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Tenth Circuit's Limitations Ruling Feeds Circuit Split Over ADA

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In *'Hamer v. City of Trinidad'*, the U.S. Court of Appeals for the Tenth Circuit expanded municipalities' exposure under federal disability laws by holding that the statute of limitations begins to run anew each day that a public entity remains out of compliance. The ruling deepens a developing circuit split, yet the Supreme Court denied certiorari this month.

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The Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) forbid public entities from excluding individuals with disabilities from services, programs, or activities based on their disabilities. But if a public entity violates these Acts, when does a claim against it accrue for purposes of the statute of limitations?

In *Hamer v. City of Trinidad*, 924 F.3d 1093 (10th Cir. 2019), a unanimous panel of the 10th Circuit held that a claim under the ADA or RA accrues each day a violation remains uncured. Thus, a plaintiff with a disability may bring a claim at any time, even if the plaintiff discovered the violation outside the applicable two-year limitations period, so long as the violation persisted during any part of that period.

Summary Judgment Based on Statute of Limitations

Stephen Hamer, the plaintiff in the district court proceedings, is confined to a motorized wheelchair, which is his primary means of transportation. Between April and August 2014, Mr. Hamer attended city council meetings in Trinidad, Colo. and notified officials of 79 sidewalks and curb cuts that violate the ADA and RA, and he filed an ADA complaint with the U.S. Department of Justice (DOJ). DOJ thereafter audited the City and confirmed noncompliant facilities, which the City began to repair. Mr. Hamer nevertheless filed suit in October 2016.

The district court granted summary judgment for the City, concluding that the two-year statute of limitations on ADA and RA claims foreclosed Mr. Hamer's suit. The district court reasoned that Mr. Hamer's claims accrued no later than August 2014, when he last appeared before the Trinidad city council. In reaching this conclusion, the district court rejected the "continuing violation doctrine," whereby a series of separate constituent acts are deemed to constitute a single unlawful act, which is timely so long as one of the constituent acts occurred within the limitations period. In the district court's analysis, Trinidad's construction of allegedly noncompliant facilities constituted a single unlawful act, and, while Mr. Hamer suffered "continual ill effects" from that original wrong, those ill effects did not

constitute “continual unlawful acts.” Likewise, the district court rejected the argument that each day of noncompliance by the City gave rise to a new claim, because daily noncompliance did not equate to “discrete acts of discrimination” that would trigger separate limitations clocks.

Tenth Circuit Finds Timely 'Repeated Violations,' If Not a 'Continuing Violation'

The Tenth Circuit reversed the district court in an opinion by Judge Carson, joined by Judges Briscoe and Bacharach. The Circuit appeared to agree that repeated injuries caused by noncompliance are discrete harms and thus not part of a single continuing violation, but Mr. Hamer had already abandoned that theory on appeal. Instead, he focused on the second theory the district court rejected, by which a new limitations clock would commence on each individual day of noncompliance. The Circuit dubbed this the “repeated violations doctrine,” and agreed with Mr. Hamer that it applies:

[A] public entity repeatedly violates [the ADA and RA] each day that it fails to remedy a non-compliant service, program, or activity, [and a plaintiff] stops suffering daily injury only when the public entity remedies the non-compliant service, program, or activity or when [the plaintiff] no longer evinces an intent to use it.

924 F.3d at 1103.

The Circuit determined that the repeated violations doctrine applied in light of both the statutory language and the context of the ADA and RA. Textually, the Circuit concluded that the statutes' present-tense formulation—individuals may not “be excluded” or “be denied” or “be subjected”—suggests that the law targets an individual's current *experience* of discrimination rather than a public entity's past discriminatory *act*. As to context, the Circuit looked to the purpose of Title II of the ADA, which, according to the Supreme Court, imposes “an affirmative obligation to accommodate persons with disabilities.” *Tennessee v. Lane*, 541 U.S. 509, 533 (2004). This “duty to accommodate,” the Circuit reasoned, “clearly and unambiguously conveys that a non-compliant service, program, or activity gives rise to repeated violations.” 924 F.3d at 1105.

In further support of the repeated violations doctrine, the Circuit analogized to tort law's temporary nuisance doctrine, whereby a plaintiff may seek damages for every day of injury caused by the nuisance reaching as far back as the statute of limitations extends, even if the nuisance commenced and harmed the plaintiff prior to the limitations period. The Circuit also suggested that a contrary holding would offend efficiency considerations by barring Mr. Hamer's claims even though “a substantively similar but timely suit brought by a different plaintiff ... could land in this Court's lap soon thereafter.” *Id.* at 1108.

Finally, while the Circuit acknowledged that its ruling would “keep[] public entities on the hook for injunctive relief as the years go by,” it rejected the notion that this led to an absurd burden, since the statute of limitations still

would “limit[] the plaintiff's ability to recover damages to only those injuries incurred during the limitations period immediately preceding the suit.” Id. at 1108-09. Echoing Mr. Hamer's arguments, the Circuit also waved off concerns about far-reaching injunctive burdens: “public entities have the ultimate option to avoid liability by simply making their programs, services, and activities accessible for persons with disabilities.” Id. at 1109.

The Circuit thus determined that Mr. Hamer's action is timely, reversed the district court's summary judgment, and remanded for further proceedings, including a determination whether noncompliant sidewalks and curb cuts fall within the applicable ADA and RA provisions.

Emerging Circuit Split But No Supreme Court Review

The City of Trinidad filed a petition for certiorari with the Supreme Court in August, arguing chiefly that the Tenth Circuit's ruling exacerbated an emerging split between, on the one hand, the Fourth and Fifth Circuits, which have held or implied that the continuing violation and repeated violations doctrines do not apply to ADA and RA claims, and, on the other hand, the Seventh and Ninth Circuits, which have applied the repeated violations doctrine to comparable claims. Mr. Hamer contended, however, that this split is illusory because the nature of the discrimination in the Fourth and Fifth Circuit cases differed from the discrimination he alleges in his case.

Aside from the apparent circuit split, the parties largely focused on issues of burden and incentive. The City argued that the expanding canon of doctrines to toll and modify the statute of limitations is too cumbersome for municipalities and would-be plaintiffs. An amicus brief by the International Municipal Lawyers Association and Colorado Municipal League echoed this concern and predicted that the Circuit's ruling will encourage more lawsuits and may even give plaintiffs a reason to delay those lawsuits in order to develop a record of intentional noncompliance, which is prerequisite to money damages. Both the City and amici pointed to the inelasticity of municipal budgets that cannot cover expanding ADA and RA suits and expressed a fear that proliferating claims could upend remedial planning and consent arrangements with DOJ.

Mr. Hamer disputed these concerns, arguing that the Circuit's decision will not hinder DOJ's enforcement of the ADA and RA or lead to more litigation. To the contrary, he contended that imposing a strict statute of limitations would lead to more and hastier litigation, quickly filed before the limitations window closes. He also pointed out that, even if his claim were time-barred, another eligible plaintiff who discovered the City's noncompliance within the last two years could bring an identical suit. In his view, the City was complaining about burdens that are imposed by the ADA and RA, not by the Circuit. If the City wants “repose,” he argued, it should not look to the statute of limitations but should simply build compliant sidewalks in the first instance and rectify noncompliant sidewalks now.

Pointing to the cost of sidewalk projects—thousands of dollars each—and the scope of its responsibility—154 miles of sidewalk with 1,300 curb

cuts—the City of Trinidad noted that the suggestion simply to comply is “not particularly helpful.” And amici noted that more than 90,000 local governments around the United States face the same dilemma.

The Supreme Court considered the City's petition during the Justices' December 6 conference, and certiorari was summarily denied on December 9. As a result, the Tenth Circuit will remain in tension with the Fourth and Fifth Circuits regarding the accrual of certain claims under the ADA and RA.

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