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United States District Court,
D. Massachusetts.

COMMONWEALTH OF MASSACHUSETTS, The National Federation of the Blind, Inc., The National Federation of the Blind of Massachusetts, Inc., Adrienne Asch, Richard Downs, Theresa Jeraldi, and Philip Oliver Plaintiffs,

v.

E*TRADE ACCESS, INC. and E*Trade Bank Defendants.

No. 03-CV-11206-MEL. | Feb. 22, 2005.

Attorneys and Law Firms

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Douglas P. Lobel, David A. Vogel, Arnold & Porter LLP, McLean, VA; Jenny K. Cooper, Joseph L. Kociubes, Bingham McCutchen, LLP, Boston, MA, for Defendants.

Opinion

MEMORANDUM AND ORDER

LASKER, J.

***1** The Commonwealth of Massachusetts, the National Federation of the Blind, Inc., the National Federation of the Blind of Massachusetts, Inc., and a number of blind Massachusetts residents (collectively, "Plaintiffs") sue E*Trade Access, Inc. and E*Trade Bank (collectively, "E*Trade") alleging discrimination against the blind. E*Trade now moves for judgment on the pleadings, asserting that the Plaintiffs fail to state a claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12182 and 12183, because they seek relief not required or authorized under the current implementing regulations of the United States Department of Justice ("DOJ").

I. Background

E*Trade operates a network of over 11,000 Automated Teller Machines ("ATMs") nationwide, approximately 700 of which are located in Massachusetts. E*Trade's network consists of two types of ATMs: a limited number that it has title to, and a larger number that are owned and operated by third-party merchants. In June 2003, E*Trade agreed to retrofit all ATMs which it owns to make them accessible to the blind. The present lawsuit concerns the remaining ATMs operated by third-parties.

The Complaint alleges that E*Trade has failed to make ATM banking services accessible to and independently usable by the blind, and that E*Trade operates and/or controls and/or leases ATMs that are inaccessible to and not independently usable by the blind, in violation of Title III of the ADA and the regulations promulgated thereunder, 28 C.F.R. pt. 36 *et seq.*, the Massachusetts Public Accommodations Act ("MPAA"), M.G.L. c. 272 §§ 92A and 98, and the Massachusetts Equal Rights Act ("MERA"), M.G.L. c. 93 § 103. The Plaintiffs seek injunctive relief ordering E*Trade to make the necessary modifications to ATMs that they operate and/or lease so that the blind may have access to and independently use such ATMs.

II. Motion for Judgment on the Pleadings

E*Trade contends that the sole relief requested by the Plaintiffs is the installation of voice-guidance technology, in the form of headphone jacks, and that under the DOJ's current regulations no such relief may be granted. E*Trade argues that the DOJ's existing regulations for ATMs, first specified by the Architectural and Transportation Barriers Compliance Board ("Access Board") in the 1991 ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG"), require that instructions and all information for use of ATMs be "made accessible to and independently usable by persons with vision impairments." *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 C.F.R. pt. 26, App. A § 4.34.5 (1994). E*Trade contends that the 1991 ADAAG do not mandate or require headphone jacks: "In light of the evolving technology in this area and to allow flexibility in design, the Board has stated the requirement for accessibility to persons with vision impairments in general performance terms." *Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities*, 36 C.F.R. pt. 1191 (1991). According to E*Trade, despite adopting a flexible approach the Access Board rejected mandating voice guided technology in the form of headphone jacks: "Until such time as additional research can be conducted into the issues of security and privacy at ATMs, the Board does not propose to include requirements for such measures." *Id.* In contrast, the Access Board specifically stated that Braille and large print instructions, "when used in conjunction with tactually marked keys or other means of identification, do serve as one source of accommodation for persons with vision impairments." *Id.*

*2 E*Trade contends that: (1) the Plaintiffs' sole allegation is that the ATMs at issue in this case fail to comply with the ADA because they lack headphone jacks: "The only effective means to make ATMs accessible to blind people is through voice-guidance technology", Amend. Compl. ¶ 28, and (2) the DOJ's regulations adopting the 1991 ADAAG do not require voice-guidance technology, and it is these regulations, not the more general statutory provisions of the ADA itself, that establish accessibility obligations under the ADA: "Congress unambiguously intended compliance with the specific regulations of the Attorney General and the Access Board to be sufficient to satisfy the requirements under Title III of the ADA." *United States v. National Amusements, Inc.*, 180 F.Supp.2d 251, 257 (D.Mass.2001). Therefore, E*Trade maintains that because any claim about inaccessibility of ATMs is limited by the language of the DOJ's regulations, which do not mandate voice-guidance technology, the Plaintiffs have not stated a claim under the ADA and judgment on the pleadings should be granted for E*Trade.

Finally, E*Trade argues that the DOJ's forthcoming adoption of the revised 2004 ADAAG will be dispositive of the Plaintiffs' claims and will moot this suit. E*Trade recognizes that the proposed 2004 ADAAG may impose voice-guidance technology on all new ATMs, in which case the DOJ will decide whether the 2004 ADAAG should also apply retroactively. E*Trade therefore asserts that if the DOJ does not apply the 2004 ADAAG regarding voice-guidance technology to existing ATMs, the Plaintiffs will have no ADA claims; if the DOJ decides the new regulations apply retroactively the DOJ will specify which ATMs must be retrofitted and on what timeline, and the Plaintiffs will be entitled to relief that aligns with new industry standards. According to E*Trade, the Court should therefore follow "primary jurisdiction" doctrine and defer to the DOJ's policy-making authority by dismissing or staying this suit until the DOJ issues final regulations. *See U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 339 F.3d 23, 34 (1st Cir.2003).

E*Trade contends that the sole relief sought by the Plaintiffs is voice-guidance technology, as admitted in their responses to E*Trade's second set of interrogatories, and that because such relief is not available under the current regulations judgment on the pleadings must be entered for E*Trade. The Plaintiffs respond that aside from legal objections to the interrogatories, they merely admitted that "voice guidance technology is the most effective means of making ATMs independently usable by blind people within the meaning of 28 C.F.R. pt. 36 App. A section 4.35." Plaintiffs' Response to Defendants' Second Set of Interrogatories at 3. Plaintiffs maintain that their answer did not concede that alternative forms of relief are unavailable, and indeed stressed the legal responsibility of E*Trade to assert affirmative defenses.

*3 The Plaintiffs further contend that E*Trade misconstrues the Complaint, which seeks broad equitable relief for E*Trade's failure to make ATMs "accessible to and independently usable" by blind persons, as required by the 1991 ADAAG. Plaintiffs argue that voice-guidance technology has not been rejected as a method of compliance with the ADAAG; rather, the Access Board decided against mandating any specific approach and instead "stated the requirements for accessibility for persons with vision impairments in general performance terms" in order to "maintain its position of flexibility in this area." *Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities*, 36 C.F.R. pt. 1191 (1991). Plaintiffs assert that their Complaint is not focused exclusively on voice-guidance technology, but instead seeks injunctive relief consistent with the ADAAG's performance-based standards. "Plaintiffs request that the Court ... enjoin each of the Defendants from continuing to violate the ADA and Massachusetts law and order all Defendants immediately to make the necessary modifications to the ATMs they operate or operate and lease, so that blind people may have access to and independently use these ATMs." Amend. Compl. at 14. Although the Plaintiffs maintain that voice-guidance technology is

the most effective method currently available to make ATMs accessible to the blind, their Complaint leaves open the possibility that other options can satisfy the ADA's legal mandate.

Finally, the Plaintiffs assert that the 2004 ADAAG rulemaking process does not affect their claims. According to the Plaintiffs, even if the 2004 ADAAG, once adopted, do not apply retroactively, and even if the DOJ establishes a safe harbor for entities that are in compliance with the 1991 ADAAG, the ATMs at issue in this case would not be eligible because, as the DOJ explained in its advance notice of proposed rulemaking, "This safe harbor option would, of course, have no effect on noncompliant elements. To the extent that elements in existing facilities are not already in compliance with scoping and technical requirements in the current ADA Standards, existing public accommodations would be required to remove barriers, to the extent readily achievable, to make elements comply with the revised ADA Standards." *Nondiscrimination on the Basis of Disability in Public Accommodations and in Commercial Facilities; Proposed Rule*, 69 Fed.Reg. 58,771 (2004) (to be codified at 28 C.F.R. pts. 35, 36) (proposed September 30, 2004). The Plaintiffs argue that because E*Trade's ATMs are not accessible to and independently usable by the blind, they are not in compliance with existing DOJ regulations. Therefore, according to the Plaintiffs, whether the 2004 ADAAG are adopted by the DOJ and include a safe harbor provision is irrelevant to this case, because the ATMs at issue must still be made accessible to and independently usable by the blind.

III.

*4 The DOJ's current regulations for ATMs require that instructions and all information for use be "made accessible to and independently usable by persons with vision impairments." *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 C.F.R. pt. 26, App. A § 4.34.5 (1994). The 1991 ADAAG do not mandate or require headphone jacks: "In light of the evolving technology in this area and to allow flexibility in design, the Board has stated the requirement for accessibility to persons with vision impairments in general performance terms." *Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities*, 36 C.F.R. pt. 1191 (1991). The statutory language and structure of the ADA indicate that Congress intended that the DOJ's regulations and the ADAAG, when passed, would set forth standards sufficient to satisfy ADA obligations; the DOJ's regulations therefore establish the limits of ADA liability. *National Amusements*, 180 F.Supp.2d at 258-59. Accordingly, the remedy of voice-guidance technology, which is not mandated or required by the current DOJ regulations, may not be imposed on the Defendants in this case under the law as it stands, and the DOJ's policymaking authority may not be compromised or preempted by the Court.

Nevertheless, judgment on the pleadings may not be entered "unless it appears beyond a doubt that the nonmoving party can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Feliciano v. Rhode Island*, 160 F.3d 780, 788 (1st Cir.1998). The Plaintiffs have put forward a legally sufficient claim that under the existing regulations the Defendants' ATMs are not accessible to or independently usable by the blind. It appears that the Plaintiffs may be able to prove a set of facts that would entitle them to some relief, aside from voice-guidance technology, required by the current DOJ regulations. Although their preferred remedy of voice-guidance technology is not available under the existing regulations, the Plaintiffs can seek "the necessary modifications to the ATMs they [E*Trade] operate or operate and lease, so that blind people may have access to and independently use these ATMs." Amend. Compl. at 14. Accordingly, E*Trade's motion for judgment on the pleadings is DENIED.

E*Trade has alternatively moved for a stay of the proceedings pending a determination by the DOJ as to what course it will take with the 2004 ADAAG. This is an issue which should be separately discussed and decided. Accordingly, the Court will arrange for a meeting to determine what further proceedings are appropriate.

It is so ordered.