

LAW REVIEW

Published in the Sierra Sun
September 12, 2008

By: Jim Porter

MERVYN'S STORES FAIL TO PROVIDE WHEELCHAIR-ACCESSIBLE SHOPPING

Californians for Disability Rights (CDR), an organization representing disabled individuals, sued Mervyn's department stores for maintaining narrow pathways between merchandise display racks that block shoppers with wheelchairs from reaching the merchandise.

The trial court found that Mervyn's indeed denied access to disabled individuals but concluded that widening the merchandise aisles was not legally mandated because it would cause a significant loss of selling space and profit.

The trial court also ruled that by building two new stores in Las Vegas, Nevada and Folsom, California that met accessibility standards, Mervyn's had provided a legally adequate alternative method for making its merchandise available to disabled individuals. CDR appealed.

Mervyn's

At the time of the lawsuit, Target Stores owned Target Store's, Mervyn's and Marshall Fields with a total of 1,476 stores nationwide. Mervyn's, which Target sold in 2004, has 266 department stores nationwide, 125 in California.

In July of this year Mervyn's felt the effect of the country's economic downturn and filed bankruptcy, joining Shoe Pavilion, Sharper Image, Linens 'n

Things and dozens of other retailers. Mervyn's competes with Target, Kohl's, Wal-Mart and other discounters.

ADA

When Congress adopted the Americans with Disabilities Act (ADA) it established 2 distinct standards for regulating building accessibility: one to apply to facilities existing before January 26, 1993, and the other to apply to facilities newly constructed or altered after that date.

Under the ADA, "existing facilities" (built before 1-26-93) must remove architectural barriers "where such removal is readily achievable" meaning "easily accomplishable and able to be carried out without much difficulty or expense."

If removal of architectural barriers is not readily achievable, the facility must make its goods and services available to disabled individuals through "alternative methods if such methods are readily achievable."

California's Unruh Civil Rights Act and the Disabled Persons Act incorporate the ADA standards.

Under California's Health and Safety Code all buildings constructed or altered after July 1, 1970, must comply with standards governing the physical accessibility of public accommodations. The standards are set forth in Title 24 of the California Code of Regulations.

Accessible Aisles

The Court of Appeal found that Mervyn's could physically rearrange its aisles for better accessibility; however re-arranging those architectural barriers would not be "readily achievable" if it caused Mervyn's a significant loss of business.

In fact, the Court found that Mervyn's would lose sales of \$70 million annually if it had to rearrange its store aisles, which could put Mervyn's out of business. As noted earlier, Mervyn's has managed to almost go out of business with its bankruptcy filing even without having to widen its aisles.

Decision

The Court of Appeal ultimately ruled that Mervyn's did not have to widen its aisles due to the expense and potential devastating effects on business sales; however Mervyn's proposed "alternative method" to serve disabled individuals – opening two new stores - was not a satisfactory alternative method.

Specifically, opening newer more accessible stores hundreds of miles away from older partially inaccessible stores is not a sufficient "alternative access" to serve disabled individuals.

I completely agree with that conclusion.

The Court of Appeal allowed Mervyn's to return to court to propose better alternative means for making merchandise available to disabled individuals, like improved customer service or redesign of aisle-ways with wheelchair accessibility.

Editorial Comment

I think Mervyn's poor financial condition weighed on the Court's decision. While the Court was probably tempted to have Mervyn's widen its aisles, it did not want to contribute to Mervyn's decline in sales.

Notwithstanding its bankruptcy status, Mervyn's is going to have to do a better job of providing access to disabled shoppers. But that may be the equivalent of re-arranging the deck chairs on the Titanic.

Jim Porter is an attorney with Porter Simon, with offices in Truckee, South Lake Tahoe, Incline Village and Reno and a licensed California Real Estate Broker. He was the Governor's appointee to the Bipartisan McPherson Commission on political ethics and the California Fair Political Practices Commission. He may be reached at porter@portersimon.com or at the firm's web site www.portersimon.com

© 2008