

Federal Court Stops Serial Americans with Disabilities Act (ADA) Plaintiff's Latest Effort: Payne v. Chapel Hill North Properties

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The United States District Court for the Middle District of North Carolina recently dismissed an **Americans with Disabilities Act** (“ADA”) case filed by Denise Payne, a Florida resident, and National Alliance for Accessibility, Inc. (“NAA”), a nonprofit Florida corporation (Payne is the founder of and a member of NAA). Payne and NAA sued Chapel Hill North Properties, LLC (“CHNP”) alleging the company’s shopping center in Chapel Hill, NC did not comply with ADA requirements for accessibility to disabled individuals. Poyner Spruill attorneys Nick Ellis and Kevin Ceglowski filed a Motion to Dismiss the case and a supporting brief for CHNP arguing that the court did not have subject matter jurisdiction because Payne lacked standing to proceed.

Payne was seeking injunctive relief, requesting CHNP to remedy the alleged ADA violations. In order to seek injunctive relief, a plaintiff must have constitutional standing to proceed with the lawsuit, which depends on showing a likelihood of future harm from the alleged violations. Payne alleged she encountered architectural barriers when she visited the shopping center on June 10, 2010, April 1, 2012 and on September 27, 2012. Payne alleged only vague future plans to visit the shopping center, saying she “intends to visit North Carolina again in June of 2013” and “intends to visit Defendant’s property once again.” Payne’s Complaint alleged she intends to continue to meet with existing NAA members in Asheville, Wilmington, and Fayetteville, none of which are near CHNP’s property. After CHNP filed its Motion to Dismiss, Payne filed an affidavit, hoping to avoid dismissal of her case, and in which she stated she specifically intended to return to the shopping center in June 2013. In her Complaint, she alleged she stopped at the shopping center on her visits to North Carolina because it “has an attractive selection of goods and services” and “is convenient based on her travel patterns.”

CHNP argued the plaintiffs failed to sufficiently show that Payne would return to the property and, therefore, that they were unable to demonstrate she was likely to suffer any harm in the future. Specifically, CHNP argued Payne lives over 700 miles from the property, lacks a reliable record of past patronage, and her alleged intent to return to the property in the future is not credible. In order to evaluate this argument, the court used what is known as the proximity test – a set of factors for determining standing that takes into account (1) the plaintiff’s proximity to the defendant’s business;

(2) the plaintiff's past patronage of the business; (3) definiteness of plans to return to the business; and (4) the frequency of the plaintiff's nearby travels.

The court first examined the proximity factor because as the court said, "the further away a plaintiff ordinarily finds herself from a business, the less likely she is to suffer future harm." In this case, Payne lives over 700 miles from the shopping center, which the court decided weighed against finding she was likely to return and suffer harm. More importantly, the court reviewed Payne's filings in other ADA cases in North Carolina courts and determined her representations to the courts were not consistent from case to case. Specifically as it related to this case, the court pointed out that Payne's allegation that she passes through Chapel Hill on the way to see her attorney when traveling to North Carolina contradicted a sworn statement made in another case that her "first stop is always Greensboro." The court said, "the fact that Payne has submitted such clearly conflicting statements clearly calculated to avoid dismissal in these cases is very troubling and casts significant doubt on her claims."

The court also examined Payne's past patronage of the shopping center. Although the court noted Payne had made only three past visits and did not explain why she chose this particular shopping center instead of many others on her route, it allowed this factor to weigh in her favor, if only slightly.

The court next examined Payne's intent to return to the shopping center. The court found this factor weighed against Payne and NAA because the shopping center is located on a 100-mile stretch of highway between the airport at which Payne arrives and her lawyer's office, which is her alleged destination when she comes to North Carolina. Moreover, several of the cities Payne alleged she intended to visit in the future (Fayetteville and Wilmington) are in the opposite direction from the shopping center. In sum, the court determined Payne did not express any definite reason she would return to the shopping center other than to test its compliance with the ADA.

Finally, the court assessed Payne's frequency of travel to areas near the shopping center. The court said Payne's sporadic trips to North Carolina provided weak evidence she would suffer actual or imminent harm. Beyond that, Payne's frequent lawsuits worked against her efforts to maintain standing in this case. The court noted it was implausible that in her one or two visits a year to North Carolina, Payne could return to each of the 80 plus properties she has sued in the state for alleged noncompliance with the ADA. The court found this final factor weighed against finding that Payne had standing to proceed with her lawsuit. After considering all the factors together, the court determined Payne was unlikely to suffer future harm at the shopping center and rules that she did not have standing to proceed and the lawsuit should be dismissed.

CHNP also argued that Plaintiff NAA lacked standing to proceed with the lawsuit because, as an association, its standing depended on an allegation that one or more of its members was suffering immediate or threatened injury as a result of the allegations in the Complaint. Because Payne was the only member of NAA identified in the Complaint and the court decided she was not suffering immediate or threatened injury, the lawsuit was also dismissed as it related to allegations made by NAA.

The court's opinion is a victory for CHNP, but also an example of how serial plaintiffs in ADA cases have credibility issues because the volume of lawsuits they file can create inconsistent "facts" they allege to be true. The result in this case was also a strong rebuke against Payne's dishonesty to the courts in an effort to maintain standing in her multitude of lawsuits against North Carolina companies. (Payne has filed over 80 cases in NC.) Businesses that find themselves facing ADA suits from out-of-state plaintiffs may find the arguments and result in this case helpful in defending

those claims.

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National Law Review, Volumess III, Number 181

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