

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 14-cv-03111-REB-KLM

JULIE REISKIN *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

REGIONAL TRANSPORTATION DISTRICT,

Defendant.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby submit their Reply Brief in Support of Motion for Summary Judgment Regarding Liability ("Motion") [# 82].

BACKGROUND

Plaintiffs set forth in detail in their Motion the measurements of the relevant portions of the light rail vehicles ("LRVs"). Those measurements, along with the realities of Plaintiffs' experiences (Defendant has now taken fifteen of Plaintiffs' depositions), demonstrate that Plaintiffs do not have 32 inches of an accessible route to a 30 inch wide by 48 inch long minimum clear floor space that does not unduly restrict the movement of other passengers and provides maximum maneuverability at the doors. 49 C.F.R. §§ 38.77(c) & 38.83(a). Defendant's Response [# 101] does not raise any disputes of material fact and fails to show why this Court should deny the Motion. Plaintiffs are not asking this Court to look beyond the regulations. RTD admits that it acquired its vehicles

in the 1990's, after the enactment of the ADA. The facts that (1) Defendant used DOT funds to purchase LRVs, (2) put in its vehicle provider contract it must comply with the law, (3) other cities use the same vehicles and (4) there may have been more than two mobility aids on an LRV at any given time are all red herrings, unless the experiences comported with the regulations. Just like someone sitting on an LRV seat, those who use mobility aids are allowed clear space. Either the LRVs comply or they do not.

ARGUMENT

I. Why Each Space Defendant Suggests Fails to Meet the Requirements.

Defendant submitted an expert report that purports to identify three locations that meet the ADA regulations.¹ Each of the three spaces fails to comply with the regulations. The report even contradicts RTD's theory that only two such seats are available.² Not only are Plaintiffs entitled to certain dimensions, they are entitled to clear floor space, not unduly restricting the movement of others, and maximum maneuverability at the doors.

A. The Designated Wheelchair Area Does Not Provide Clear Floor Space and Unduly Restricts the Movement of Other Passengers

Each Plaintiff is entitled to a 30 inches wide by 48 inches long space. Plaintiffs have shown, and Defendant does not dispute, that if an individual using a mobility aid sits in the designated Wheelchair Area, the mobility aid will jut out into the aisle, blocking

¹ Response, Ex. 3 [# 101-7].

² All references to deposition transcripts are to true and correct copies of excerpts. Williams Dec. ¶¶ 8-20; Babcock 55:22-24; see also Williams Dec. at 1 ¶ 4 (light rail training Power Point disclosed from RTD), Ex. A, Slide 17.

others from moving in the aisle. See n.1, ECF p. 24 (“Report”) (the tape measure extends approximately two² inches beyond the edge and is not affirmed as a 48 inch long piece of material), an admission that there is not clear floor space of 48 inches of length for an individual using a mobility aid seated in this area. Any object of 48 inches juts most of the way into the aisle, blocking anyone from passing this space. Mr. Ames agrees there is only room for one aid to have 48 inches in length in this area. Mr. Ames never informs us whether the red material is 30 by 48; we are to assume that because it is written on the material. The tape measure photographs give us no indication of the size of the red material. It also does not show whether the material is flat on the floor. Nevertheless, we now have the benefit of Plaintiffs’ testimony that their aids (measuring 48 inches or less, with the exception of Ms. Jackson’s and Ms. Nozliç’s wheelchairs) jut out into the aisle, blocking others from being able to use the other side or move down the aisle.³

Using this as Wheelchair Seating violates the regulations because RTD has placed the Priority Seating directly behind this Wheelchair Area.⁴ As the signs show, the Priority Seating area is for those who use walkers and canes and not wheelchairs. Tina

³ Williams Dec. at 1-2 ¶ 5 (dimensions of Plaintiffs’ mobility aids are provided in Ex. B, Responses to Interrogatory 10, pp. 36-43); Babcock 9:2-3, 22:11-12; 22:17-23:8, 55:10-21, 61:7-20, 87:21-88:24; Beaver 29:19-30:2, 63:19-64:7, 65:6-66:2, 99:8-12; Culpepper 26:14-22, 48:6-11; Howey 49:21-50:6, 51:18-25, 58:10-23; 59:25-60:24; Jackson 16:1-13, 20:8-20; 50:1-9. Other Plaintiffs testified to jutting into the aisle, but page limits prohibit listing all. Defendant must carry the wheelchair and occupant if the vehicle can accommodate a larger size. Williams Dec. 3 ¶ 20 & Ex. D.

⁴ See Motion, Howey Dec. [81] at 36 ¶ 33 and attached exhibits.

McDonald, who uses a walker,⁵ testified there is insufficient room to get to the Priority Seating area using her walker.⁶ Ms. McDonald also testified she becomes trapped by individuals who use wheelchairs if they sit on the other side of the designated Wheelchair Area.⁷ At times, Ms. McDonald has not been able to ride the train because there is insufficient room to get to the Wheelchair Seating area or the Priority Seating area.⁸

B. The Seating Area Between the First Rows of Seats.

RTD's second suggestion for an individual who uses a mobility device to sit is in between the first row of seats. Report, at pp. 19-22. Again, Defendant's expert photographs do not dispute that this is not an appropriate place to sit. Again, it is impossible to tell what size the material is or what the tape measure says. Nevertheless, this area violates several aspects of the regulations: (1) We cannot tell from the photographs or the report exactly how much space there is in this area; (2) the area is in the middle of the aisle of the train, which would unduly restrict the movement of any person trying to pass through that section; (3) when the operator cabin door is open, it will

⁵ McDonald 33:9-12.

⁶ *Id.* 26:10-13; 47:15-19; see also Motion, Howey Dec. [# 81] at 24 ¶ 23.n. and attached exhibits (showing that there are only 24 inches to get to the Priority Seating area).

⁷ McDonald 26:14-27:18.

⁸ *Id.* 61:23-62:19 (explaining that she cannot board the train even if there is even one individual using the designated Wheelchair Seating section because there is insufficient room to navigate her walker).

open directly into the feet of an individual who uses a wheelchair;⁹ (4) Mr. Ames provides no explanation of how the operator is supposed to allow someone who is trying to board on the left side of the train under these conditions. If somebody is seated in the designated Wheelchair Area, by necessity jutting into the aisle, the individual seated as shown in the photograph on page 21 would not be able to back up without smashing into them. Mr. Ames provides no explanation of where that individual is supposed to maneuver the mobility aid in these circumstances.

Furthermore, it cannot be considered “clear floor space” if the individual with a mobility aid must move completely out of the way or off the train to enable someone else to board, and it certainly unduly restricts the movement of other passengers if they cannot board because there is no place for someone who uses a mobility aid to move. Plaintiffs testified that they had to move completely off the train and sometimes all the way down the ramp to enable another person to board or alight from the train.¹⁰ Often, they have had to do so to allow another individual who uses a mobility device, stroller, bicycle or whatever else Defendant allows on the train,¹¹ to let that individual to get on or off the

⁹ See Response, Ex. 3, p. 21.

¹⁰ Babcock 101:22-102:5; Beaver 81:18-20, 82:4-84:2; Culpepper 39:11-13; Howey 34:21-35:5; Jackson 17:2-12; Kilbourn 95:5-25; Lewis 54:9-55:2; McNair 74:2-23; Quinlan 74:20-75:9.

¹¹ The advisory commentary by the Department of Transportation states:

Canes, crutches, and walkers, for example, are often used by people whose mobility disabilities do not require use of a wheelchair. These

train.¹² Those who do not use a mobility aid must completely exit an LRV to board others.

C. Seating Adjacent to Either One of the Entry Doors.

The final place RTD suggests those who use mobility aids can occupy is immediately adjacent to the accessible entry doors.¹³ Again, without any explanation, it is impossible to tell from the photographs whether there actually is 30 inches in width by 48 inches in length of clear floor space in these areas. Defendant's expert opines that it is appropriate for an individual who uses a wheelchair or mobility aid to sit directly adjacent to a door. This defies 49 C.F.R. § 38.77(c), which requires that "Particular attention shall be given to ensuring maximum maneuverability immediately inside doors." Mr. Ames' report recommends individuals who use mobility aids sit directly in the doorways. Defendant specifically posts a sign that reads, "Do Not Lean On Doors."¹⁴ One using a wheelchair directly adjacent to the doors risks leaning on them when the train moves.

devices must be accommodated on the same basis as wheelchairs.
However, the Department does not interpret its rules to require transportation providers to accommodate devices that are not primarily designed or intended to assist persons with mobility disabilities (e.g., skateboards, bicycles, shopping carts) . . .

49 C.F.R., pt. 37, app. D (emphasis added). Yet RTD allows such items to board and ride LRVs in the designated wheelchair areas routinely. Ex. A, Slide 14 (boarding large objects), Slide 15 (strollers & other large items), Slide 16 (grocery carts).

¹² Babcock 42:24-45:23; Beaver 37:9-18, 43:1-47:11; Culpepper 42:22-43:17, 44:5-9; Howey 45:6-18; Jackson 67:2-23; Lewis 61:22-62:13; McDonald 42:23-43:18; Milne 63:9-64:9, 66:3-66:23; 75:10-22; Nozliç 57:12-15, 58:1-12; Quinlan 55:19-56:16; Torres-Vega 71:2-11.

¹³ Response, p. 5; Ex. 3, pp. 45, 47, 48, 50, 51, 52, 54, 55, 57.

¹⁴ Williams Dec. at 2 ¶ 6 and Ex. C.

This means if another individual who uses mobility aid (or a stroller, bicycle or other large object) boards or alights, the individual seated adjacent to that door would have to maneuver the mobility aid completely out of that location to allow the individual to board or exit. For the reasons in the Motion at 15 regarding the Stepwell Handle and Bridge Plate Lever, Plaintiffs testified that their wheelchairs cannot fit facing forward in that section.¹⁵ Plaintiffs' devices were measured at Defendant's request, and with the exceptions noted, they were smaller than 30 inches in width by 48 inches of length.¹⁶ The Report also ignores the fact that individuals who use mobility aids are three-dimensional. The photograph on page 52 demonstrates levers and devices that protrude into the clear space. Furthermore, RTD's own rules require that aisles be clear and nothing block the operator door at any time.¹⁷ Sitting sideways in the front vestibule area would clearly block the aisle and door for any object that will was 48 inches long.¹⁸ Anyone seated in the doorway does not have clear floor space, because they must move from that position if anyone needs to board or exit there. Depending on how cumbersome it is to move a mobility aid from that area, the boarding or alighting of a passenger is unduly restricted while waiting for the individual who uses a mobility aid to move.¹⁹

¹⁵ See, e.g., Babcock 103:7-104:8.

¹⁶ Williams Dec. at 1-2 ¶ 5 (Ex. B, Responses to Interrogatory 10 pp. 36-43).

¹⁷ *Id.* at 1 ¶ 4, Slide 13.

¹⁸ Response, Ex. 3 pp. 11-13, 16.

¹⁹ Babcock 103:7-104:8; Howey 116:3-121:5; Torres-Vega 46:16-48:6; 82:20-83:5.

II. Operators Must Request Passengers Move From Wheelchair Seating Areas.

Defendant claims that, “A light rail operator has only a few seconds to dwell at a station before another train arrives so the ability to resolve a conflict with a passenger is limited. Miller Aff., at ¶ 3 “Maintaining timely movement of all trains is essential when one train can shut down the entire light rail system. *Id.* at ¶ 4. As a result, RTD cannot be held responsible for violating federal law if operators fail to ask passengers to move because the regulation does not require it.” Response at 17. The regulations do require operators ask individuals to move for those who use mobility aids to access the Wheelchair Areas.²⁰

(1) When an individual with a disability enters a vehicle, and because of a disability, the individual needs to sit in a seat or occupy a wheelchair . . . location, the entity shall ask the following persons to move in order to allow the individual with a disability to occupy the seat or securement location:

- (i) Individuals, except other individuals with a disability or elderly persons, sitting in a location designated as priority seating for elderly and handicapped persons (or other seat as necessary);
- (ii) Individuals sitting in or a fold-down or other movable seat in a wheelchair securement location.

(2) This requirement applies to light rail . . . only to the extent practicable.

49 C.F.R. § 37.167(j) (emphasis added). Immediately preceding this regulation, the DOT mandates that “The entity shall ensure that adequate time is provided to allow individuals with disabilities to complete boarding or disembarking from the vehicle.” 49 C.F.R. § 37.167(i). Defendant’s training policies for light rail operators mandate the following: “If a passenger is sitting in the Wheelchair Area, approach the individual and say, ‘I need to use this area to allow a passenger with a disability to board, please move to a seat behind

²⁰ Defendant cites to a regulation that does not exist. See Response at 16 (referencing 49 C.F.R. § 37.169(j)(2)). The correct citation is 49 C.F.R. § 37.167(j).

the access area.”²¹ Passengers who use wheelchairs are limited to two locations.²² Since this lawsuit was filed, RTD has added new signage stating that “Federal law requires that this area must be vacated when a person with a disability using a wheelchair for mobility needs the space.”²³ When boarding an individual who uses a mobility aid, the following must be done in order to board or alight the individual: (1) the operator must open the front doors inside the cabin; (2) he/she must open the door and move to the left side or right side depending on which side the high block for boarding is located, at which time the operator is in front of those seated in the Wheelchair Area;²⁴ (3) the operator must put down the bridge plate; (4) the passenger/s board by maneuvering the mobility aid; (5) the operator must raise the bridge plate; (6) the operator must raise the flip-up seat that enables the individual who uses a mobility aid to have room to get into the designated Wheelchair Seating;²⁵ (7) the operator must ask the destination of the individual/s boarding to ensure departure at the right location; and (8) the operator must reenter the cabin and close the doors before the train can move.²⁶ This is uncontested evidence. Mr. Miller’s affidavit claims that there is “an average 20 seconds of dwell time at

²¹ Williams Dec. at 1 ¶ 4, Slide 18; see also Response, Ex. 2.1 at 5, bullet point 2 (same).

²² *Id.* Slides 4 & 17.

²³ *Id.* Slide 19.

²⁴ *Id.*, Slide 4.

²⁵ *Id.*, Slide 17 which shows the flip-up seat adjacent to a wheelchair with no one in it.

²⁶ *Id.* Slides 7 and 11.

a station.” This terminology is unexplained, but RTD’s own materials show that there is plenty of time, and operators are required to ask passengers to move from the wheelchair seating location. The problem is they just don’t do it.²⁷ Since RTD takes the position that it is not legally required to ask people to move, the issue is not moot. “[V]oluntary cessation of a challenged practice rarely moots a federal case” *Unified School Dist., No 259, v. Disability Rights Center of Kansas*, 491 F.3d 1143, 1149 (10th Cir. 2007) (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n. 1), and the argument is even weaker where the Defendant openly asserts it has no legal obligation.

Dated: December 29, 2015

Respectfully Submitted,

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²⁷ Babcock 27:18-21; Beaver 53:24-54:2; Culpepper 12:14-13:25; Jackson 18:2-9; Kilbourn 70:6-16; McDonald 54:4-15; Milne 53:18-54:8.

CERTIFICATE OF SERVICE

I certify that on December 29, 2015, I filed the foregoing document using the CM/ECF electronic filing system, which will serve the foregoing by electronic mail upon the following:

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I also certify that on December 29, 2015, I delivered Ex. A, the Power Point presentation referenced herein, in person to both the Court and the offices of opposing counsel.

/s/ Lauren Haefliger
Lauren Haefliger
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