The California Supreme Court Issues a Win for Businesses Who Prevail in Disability Access Cases in California

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Facts and Procedural History of the Case.

Defendant, Song Koo Lee owns and operates the K&D Market, a small grocery store in San Francisco's Mission District. He does not own the building but has operated the market since 1985. Plaintiff, Les Jankey, a wheelchair user, sued Lee alleging that he and other similarly situated disabled persons were denied access to the full and equal enjoyment of the goods and services offered by K&D Market. Jankey contended that a four-inch step located at the entry of the market was an architectural barrier that prevented him and other wheelchair-bound individuals from wheeling into the store.

Jankey asserted violations of the federal ADA, the Unruh Civil Rights Act (Cal. Civil Code § 51 et seq.), the Disabled Persons Act (Cal. Civil Code § 54 et seq.), and Health and Safety Code section 19955 et seq. Among other relief, Jankey sought an injunction under state and federal law compelling Lee to make K&D Market readily accessible to individuals with disabilities. (See Cal. Civil Code § 55; 42 U.S.C. § 12188(a)(2).)

The trial court granted Lee summary judgment finding that even though K&D Market had a threshold step at the entry of the market, Lee conclusively established as an affirmative defense that removal of the barrier was not "readily achievable" and he thus was entitled to judgment on all four disability access claims. Lee moved for and sought attorneys' fees under California Civil Code section 55. The trial court concluded fees for a prevailing defendant under Civil Code section 55 were mandatory and awarded $118,458, and the Court of Appeal affirmed.

The California Supreme Court accepted review of the case and considered two principal challenges to the attorneys' fees award: 1) whether the trial court erred in determining that section 55 fees are mandatory; and 2) whether an award of mandatory fees is preempted by the federal Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.; ADA).

Our Firm filed an amicus brief with the Supreme Court on behalf of eleven industry and trade organizations in support of Lee) arguing strenuously that business owners and operators who prevail in a disability access lawsuit brought against them deserve to recover their attorneys' fees if the lawsuit includes a claim under Civil Code section 55.[1]

[1] Weintraub Tobin (formerly "Weintraub Genshlea Chediak") represented the following amici curiae before the California Supreme Court in this matter: the California Hotel & Lodging Association, the Golden Gate Restaurant Association, the California Parks Company, the California Restaurant Association, the California Business Properties Association, Small Business California, the San Francisco Chamber of Commerce, Building Owners and Managers Association of California, the

Issues Before the California Supreme Court.

1. Section 55 is Mandatory.

Civil Code section 55 expressly provides: "Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code, or Part 5.5 (commencing with Section 19955) of Division 13 of the Health and Safety Code may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees."

Jankey argued that the legislative history behind section 55 shows the Legislature intended to afford only prevailing plaintiffs mandatory fees. However, the Supreme Court correctly pointed out that Jankey only "selectively cites passages from analyses of [the legislation] that confirm the Legislature's intent to afford prevailing plaintiffs attorney fees, but never demonstrates that the Legislature did not also intend to afford fees to prevailing defendants." In fact, the Court noted that "the legislative history is to the contrary and reveals a conscious choice to ensure prevailing defendants a right to fees."

Relying much on the argument and legal authority offered by Lee and Amici Curiae, the Supreme Court said that two aspects of the plain language of section 55 are dispositive. First, the Court recognized that the statute was written to allow fees for a "prevailing party," not just a prevailing plaintiff. The Legislature knows how to write both unilateral fee statutes, which afford fees to either plaintiffs or defendants, and bilateral fee statutes, which may afford fees to both plaintiffs and defendants. "When the Legislature intends that the successful side shall recover its attorney's fees no matter who brought the legal proceeding, it typically uses the term 'prevailing party.'" (*Stirling v. Agricultural Labor Relations Bd.* (1987) 189 Cal.App.3d 1305, 1311; see also *Molski v. Arciero Wine Group*, *supra*, 164 Cal.App.4th at p. 790; cf. §§ 52.1, subd. (h).)

Second, the Court found that while the determination that a defendant is a prevailing party is generally discretionary, once a trial court determines that a defendant qualifies, "the language of section 55 mandates a fee award: a prevailing party 'shall be entitled' to reasonable fees." Again, the Court noted that the Legislature has routinely and clearly differentiated, using "may" in circumstances where it intends a fee award to be discretionary and "shall" in circumstances where it intends an award to be mandatory. Thus, the Supreme Court concluded that the plain language of section 55 makes an award of fees to any prevailing party mandatory.

California Building Industry Association, the National Federation of Independent Business Small Business Legal Center, and the California Chamber of Commerce.

2. Section 55's Mandatory Fee Provision is Not Preempted by the ADA.

The second question before the Supreme Court was whether section 55 was preempted by the ADA. In contrast with section 55, the ADA allows defendants fees only for responding to frivolous claims and makes fee recovery discretionary. The statute reads specifically that "[i]n any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." (42 U.S.C. § 12205.)

The legislative history of the ADA shows that Congress intended that the court's discretion in awarding attorney's fees under the ADA, be exercised in accord with principles set forth in the well-known case of *Christiansburg Garment Co. v. EEOC* (*Christiansburg*). Under *Christiansburg*, while prevailing plaintiffs should receive fees unless an award would be unjust, prevailing defendants may receive fees only when the trial court finds that a plaintiff's claim is "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." (*Id.* at p. 422.)

Recognizing that there is a presumption against federal preemption of a state law, the Supreme Court then undertook a long and detailed analyses to determine if Congress had made "clear and manifest" its intent to displace state law in this area. Jankey argued that Section 501(b) of the ADA was an express preemption clause and nullified all state laws less protective of the rights of the disabled than the ADA and that section 55 was such a less-protective law.[2] The Court disagreed and found that, first, the text of ADA section 501(b) and the legislative history behind it reveal it not as an express preemption clause but rather a clause insulating from preemption any state laws offering better protections in some respect.

Second, in connection with Jankey's contention that section 55 is less protective than the ADA, the Supreme Court made clear that such contention rested "entirely on his assumption that all that matters is what protection or benefit he ultimately obtained from invoking section 55 in this case. … [and such] assumption is unfounded." The Court explained that Congress contemplated that state laws would be protected from ADA preemption if in principle they afforded superior protections in some regard. According to the Court, section 55 does so and Jankey took advantage of such protections. "Clearly Jankey himself at the time of filing saw some benefit to adding a section 55 claim to his ADA claim or else he would have omitted it. Having invoked section 55, he cannot now be heard to complain that it has brought him only a bill for attorney fees."

[2] Section 501(b) provides that "[n]othing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act." (42 U.S.C. § 12201(b) (hereafter sometimes ADA § 501(b)).)

The Supreme Court found that Congress's concern about not discouraging "would-be" plaintiffs from availing themselves of the ADA offers no reason to preclude states from establishing different fee award regimes for independently established state law remedies. The Court also found that "[n]or will the fee award chill Jankey or others from asserting ADA rights in the future. It may inspire reluctance to invoke section 55 rights, but that is a matter for the Legislature to consider; it is no concern of Congress's, and it is no basis for finding preemption."

Finally, the court rejected the final argument by Jankey (and his Amicus Curiae, the Impact Fund) that state law should be read to foreclose fees for overlapping work done to defend against both ADA and section 55 claims. The Supreme Court said there was no indication in the ADA or its legislative history that Congress intended state fees for overlapping state claims to be foreclosed. Likewise, the Court said there was nothing in the text or sparse legislative history of section 55 to indicate fee recovery should be limited as a matter of state law based on overlap with federal remedies. Accordingly, the Supreme Court declined to read state law as limiting an award of section 55 fees on this basis.

Takeaway: This is a small victory for California business owners and operators. While it will not prevent the "drive-by" – "shakedown" disability access cases that continue to plague the state, it will (or should) cause the plaintiffs who bring these types of cases to take pause in pursuing a claim under Civil Code section 55, lest they risk paying a prevailing defendant's attorneys' fees.