

# Pennsylvania Court Certifies Nationwide Class in Accessibility Case Against Public Accommodations

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A federal district court judge has certified a nationwide class of people with mobility disabilities who allegedly had difficulty getting around the defendant's stores due to aisle obstructions in violation of Title III of the Americans with Disabilities Act. The class involves all or most of the defendant's 350 retail stores nationwide. *Allen v. Ollie's Bargain Outlet, Inc.*, No. 2:19-cv-281 (W.D. Pa. Mar. 26, 2021).

The lawsuit asserted that Ollie's Bargain Outlet, Inc. stores contain barriers — some fixed, some movable, such as merchandise displays — that result in inaccessible interior paths of travel or routes. The company does not have adequate policies to ensure the interior paths of travel or routes are maintained to be accessible to individuals with mobility disabilities or who use mobility devices for mobility, such as wheelchairs, according to the lawsuit. The defendant is accused of "employ[ing] uniform policies and procedures that actively or intentionally facilitate the placement of barriers in interior paths of travel to facilitate revenue and profits." In particular, the plaintiffs cited the retailer's "Visual Store Standards" policy, which outlines store standards for displaying merchandise.

### The Decision

After addressing defenses raised concerning the plaintiffs' standing and whether certain census data was admissible, the district court's decision to certify a nationwide class addressed class certification prerequisites (numerosity, commonality, typicality, and adequacy of representation).

The representative plaintiffs sought certification of a class under Federal Rules of Civil Procedure Rule 23(b)(2). Rule 23(b)(2) is reserved mostly for claims where only an injunction or injunctive relief is sought. Rule 23(b)(2) requires a showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Some commentators have expressed a view that Rule 23(b)(2) prerequisites are easier to satisfy than other bases for class certification.

The plaintiffs proposed a class comprised of:

All persons with qualified mobility disabilities who have attempted, or will attempt, to access the interior of any store owned or operated by Defendant within the United States and have, or will have, experienced access barriers in interior paths of travel.

A plaintiff seeking class certification under Rule 23 bears the burden of proving, by a preponderance of the evidence, that the prerequisites of Rule 23(a) — numerosity, commonality, typicality, and adequacy of representation — are met.

The district court certified the class after concluding that all Rule 23 prerequisites were satisfied after a "rigorous analysis" required by the U.S. Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The plaintiffs established numerosity by presenting statistical census data that thousands of individuals with mobility impairments reside within the same zip codes of the defendant's stores. This data was supplemented with evidence of some 30 individual shoppers with mobility disabilities that included written complaints and a random sampling of video footage of individuals attempting to traverse the stores.

As for the commonality requirement, the defendant argued that resolution of the case would require individualized analyses of each store and alleged access barrier, as well as individual determinations of which putative class members were disabled as a matter of law. The court rejected these arguments, pointing out that the defendant did not identify how these issues would prevent resolution on a class-wide basis. "Ollie's policies are uniform and company-wide," the court wrote. "If Ollie's policies and procedures do, in fact, cause access barriers to unlawfully restrict individuals with disabilities from obtaining their desired goods, then proposed members who endured violations have suffered the same injury, the resolution of which will resolve a central issue in one fell stroke." Therefore, according to the court, the plaintiffs established commonality by a preponderance of the evidence. It also found that the plaintiffs met the typicality and adequacy requirements and satisfied Rule 23(b)(2) in their bid for injunctive relief.

### Takeaways

This case illustrates that garden-variety accessibility claims historically brought as individual claims may be brought as a class claim. This decision comes after a long line of similar cases filed by the law firm representing the plaintiffs after the U.S. Court of Appeals for the Third Circuit (which has jurisdiction over Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands) reversed a district court's class certification in a similar case, *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467 (3d Cir. 2018). The other cases have been settled according to court dockets. While *Ollie's* may be an outlier, businesses, especially large retailers, may want to review operational policies and procedures to avoid this type of class action or to ensure they are in a good position to defeat class certification.

As the case moves along, there are weighty legal issues the court and the parties may need to address. On the plaintiffs bringing their discrimination claim as a class action, there is an issue whether the relevant facts they contend prove their individual discrimination claims also prove the discrimination claims of each absent putative class member. The plaintiffs' burden of proof also does not change or is lower simply because they elected to proceed as a class action. In addition, proceeding as a class action does not diminish the defendant's substantive right to prove its defenses in any way. *See* 28 U.S.C. § 2072(b) (Rules Enabling Act). Similarly, evidence of the condition of the stores involved in the plaintiffs' individual claims may not be representative evidence admissible to prove liability on behalf of each member of the putative class at other stores — some of which may be thousands of miles away. *See Tyson v. Bouaphakea*, 136 S. Ct. 1036 (2016) (representative evidence is admissible if unnamed putative class members could have similarly used the representative evidence in individual lawsuits if they had brought individual suits instead of a class action).

Please contact a Jackson Lewis attorney with any questions about this case.

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