judgment in several cases--filed by many of the same plaintiffs and same attorneys at different store locations. More recently, on March 25, 2013, in *Chris Kohler v. Presidio International, Inc. and Eddie Bauer, et al.*, Eddie Bauer secured a favorable verdict on all claims against a serial litigant in the U.S. District Court for the Central District of California.

In the *Kohler* trial, the plaintiff alleged that he encountered a number of physical or architectural barriers that prevented him from enjoying full and equal access to an Eddie Bauer outlet store in violation of the ADA, the CDPA, and the Unruh Act. These alleged barriers included: (1) a checkout counter that was too high to accommodate a patron in a wheelchair, (2) a dressing room bench that was too long, (3) the absence of an International Symbol of Accessibility (“ISA”) sign at the store’s entrance and (4) aisles that were cluttered with merchandise, impeding the plaintiff’s ability to navigate through the store.

District Court Judge Philip S. Gutierrez ruled in favor of Eddie Bauer on all claims and, in the process, made some significant rulings. While they are not binding on any other district court judge, they do provide useful support for other defendants who want to fight these frivolous lawsuits.

*Some highlights:*

**No ADA Violation Where An “Equivalent Facilitation” Is Provided.** The Court held that there is no violation of the ADA if places of public accommodation provide an “equivalent facilitation” that allows access. For example, the Court rejected plaintiff’s claim that Eddie Bauer’s 60-inch dressing room bench violated the applicable ADA accessibility standards because it was not exactly 48 inches long as specified in those standards. The Court held that the longer and wider bench provided at least “substantially equivalent” access to a 48-inch bench.

Similarly, the Court found that even if a checkout counter does not meet the 36-inch maximum height requirement under the ADA, there is no violation of the ADA or California accessibility statutes if a clipboard is made available as an equivalent facilitation.

**No ADA Liability If Alleged Barriers Are Fixed Before Trial.** The Court found that there is no liability under the ADA if alleged barriers to access are remedied prior to trial, because the ADA provides for only injunctive relief. Thus, the plaintiff’s claim that the store’s entrance did not have an ISA sign was rendered moot when Eddie Bauer subsequently affixed a sign to the entrance, and Eddie Bauer could not incur liability under the ADA.

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**Moveable Displays Are Not Unlawful Barriers To Accessibility.** The Court rejected the plaintiff's claim that the aisles in the store were too narrow because there was "too much clothing on the floor." Finding that the store had a policy of maintaining 48-inch aisles and moving any merchandise upon request, the Court concluded the store met the applicable standard, and that there was no colorable ADA violation. The Court also offered the common sense conclusion that, "If clothing falls on the floor, it is easily moveable."

**Plaintiff Must Provide Specific Measurements To Establish A Violation of the ADA.** The plaintiff claimed that the store's checkout counter did not meet a 36-inch maximum height requirement. However, the Court held that, in order to establish a prima facie case of violation of the ADA, the plaintiff bears the burden of providing precise measurements of any alleged ADA violation. Consequently, because the plaintiff could only provide estimates of the counter height, but failed to proffer any admissible evidence of the precise measurements of the counter, the plaintiff could not meet his burden of proof.

**No Liability Under California's Accessibility Statutes Unless Plaintiff Can Prove He Was Deterred/Prevented From Access Or He Experienced "Difficulty, Discomfort, Or Embarrassment."** The plaintiff also sought statutory damages under state law, based on the CDPA and the Unruh Act. The plaintiff, along with numerous claimants in other cases, argued that statutory damages must be awarded under state law if there is a violation of the accessibility rules, even if a violation has been remedied.

In one of the first decisions to address the effect of the 2009 Construction Related Accessibility Standards Compliance Act ("CRAS") amendments to California's disability access laws, the Court held that there is no liability under the CDPA and Unruh Act, unless a plaintiff is either (1) deterred or prevented from accessing the place of public accommodation or (2) personally encounters a barrier and experiences "difficulty, discomfort, or embarrassment."

The Court found that the plaintiff could not meet his burden of proof that he was deterred from access to the store because he encountered no problem entering the store and making a purchase. Further, the plaintiff testified he did not experience any difficulty, discomfort, or embarrassment based on any of the alleged barriers. Therefore, the Court found that CRAS precluded plaintiff from recovering damages under the California statutes.

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