Podcast

ADA Public Accommodation Challenges for Restaurant Industry Operators

By Joseph J. DiPalma & Jennifer Rusie

February 11, 2025

Meet the Authors

Joseph J. DiPalma
Principal
(914) 872-6920
Joseph.DiPalma@jacksonlewis.com

Jennifer Rusie
Principal and Office Litigation Manager
615-565-1664
Jennifer.Rusie@jacksonlewis.com

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Food establishments are committed to serving all customers fairly, including offering reasonable accommodations for individuals with disabilities.

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INTRO

Food establishments are committed to serving all customers fairly, including offering reasonable accommodation for individuals with disabilities.

On this episode of We get work®, we explore how restaurants and other eateries can address common accessibility issues, such as accommodating service animals, providing accessible parking, and charging customers surcharges for requesting dairy-free milk alternatives.

Our hosts today are Joe DiPalma, principal in Jackson Lewis' White Plains office, and Jennifer Rusie, principal and office litigation manager in the firm's Nashville office. Both are members of the firm's disability access, litigation, and compliance group.

Jen and Joe, the question on everyone's mind today is: What are common types of disability-based claims and inquiries that affect restaurant operators, and how does that impact my business?

CONTENT

Joseph J. DiPalma
Principal, White Plains

Hey, everyone; thank you for joining us on today's podcast. I am Joe DiPama. I'm an equity partner here in the White Plains office of Jackson Lewis in New York. With me is Jennifer Rusie, who's an equity partner down in Nashville. Today, we are going to be chatting with you about some ADA public accommodation issues that we've been seeing in restaurants and food establishments across the country. We thought it'd be a good opportunity to highlight some of the recent cases we've been seeing that Jen and I have been working on together actually.

The first one I think makes a lot of sense for us to talk about is a slew of cases

happening across the country. Jen and I are working on one in California right now against coffee shops. What it really is, and Jen, I'll let you jump in, but it's plaintiffs alleging to be lactose intolerant.

Jennifer Rusie
Principal and Office Litigation Manager, Nashville

Or have milk allergies, which we have learned are different things.

DiPalma

And we'll get into that. But essentially, what they're saying is that because of these conditions, the coffee shops are violating Title III of the ADA by charging surcharges on dairy alternative milk. So, if someone comes in and says, hey, I want almond milk or coconut milk, and there's a $0.95 surcharge on that milk, that's discriminatory because a person with lactose intolerance or a milk allergy has to pay more money for a coffee with a milk in it than someone who's ordering a regular milk. So, that's the premise of the case.

Jen, what do you think?

Rusie

It's interesting because you use the word surcharge, which is a normal term that we would all use, but it actually has a legal definition, which was one of the ways that we actually got the case dismissed originally that was filed against our client. Of course, the plaintiffs have gotten leave to amend, but that's where it stands right now.

The plaintiffs are arguing that they don't have a “like experience” to other consumers who do not have a disability because they have to pay more money for the same experience or good. It was really interesting from a legal standpoint because this was a totally new argument, something that we really got to research and argue with out of the blue.

One of the main cases that the plaintiffs focused on was a case out of the Northern District of California against a restaurant. The plaintiff, in that case, had celiac disease and couldn't have gluten at all. They had a separate gluten-free menu that they would direct anyone who had celiac disease to. These things were the same meals; they just lacked gluten. In some cases, it was a menu item like green beans that does not have gluten anyway, yet everything on the menu was more expensive. So, we argued in our case that's not the same thing. It's not analogous because in the cases that we're dealing with in these coffee shops, every single person who orders a drink made with almond milk, soy milk or oat milk pays an additional charge. It is not only for somebody with a disability. It is an ingredient-based price increase, not a disability-based price increase, which was the issue in the matter.

Another thing we argued in our case was that somebody who is lactose intolerant is not disabled. The court agreed with that. Based on what was alleged, the experiences that the plaintiffs in our case had, and essentially, they just said they have a stomachache if they consume dairy milk as opposed to somebody with a peanut allergy who could have an anaphylactic reaction. Something like that would

be considered a disability. But just this intolerance to a single ingredient really doesn't rise to the level of a disability.

DiPalma

You raise a good point because the first time, even not reading it as a lawyer necessarily, but you read the complaint, and it's, okay, this person is saying that they're having an intolerance to dairy, and they have to pay extra money to have almond milk or something like this. The first thing I think is you don't have to add milk to coffee, right? You don't even have to do that.

Rusie

I don't. I take it black.

DiPalma

I do, too. Any person who wants to get almond milk to put in their coffee or coconut milk is going to have to pay whatever the cost is for that, irrespective of disability status.

Then, the other thing I thought about is, if you're a coffee shop, assuming that the plaintiff's theory is correct and that they can't be charged more money for a milk alternative, what do you do if you're working behind the counter at the coffee store, if someone just comes to you and says, hey, I have lactose intolerance, you can't charge me extra for almond milk. Are you supposed to just not charge them for almond milk just because they say that? That would create another host of issues that I don't even know how you'd be able to resolve. If I'm a coffee shop owner and the law becomes that we can't charge extra money for products that are costing us more money to procure, I'll probably do one of two things. I'll stop getting those alternative milks because it's too costly, or I'll just increase my prices across the board. Instead of it being $5 for a cup of coffee, we'll charge you an extra $0.90 if you want an alternative milk. Now it's just $6 for a cup of coffee, and you could have any milk choice you want. I think that's really the practical effect.

Then, one of the other interesting things I thought about in this case was one of the forms of relief they were looking for. In the initial complaint, Jen, you can correct me if wrong, there was no injunctive relief necessarily they were seeking, but they were looking for a disgorgement of the profits. Can you explain to us what that means?

Rusie

They had a claim for unjust enrichment and restitution. So, they wanted the coffee shops to disgorge all this money that they had gained by charging people for the non-dairy alternatives. It was also not clear how you would figure out which people we got them from unjustly who were disabled versus somebody who likes the taste of oat milk. But they wanted all of that money to be paid to the plaintiffs. That was the one claim that we actually got completely dismissed without leave to amend regarding that claim. So, the court really didn't like that argument and said, no, you don't get to get a second bite of the apple on that one. But you can potentially come back and draft your complaint so that if you give us some more details on the

impact of dairy milk on your body, maybe we'll look at it and see if it's a disability.

Then, there is another argument about the charges. Because it's not a surcharge and it is applied across the board to every person who wants a non-dairy alternative like you said, the impact would be you're just going to wind up with too many questions, we're not going to offer them at all, or we're just going to increase the price of everything.

DiPalma

Right. One thing I'm thinking about is something you said earlier, at the outset, a restaurant---are they required to offer their food gluten-free? There's no legal requirement for you to provide a gluten-free menu. Was it found unlawful that the gluten-free menu was more money than the regular menu?

Rusie

Right, because it was considered to be a surcharge that was only for the disabled. Typically, that was a situation where they thought there was no other reason to be ordering off this menu, and only people who said; I'm celiac, I need gluten-free, were directed to this menu.

DiPalma

So, it wasn't a menu that was readily available at the table. It was only upon request.

Rusie

Right, and they charged more money for it, and that was the downfall there.

DiPalma

So hypothetically, had the menu just been sitting on the table, and a person who doesn't have celiac disease or doesn't have gluten intolerance says, I just prefer to eat gluten-free because I think it's healthier, and I'll pay an extra three or four dollars for my meal because it's gluten-free. I think that's more analogous to what we're saying in the coffee shop case. So that's an important distinction between the two matters.

One of the main takeaways from a case like this one, and this isn't too dissimilar to what we saw a couple of years ago with the Braille gift cards. There is a plaintiffs' bar that is actively looking for creative ways to file hundreds or thousands of lawsuits across the country. This is just a really good example of if you're in a place of public accommodation, a coffee shop or a restaurant, and you're offering a good, a service or a product to the public. There are people out there who are trying to figure out how that might violate the law.

For the Braille gift card cases, for those of you who don't know, I think Starbucks was the first company that actually introduced gift cards in Braille. So, when you think about a gift card, it's just like a little piece of plastic like your credit card. If you were visually impaired, you wouldn't know what card you were holding; you could be holding any card in the world. Starbucks put Braille on them, so a person

with visual impairment who knew how to read Braille could identify in their wallet their Starbucks gift card. I don't think there was really much more information on it other than Starbucks. Then we got a slew of cases where if you have gift cards, you also need to make them available in Braille. Our firm handled many of those cases. They were all dismissed and ultimately appealed but never really went anywhere. But again, that's just another example of how these plaintiff firms are trying to come up with ways to file lawsuits and extract settlements along the way.

Rusie

The interesting thing in both the Braille gift card cases and, in this case, it came down to goods. The ADA requires that you have equal access to places of public accommodation and access to goods and services and that everyone has equal access. You can't go in there and say, no, we aren't serving you because you are blind or visually impaired or no, we aren't giving you a latte because you have a milk allergy or a lactose intolerance. Whatever you charge for the goods, you can charge. The ADA doesn't regulate goods. It only regulates access and ensures equal access to goods and services. So, that was also a big turning point in both of those cases.

DiPalma

Yeah, it's interesting. Switching gears to thinking about restaurants and the types of cases we typically see. They run the gamut. So, everyone is probably aware of the website accessibility cases and then the physical brick-and-mortar type cases. There are steps at the front entrance. We need a ramp. We need a lift-type thing.

One thing we've been seeing a lot lately is issues related to service animals or animals generally. Most restaurants have something like a no pets policy, and it's usually for a reason: it has to do with cleanliness or patron experience. You don't want dogs barking or things like that. But how do you deal with issues when a person comes in and says, this is a service animal, or this is an emotional support animal, and I need them with me? What's your take? When you get those issues, how do you go about addressing them with clients?

Rusie

I actually just am almost wrapping up an issue that the DOJ had brought against a client who was a restaurant. There were a lot of disputed factual ones in that one as to what exactly happened. A woman had complained because she came in with her dog, which she claimed was a service animal, and they said that she couldn't stay there. Apparently, that was the allegation. The thing is, a service animal under the ADA has to be a dog or a small horse. I hope no one is bringing your small horse into a restaurant because that would be very, very crowded. But you can't really ask a lot of questions. You can ask one, is this a service animal? And number two, what service does it provide? You can't ask if they're disabled or what disability they have. You can't ask for any sort of certification, and by the way, there is no sort of certification. If someone says, I have a certification about the service animal, they have been duped somewhere, or they are trying to dupe you because you can just order papers from Amazon that say certified service animal. So, anything to that effect is not worth the paper that it's written on. But you really are limited to those

two questions. If someone says, yep, it's a service animal, you have to see what it says for you. Then you're going to have to make that judgment call like, are you really going to call this customer out and say, I don't really think that is a service animal?

Another thing people always ask about is that they do have to behave. There are parameters on the service animals when they're in a restaurant. They can't sit at the table. They have to sit on the floor. They have to be leashed or otherwise under control, like if somebody has a disability that they can't keep hold of the leash. They can't bark. They can't defecate and do things like that in a restaurant. But if someone has a service animal, then you really can't bar them from bringing that animal in as long as it's under control and sitting on the floor.

DiPalma

That goes a lot to training. So, if you're a front-of-the-house person at a restaurant knowing, okay, this person has an animal, and immediately I can tell it's a cat.

Rusie

Yeah, it's meowing.

DiPalma

You know it's not a service animal because ADA Title III doesn't provide any coverage for emotional support animals. So, if you're thinking, well, I'm an employer, and I have to accommodate employees with disabilities, and some people have emotional support animals. This is different. When you're talking about a customer or a member of the public coming into a place of public accommodation, there's only protection for these service animals. So, if you see it's not a dog or a miniature horse, then you know, okay, this can't be a service animal. We do not have to allow it. Even if they say it's a service animal, even if they say it's an emotional support animal.

Any good advice as to, like, all right, we understand that the animal needs to behave and be under control but say if the animal barks a couple of times or is on a leash, but it was like walking around the table. Any good advice on how to train employees to deal with that situation in real time?

Rusie

That was actually one of the things that we agreed to with the DOJ---that we would have some training, but it was more of training as to how to recognize a service animal and not how to correct its behavior.

The front-of-the-house employees do need to be aware of the parameters and that if an animal is being disruptive or barking, you're going to need to go up and tell the patron that this can't happen. It's up to you. Do you want to say one strike and you're out, or do you want to say, hey, if this happens again, we're going to have to ask you and the animal to leave? Those are going to be what you want to have to make that decision as to how far or how much of a leash you let it go out on.

Then what really is your policy going to be on that, and who's going to be the one to

tell it? It's probably best for the manager to do it if it's something like being disruptive and whatnot. People feel very, very strongly about their service animals. So, it's a really good way to get into a disagreement with a patron if you're trying to disallow or remove the service animal. But at the end of the day, you have a business to run, and if the animal is doing things that are outside of the scope of the ADA and are disrupting your business, then you have the right to make sure that it is complying with the ADA.

DiPalma

It's definitely a beast of an issue, and I'm glad you're dealing with it. We have time for one more topic that we see come up a lot with restaurants and hospitality, and more so where you are in Nashville than where I am in New York. Accessible parking and issues surrounding that. I know, just generally speaking, a lot of times the issues come up because the parking lot might be a shared parking lot, and the case may be only against the business owner, the restaurant, or whatever, saying you don't have enough accessible parking. There's something wrong with the way that the parking's laid out. You don't have an accessible route from the parking lot to the front door of the entrance or anything like that. As a tenant, you find yourself in a dispute with the landlord as to whose responsibility this is, what the obligations are, et cetera.

So, any advice to clients on how to be proactive to ensure that they're not violating the ADA as it relates to accessible parking issues?

Rusie

Two big things: you need to look at your lease and see who is responsible for the parking. Not just the parking, but like you said, the accessible routes, the sidewalks, the entrances and everything else where someone needs to be on a path of travel. See who's responsible for that. If it's you, then you want to go out there and be sure that it is meeting the standards of the ADA. If it's not and it's someone else, I still would look and see if it's meeting the standards. If it's not, you want to let whoever is responsible, if it's your landlord, know that this isn't up to snuff and that they should get it remediated. They don't want to be on the hook. Then check and see if you have indemnification language because that's what happens all the time if the wrong party gets sued or there are multiple issues.

I have a case right now, and there are issues in the parking lot, issues in the accessible route and alleged issues in the restaurant. My client is only responsible for the accessible route and the issues in the restaurant, but not the parking. The only person who was actually sued was a trust that owns the parking lot. They have a lease with someone else for the parking lot, and then there's us and it's very complicated.

That does bring up one other little issue with the restaurant. The issue that was allegedly the issue on the inside of this restaurant was the bar. They alleged that the bar lacked accessible seating, which is completely false because I have photographs of the bar. There is a lowered portion. The 2010 regs require that any building that has been constructed or altered after March 15th, 2012, has to have a portion of the bar that is lowered down. I believe it's 36 inches high and 36 inches long. That's

something that gets missed a lot in construction plans. So, that's just something to look out for if anybody has a bar. It's something I always notice when I am at a bar. It's definitely something that's noticeable and you're like, I know this building was built a year ago. It definitely applies. So, you see, that gets missed, but since it's easy to notice, it's easy for a plaintiff to walk in and say, hey, the seating is wrong. Title III is a strict liability statute. They don't have to really prove too much. You can't say, well, it was in the plans and the builder didn't build it or anything like that. That's not going to be a defense.

DiPalma

It is definitely interesting. Going back to the parking thing, here in New York, we don't really see too many claims that include parking. A lot of times in the city, there is no parking. But there are always landlord-tenant issues. A lot of times, both defendants end up being the landlord and tenant, and you're pointing fingers arguing about who's responsible for what. So, knowing the lease before you sign it, knowing how this is going to be addressed, if and when it happens.

Having represented both sides, the landlords always want to take the position and listen; this is their business and their responsibility to make it accessible for their customers. Then the tenant responds, I inherited this like this. There were steps at the front entrance. I'm not allowed to just start modifying the front entrance or facade of the building. It's not my building. How am I supposed to do that? So, there needs to be some level of understanding and cooperation going into it. Even if the deal is already done, knowing whose obligations are whose and trying to get ahead of it.

The issues never end.

Rusie

They don't, they don't. Well, I think that is about all the time we have today. So, we'll wrap up, but it's been so fun chatting with you, Joe, about all the Title III fun in restaurants. I hope everyone has enjoyed our little chat. If you have more questions, stay tuned, and we can get you more information. Thanks, y'all.

OUTRO

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