

THURSDAY, DECEMBER 18, 2012

Decision could bring more disability suits to federal court

By Emily Green
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A wheelchair-bound plaintiff who lost a disabilities access lawsuit against a small grocery store must pay the store owner's attorney fees, the state Supreme Court ruled Monday in a unanimous decision. The ruling conflicts with a 9th U.S. Circuit Court of Appeals decision that only requires plaintiffs to pay defendants' attorney fees if the court deems their lawsuits frivolous. The divided rulings could entice more plaintiffs to bring their disability lawsuits in federal court to avoid the possibility of paying their opponents' attorney fees.

Lawyers said the state Supreme Court's decision also might mean plaintiffs will be reluctant to raise certain disability claims in state court if they aren't certain they will prevail.

The decision deals with one section of one of the three laws California plaintiffs rely on to sue for disability access violations. Section 55 of the Disabled Persons Act is important to plaintiffs in two respects: it provides standing to "potentially aggrieved" parties, not just those who have actually been harmed, and allows plaintiffs to sue for a broader range of violations than the other laws provide for. Section 55 authorizes injunctive relief, but not damages. *Jankey v. Lee*, 2012 DJDAR 16809.

Brad Seligman with the Impact Fund, who argued as amicus curiae in support of the plaintiff, said plaintiffs usually bring Section 55 claims for additional violations they don't know about at the time they file their suit. It allows, for example, a plaintiff suing over a barrier to entering a store to later amend his claim to include access violations with the bathroom. Because the plaintiff never entered the bathroom, he is only a "potentially aggrieved" party.

The plaintiff's attorney, Chico-based Scottlyn J. Hubbard IV, said the court's decision would result in fewer legal recourses for disabled plaintiffs.

"In state court Section 55 is a dead letter because no intelligent, knowledgeable attorney is going to bring a claim that could result in bone-crushing financial sanctions," Hubbard said. "There are some California laws that will go unenforced because of this ruling today."

Yet the decision, written by Associate Justice Kathryn M. Werdegar, was narrowly written, and some lawyers believe the ultimate impact will be limited.



Daily Journal
California Supreme Court Justice Kathryn M. Werdegar, who wrote a unanimous decision holding that a losing plaintiff in a disabilities access case must pay the defendant's legal fees.

"I don't see this opinion having enormous consequences," Seligman said.

David Raizman, head of Drinker Biddle & Reath LLP's labor and employment practice group, who has defended many businesses against disability access lawsuits, said he knows many lawyers who abandoned Section 55 "well before this decision" because of looming concerns they would have to pay the defendants' attorney fees if they lost.

Section 55 is distinct from the federal American with Disabilities Act and other state laws because it allows any prevailing party to seek attorney fees, not just a prevailing plaintiff.

The case stems from a lawsuit plaintiff Les Jankey brought against San Francisco grocery store owner Song Koo Lee. Jankey claimed a four-inch step located at the entrance of the market prevented him from wheeling directly into the store. He sued under the federal Americans with Disabilities Act and three state laws, one of which included Section 55. Lee won on summary judgment and was awarded \$118,458

in attorney fees. Jankey sought to have the attorney fees award overturned, urging the court to accept a 9th Circuit ruling that the attorney fees portion of Section 55 is preempted by the federal Americans with Disabilities Act. The state Supreme Court declined.

"Absent congressional intervention, California has every right to adopt whatever fee regime it deems appropriate upon invocation of state law remedies," Werdegar wrote. "Accordingly, we respectfully disagree with the Ninth Circuit's conclusion ..."

David Axelrad, a partner with Horvitz & Levy LLP who argued on behalf of defendant Lee, said he believed the court reached the right decision.

"There are a number of advantages that accompany the request for relief under Section 55, but you have to accept the burden that if you fail in presenting that claim, the other side is going to have a claim for attorneys' fees," Axelrad said. "That is the bargain the Legislature set out when they enacted that statute."