NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHIL CACOPARDO,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.
/

No. C-00-2688 PJH

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Plaintiff Phil Cacopardo ("Cacopardo") alleges that at some point in early April, 2000, he visited the Employment Development Department ("EDD") branch office at 409 K Street in Eureka, California. Cacopardo, who is wheelchair mobile, attempted to utilize the wheelchair lift at the EDD facility by pressing the call button on the lift. No one responded, and Cacopardo alleges that he was left to endure the rain and the stench of urine emanating from near the lift until he was able to prevail upon two passersby to physically carry him up the stairs to the facility's entrance. This litigation, alleging various access barriers throughout the facility, followed. Plaintiff seeks both compensatory damages and injunctive relief under Title II of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act.

The action came on before this court for a bench trial which began on September 9,

[1] This order is not appropriate for citation pursuant to Civil L.R. 7-13.

2002 and lasted 3 court days. After plaintiff rested, defendants moved for judgment on partial findings under Federal Rule of Civil Procedure 52(c). Among other things, defendants argued that judgment was appropriate on the claim for compensatory damages because: (a) plaintiff was unable to establish that he ever actually visited the facility; and (b) even if plaintiff did suffer an injury, compensatory damages are unavailable because plaintiff did not make a showing of deliberate indifference by defendants. Defendants moved for judgment against the claim for injunctive relief on the ground that all of the alleged barriers for which defendants are responsible have been remedied and thus there is no likelihood of future harm. The court declined to rule on the motion until all the evidence had been entered. Now that both sides have rested and all the evidence has been entered, the court rules on defendants' motion as follows and offers these findings as support for that ruling and in fulfillment of its obligations under Rule 52.

FINDINGS OF FACT

The court has attempted to "avoid commingling findings of fact with conclusions of law." Lieber v. Macy's West, Inc., 80 F. Supp. 2d 1065, 1066 n.1 (N.D. Cal. 1999). To the extent this effort fails, "any conclusions that are inadvertently labeled as findings (or vice versa) shall be considered 'in [their] true light, regardless of the label that the . . . court may have placed on [them].'" Id., quoting Tri-Tron International v. Velto, 525 F.2d 432, 435-36 (9th Cir. 1975).

A. Plaintiff's Visit to the EDD Facility.

As mentioned above, plaintiff alleges that he visited the EDD facility sometime in April, 2000. At trial, plaintiff recounted the details of his visit as follows. Plaintiff testified that he and his wife drove to the EDD facility in their van sometime around midday and parked in the EDD parking lot. Plaintiff testified that he had recently been terminated from his job and that his purpose in going to the facility was to apply for unemployment benefits. His wife was suffering from a knee injury so she remained in the van. Plaintiff wheeled to the front entrance through the rain, but stopped short of the chair lift because a man was urinating next to it near the front entrance. After the man had finished, plaintiff wheeled

through the urine that had run across the path to the lift (apparently it was not raining hard enough to disperse the urine flowing across the pathway). The lift was equipped with a call button meant to summon someone from inside the building to help operate the lift. Plaintiff pushed the button, backed away from the lift because of the stench of urine and trash which was in the lift, and waited for a response. In this position, plaintiff was fully exposed to the rain. After a minute or two passed, plaintiff approached again, pushed the button, and again retreated to wait for a response. After another minute or two passed without a response, plaintiff pushed the button for a third time. Again, there was no response. Plaintiff looked for an alternate accessible entry to the building, and not finding one returned to the van to relate the situation to his wife.

He subsequently returned to the front of the facility, briefly considered getting out of his chair and pulling himself up the stairs, and then asked two passersby whether they would help lift him and his chair up the stairs. They did so, and plaintiff entered the building. Although he was there to apply for unemployment benefits, he wound up going to the second floor and speaking to someone in the disability office. There he was informed that the proper method of applying for unemployment benefits was over the phone. Plaintiff went back to the first floor and, rather than asking anyone to help him operate the lift, lowered himself backwards down the front stairs. Plaintiff testified that although he was "shocked," "angry," and felt "discriminated against," his top priority was getting home to phone in his request for unemployment benefits. He testified that he did so that day.

A surprising and altogether unfortunate amount of time and energy was devoted at trial to a remarkably elementary issue – the date that plaintiff endured the experience above which, according to his complaint, caused him "significant shame, humiliation, worry, chagrin, disappointment, and embarrassment." SAC, ¶16.

Before and after this complaint was filed, plaintiff seemed sure of the date. On June 27, 2000, plaintiff filed a "Government Claim" with the State of California. Ex.A-33.[2] That

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[2] Defendants' exhibits all contain the prefix "A." Plaintiff's do not. The numbers in parenthesis sometimes included after an exhibit citation refer to the page or bates number of a particular document within the exhibit.

claim form, signed by plaintiff, states that the incident date was April 4, 2000. Ex.A-33. The claim explains that "Claimant was unable to traverse stairs at entrance in his wheelchair, the electric lift was broken and in great disrepair, and there was no response by employees to a buzzer designed to alert staff of a disabled person's presence." Ex.A-33. Plaintiff's original complaint, filed on July 27, 2000, is similarly certain about the date. The complaint states that on April 4, 2000, plaintiff visited the EDD facility and found the electronic elevator out of service. Complaint, ¶¶12, 53. However the complaint adds details not found in the government claim form. Most importantly, it adds the allegation that plaintiff sat in the rain for 15 minutes[3] until he "implored two male passersby to lift plaintiff up the steps." Complaint, ¶¶14-15. The First Amended Complaint ("FAC"), filed September 25, 2000, similarly alleges that "On or about April 4, 2000, Plaintiff Phil Cacopardo . . . was denied full and equal enjoyment of the goods, services, facilities and privileges of [the EDD facility]." FAC, ¶53.

The April 4 date received further confirmation when, on October 25, 2000, plaintiff's counsel sent defendants "a copy of our statement for attorney fees and costs to date." Ex.A-45 (157). Of particular interest are the first four entries of the statement. The first, dated April 5, 2000, reads "Initial Consultation with CLIENT, open file." Ex.A-45 (158). The second, dated April 6, 2000, reads "Attorney site inspection, investigate records to determine ownership of EDD 'Job Market', building in Eureka." Ex.A-45 (158). The third, dated April 10, 2000, reads "Research, locate and contract with Americans with Disabilities Act Expert. Meet with ADA Expert." The fourth entry, dated April 12, 2000, reads "Telephone Conference with Expert re Title II of ADA and government buildings." Ex.A-45 (158). Finally, plaintiff himself explicitly confirmed the April 4 date during his deposition, taken on November 20, 2000. At first, plaintiff was somewhat equivocal: "I'm going to

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[3] The government claim makes no mention of rainfall. When plaintiff was shown this on cross-examination, he explained that he had signed the form without reading through it. On *redirect*, plaintiff agreed that one of the reasons he did not pay close attention to the form was his counsel's advice that in 10 years of practice he had never seen a government claim approved. Thus, according to plaintiff, he signed the form that included the incorrect date and left out a detail that "significantly troubled" him on counsel's advice that it really didn't matter.

have to guess about the date or rather – or rather estimate the date, and I would say that probably the 4th of April." Ex.A-46 (170). All equivocation disappeared after defendants' counsel showed plaintiff a copy of the first amended complaint:

> Counsel: "In paragraph 48, it says, 'Defendants, and each of them, at times prior to and including April 4, 2000,' dah, dah, dah, dah, dah. Does that refresh your recollection about the date of the incident that led to the filing of this complaint?"
> Plaintiff: "Yes. This is the date. April 4th, that's the day I went to unemployment, correct."
> Counsel: "Okay. Okay. Well, continue on. So you went to E.D.D. on April 4th, 2000?"
> Plaintiff: "April 4th, 2000."

Ex.A-46 (170-71).[4]

At his deposition, plaintiff was equally sure about the fact that it was raining on April 4. See Ex.A-46 (205) ("It was raining. I was indeed wet."). Indeed, plaintiff agreed that by the time he entered the building, he was "somewhat soaked" and that if one were to wring out his clothes, one would get some significant water from them. Ex.A-46 (184, 193-94). However, towards the end of the deposition, defendants' counsel represented to plaintiff that certain documents recorded that no rain fell on April 4. Ex.A-46 (204). Plaintiff's counsel objected and when defendants' counsel thereafter referenced a newspaper weather report showing no rain on April 4 and asked plaintiff to explain it, plaintiff's counsel instructed his client not to answer the question. Ex.A-46 (205).

At trial, defendants presented evidence tending to establish that indeed, there was no rainfall in Eureka on April 4, 2000. Nonetheless, plaintiff continued to maintain that he was in fact rained upon. However, plaintiff also maintained that the actual date of the incident was the following Tuesday, April 11, 2000. Indeed, he testified to this fact no less than 6 times during trial.

Plaintiff was not an entirely credible witness. There are numerous inconsistencies surrounding his version of the events. At trial he stated that he was fired from his job at the

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[4] The court includes this entire passage because at trial, plaintiff claimed that he only settled firmly on April 4th after defense counsel "intimidated" him with a document. Given plaintiff's demeanor while testifying in court, and the actual exchange at deposition quoted above, the court is convinced that there was no "intimidation."

end of March and "after a few days" visited the EDD facility. While this timing might comport with the visit occurring on the 4th, it obviously doesn't with the 11th. Plaintiff testified at deposition that the reason his wife was with him was because she had a physician's appointment that day. Ex.A-46 (199). At trial, his wife testified that this was incorrect and instead she was with him because he was taking her to school. While he testified at trial that he spoke to his wife after attempting to use the lift and before entering the building, at deposition he denied that such a conversation took place. Ex.A-46 (199). At trial plaintiff testified that one of the reasons that he did not ask his wife for help was that he was embarrassed to do so. However, plaintiff testifies that he then asked two complete strangers to lift him up the stairs. Although he had a cell phone in his van, he did not use it to try to contact someone in the EDD facility. Plaintiff testified that he did not do so because of his frustration with EDD personnel and the fact that he knew he would get no assistance. But of course at this point, plaintiff had not had any experience with the EDD staff – he simply had pushed the button and not gotten a response and he had no idea of the reason for this.[5] Despite the fact that plaintiff indicated he was dedicated to bringing about accessibility changes for the disabled, and despite the alleged "shame, humiliation, worry, chagrin, disappointment, and embarrassment" he was subjected to, he did not attempt to lodge a complaint with anyone, other than relating that the lift was broken to the person who informed him of the need to phone in regarding employment benefits.[6] At deposition, plaintiff testified that when he got back into the van he talked about the whole incident with his wife. At trial, his wife testified when he got into the car plaintiff was very upset and that he refused to talk about what happened. Finally, defendants produced

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[5] At another point, plaintiff explained that he did not want to use the lift in exiting the building because of its "putrid" smell. But as noted above, the lift's smell did not stop him from pushing the call button three times in attempting to get assistance to use the lift prior to entering the building.

[6] Despite this failure of any further step to notify EDD of the problem with the lift, plaintiff testified that he had no recourse other than legal action. His further testimony established that he has become something of a professional plaintiff. He testified that decades of frustration in seeing the ADA slowly implemented have led him to file at least three other accessibility lawsuits.

credible evidence that there was no measurable rainfall on April 11 during the hours that plaintiff said he visited the facility. Ex.2. Indeed, plaintiff's counsel was reduced to arguing that, at times other than when plaintiff allegedly visited on the 11th, there were at least recordings of "mist" in the area.

Of particular concern to the court was plaintiff's attempt to distance himself from his counsel's billing records. Plaintiff put his counsel's legal assistant on the stand to testify regarding the office's standard practice in compiling billing statements. The statement sent to defendants is dated October 25, 2000. Despite the fact that plaintiff's counsel began working on this case in April, the first billing statement issued by his office was not created until September 21. As the legal assistant explained it, her standard practice was merely to go through the file and note the instances in which plaintiff's counsel indicated, either on a post-it or on the document itself, the amount of time that counsel spent in producing said document. Apparently where there were no such time notations, the legal assistant believed that she was able to estimate the amount of time that was spent. She testified that counsel often neglects to include dates of the work allegedly done, and in that case she is left to reconstruct dates as best she can. She testified that there were no such dates for the initial entries on this billing statement, and thus she relied on the fact that the government claim said the incident happened on April 4 and her own memory that plaintiff came into the office the day following the incident.[7] As she testified in response to the direct questioning of her employer, errors in the file are repeated in the statement.[8]

In response to defendants' Rule 52 motion, plaintiff's counsel referred to the fact that weather records indicated it was not raining, even on the 11th, as plaintiff indicated it had. Plaintiff's counsel conceded that perhaps plaintiff had "aggrandized" how wet he was in an effort increase his damages, but added his opinion that it was "not uncommon" for plaintiffs

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[7] This contradicted plaintiff's deposition testimony that "I called Jason Singleton, my attorney, within a couple of days afterwards." Ex.A-46 (197-98).

[8] Plaintiff's counsel's billing practices are nothing short of appalling. Counsel may rest assured that any future request for fees and costs made to this court will be subjected to the absolute strictest scrutiny.

to do so. Insofar as counsel was referring to his own client, the record tends to support such a conclusion. Notwithstanding plaintiff's lack of credibility and the inconsistencies in the evidence, the court is persuaded by the totality of the evidence presented that plaintiff did visit the facility in early April and that when he attempted to use the lift by pushing the call button, no one responded.[9] However, the court is skeptical about the particulars of plaintiff's visit and cannot determine which details represent the truth and which are merely "aggrandizement" designed to inflate his claim for compensatory damages. The court makes no finding as to whether the visit occurred on April 11[10] or April 4.

B. Defendants' Notice of Problems With The Lift.

Another issue that the parties spent much time and effort on was when the EDD received notice of accessibility problems with the lift. Plaintiff himself testified that he did not have knowledge of any access barriers at the facility until he visited on April 11, 2000. However, plaintiff presented two witnesses who claimed to have put EDD on notice prior to that day.

The first was Lynda Dionno. Dionno testified that she visited the EDD facility twice in the spring of 1996 and again in October 1997. Dionno testified that on each occasion, the lift at the entrance to the building did not work. Dionno also testified that she contacted and met with EDD personnel about the fact that the lift was not working. However, documents entered into evidence by the plaintiff established that the lift Dionno complained about was replaced sometime after December of 1998. Ex.23(000028). Dionno also testified that she visited the EDD facility in July of 1999 and pushed buttons on the lift to see if it would work. She testified that it did not, but that she did not make any calls or send any letters notifying anyone of problems with the lift. Rather, she claims she simply went to

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[9] Thus, plaintiff has standing to plead these claims. In closing argument, plaintiff's counsel claimed that the very argument by defendants that plaintiff had never visited the facility was indicative of defendants' bad faith in litigating this case. To the contrary, although the court does find in plaintiff's favor on this issue, it is a close call.

[10] The court notes that the April 11 date receives some support from the deposition testimony of an EDD employee who testified that plaintiff called in to start his claim for unemployment benefits on April 11. Ex.1 (12).

the disability office and made a "snide comment."

Next, plaintiff called Janet Arnot, the former executive director of the Humboldt Access Project ("HAP"). Arnot testified that she first became aware of problems with the lift – in particular that it was not independently operable[11] – in the summer of 1999. Arnot then testified that she engaged in a prolonged campaign to speak about the problems with the lift with Emilia Bartolomeu, the EDD facility officer manager. Arnot said that she began calling and leaving messages for Bartolomeu once a month and that on one occasion Bartolomeu returned her call and they discussed Arnot's allegation that the lift was not independently operable. Arnot also testified that on one occasion she had a meeting with Bartolomeu in which these issues were discussed. Toward the end of her testimony, Arnot conceded that in fact she only met Bartolomeu "very briefly" near the reception desk at the EDD facility, there had been no formal meeting. Arnot testified that both of these conversations occurred prior to April of 2000 and perhaps during 1999. Arnot said that between late June and early August 2000, she had a phone conversation with Kimlyn Caywood, whom Arnot was informed was Bartolomeu's assistant, about the lift.

Bartolomeu denied that she ever spoke to Arnot concerning any access issues at EDD. She denied that she ever spoke to Arnot on the phone, that Arnot left her any messages, or that she was ever made aware of Arnot's attempts to contact her. Caywood testified that she spoke to Arnot only once, on August 3, 2000, and that Arnot never asked to speak to Bartolomeu. Caywood testified that during the conversation, Arnot told her that EDD could be sued for a substantial amount of money. Caywood testified that this was the first time she had ever spoken to Arnot and that she knew of no other attempts by Arnot to contact EDD.

Arnot also testified that she made a series of visits to the facility to attempt to use the lift. In late August of 1999, she visited the facility with Barry Atwood. An unidentified woman came out of the building and attempted to help them use the lift, but Mr. Atwood's

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[11] Arnot refers to the fact that a visitor to the facility could not operate the lift by him or herself, but needed to push the call button and receive assistance from EDD personnel.

wheelchair was apparently too large to allow the lift's gate to close. Arnot said the lift was filthy and smelled bad. In October of 1999, Arnot visited with Michael Collins. She pushed the button, but received no response. Arnot testified that she went into the building and that an unidentified woman came out and tried but was unsuccessful in getting the lift to operate. Finally, Arnot testified that on the fourth Friday in March, she visited the EDD facility with a colleague, Maeve Gannon. Arnot testified that there was a PIC/Rehab Advisory Committee ("PRAC")[12] meeting being held at the facility that day that she meant to attend. When they arrived at the facility, Gannon used a wheelchair, even though she is not disabled.[13] Arnot testified that an EDD employee named Dennis Mullins tried to help but was unsuccessful. Arnot said that there was not much discussion with Mr. Mullins. Mullins testified that when checking the lift he noted that a switch had been vandalized. He told Arnot and Gannon that he needed to go inside to get a tool and that he could fix it, but was told by Arnot, "never mind, it's too late." Arnot testified that because they could not operate the lift, she and Gannon "made a stand" and left rather than attend the PRAC meeting inside.[14]

However, Arnot did attend a subsequent PRAC meeting in which the group decided to draft a letter to Bartolomeu detailing concerns with the accessibility, operability and cleanliness of the lift. The letter, dated July 11, 2000, was signed by PRAC chairperson Robert Van Fleet. Ex.A-34. Van Fleet testified that he received a response "pretty much immediately" and that he was satisfied with the solution arrived at by EDD. That solution, which was implemented by the end of August 2000, was to give individuals attempting to

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[12] PRAC is an organization dedicated to promoting employment opportunities for the disabled.

[13] Arnot testified that it was a normal practice to have a person pretend to be disabled and attempt to access a facility. Gannon agreed and explained that she was selected because she was new to the area and people did not yet know her, would not necessarily identify her as a disability advocate, and would not know whether she was disabled.

[14] Gannon testified that sometime after early April, 2000, she and Arnot returned to the facility at the direction of plaintiff's counsel to take pictures of the entrance and to see if it was fixed. Gannon assumed that both the camera and pictures taken are in the possession of Humboldt Access Project. Both Arnot and Gannon were terminated from HAP in October 2000. Arnot testified that she showed up for work one day and the locks had been changed.

use the lift their own universal key so that they would no longer have to seek assistance. By October 2000, keys were left in the lift during business hours.

Thus, concerning the lift at issue (the one that plaintiff encountered in April 2000), there is really only one conflict in the evidence. That concerns whether Janet Arnot contacted Emilia Bartolomeu sometime prior to April 2000. The court finds that she did not. Arnot was not a very credible witness. She testified that the subject of the lift was "hotly debated" at PRAC committee meetings. However, there was no evidence of this in the meeting minutes and Arnot's testimony on this point was flatly contradicted by the trial testimony of Van Fleet and Mary Thompson. Her testimony that the lift was discussed at HAP meetings was contradicted by Gay Larsen. Ms. Bartolomeu, on the other hand, was a very credible witness. Thus, the court finds that plaintiff has not established that defendants were given notice of the alleged defects with the lift until the Spring of 2000 at the very earliest.[15]

C. Findings Regarding Specific Alleged Barriers.

Earlier in this case, plaintiff moved for summary judgment and argued that there was no material dispute of fact that numerous access barriers identified by his expert existed at the facility and thus he was entitled to injunctive relief regarding those issues. However, in his reply brief and at the hearing on his motion plaintiff acknowledged that the majority of those barriers had already been eliminated. Thus, plaintiff's requested injunctive relief was limited to five issues (four alleged access barriers and an allegedly deficient Transition Plan). The four access barriers are those concerning the lift and the ramp leading to the lift, the size of the accessible stall in the men's bathroom on the second floor, and the slope of the sidewalk leading from EDD's parking lot to the entrance of the EDD building. There are few factual disputes to be settled by the court regarding those issues, and they are addressed below.

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[15] Lorrie Bailey testified that she first became aware that regulations required the lift to be independently operable in the Spring of 2000.

1. The Lift and Ramp.

Defendants established through exhibits and testimony by Lorrie Bailey and Michael Gibbens that the lift and ramp to the lift that plaintiff encountered in 2000 has been replaced. Through the testimony of Lorrie Bailey defendants also established that the lift currently in place corresponds to a design plan with specifications identified in Ex.4-53. Defendants' evidence that the lift is now independently operable is unrebutted.

2. The Stall.

Plaintiff complains that the width of the toilet stall is 57.5 inches across rather than 60 inches as required. However, defendants point out that the stall is 124 inches long and thus significantly longer than required. Defendants argue that due to the extra length of the stall, its width is permissible as an equivalent facilitation. Plaintiff disagrees. The factual dispute relevant to this issue is whether it is possible for a wheelchair mobile person to complete side and diagonal "transfers" within the stall.[16] Plaintiff's expert, Hollynn D'Lil, testified that it was not possible. This testimony was based in large part upon her assertion that wheel chairs are generally 30 to 32 inches wide. Using a chair within this size range, D'Lil testified that there was no room to get a chair next to the seat (for a side transfer) or to put it at such an angle that a diagonal transfer would be possible without forcing the user to go over the chair wheels.[17] D'Lil conceded that the ADAAG regulations do not require the amount of space she says is required, but claimed that the regulations were based upon older model chairs and referred to information she retrieved from the internet for the proposition that chairs are between 30 to 32 inches wide.

Defendants' expert, Michael Gibbens, testified that both a side and diagonal transfer was possible in the stall and stated further that the stall provided "exceptional maneuverability." This opinion was based in large part on the assertion that the standard width of a wheel chair is 26 to 26½ inches. Gibbens referred to 28 CFR Part 36, Appendix

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[16] The term transfer refers to the physical movement from the wheelchair to the toilet seat.

[17] D'Lil testified that one reason to do the diagonal transfer was to avoid having to go over the wheels.

A, Figure A3. That figure is labeled "Dimensions of Adult-Sized Wheelchairs" and indicates that the wheel chair is 26 inches wide. See also 28 CFR Part 36, App. A.2.4 ("The wheelchair and user shown in Fig. A3 represent typical dimensions for a large adult male."). Gibbens expressed dismay at D'Lil's testimony that wheelchairs are generally 30-32 inches across and noted that such a wide chair would not be able to access many ADA compliant facilities and indeed wouldn't be able to access most standard doorways which are 32 inches wide. In addition, when shown the internet documents that D'Lil was relying upon, Gibbens pointed out that it was a sales catalogue, that the majority of the chairs offered for sale in the document were between 25 and 26½ inches wide, and that the chairs referred to by D'Lil on her direct examination had names such as wide, super-wide and extra-wide.

The court finds that Mr. Gibbens was the more credible witness and that his testimony had a more reliable foundation.[18] Thus, the court finds that defendants established that it was possible to perform both a side and diagonal (not to mention a front) transfer in the stall.

3. The Sidewalk.

The primary dispute on this issue between the parties is whether the EDD or the City of Eureka has responsibility for accessibility of the sidewalk. This is a legal dispute and it is discussed below. However, to the extent that defendants argued at trial that there was a factual dispute over whether D'Lil ever measured portions of the sidewalk other than that which is crossed by the alleyway, the court finds in favor of plaintiff. Her report and her testimony established that she did take measurements from other portions of the sidewalk, including the driveway, where the slope exceeded the allowable angle.

4. The Transition Plan.

Lorrie Bailey testified that there is a new Transition Plan currently being prepared

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[18] D'Lil's reliance upon the internet sales catalogue seriously undermines her credibility as an "expert." In addition, there was other evidence suggesting bias on her part. For instance, D'Lil not only frequently works for plaintiff's counsel as an expert (in 30-40 cases, including plaintiff Cacopardo's three other cases with Singleton) and has appeared at disability rights seminars put on by plaintiff's counsel, she is also a former and current client of his and has at least one pending access case in which plaintiff's counsel is representing her.

and that it is estimated the plan will be completed in December of 2002 or January of 2003.

CONCLUSIONS OF LAW

A. Plaintiff's Request For Compensatory Damages.

The parties agree that compensatory damages are not available absent a showing of deliberate indifference by defendants. Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001) ("To recover monetary damages under Title II of the ADA or the Rehabilitation Act, a plaintiff must prove intentional discrimination on the part of the defendant."). Generally speaking, "[d]eliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that the likelihood." Duvall, 260 F.3d at 1139. The parties disagree regarding the showing necessary to satisfy the first prong of the deliberate indifference standard – notice. Plaintiff cites to the Ninth Circuit's decision in Duvall:

> When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test.

Duvall, 260 F.3d at 1139 (emph. added). Defendants cite to Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998), a Title IX case, and argues that actual notice to an individual in a decision-making position is required. The court finds that Duvall sets forth the appropriate standard where a public entity is the defendant in an accessibility suit. There is no dispute regarding the second prong of the deliberate indifference standard – failure to act:

> Because in some instances events may be attributable to bureaucratic slippage that constitutes negligence rather than deliberate action or inaction, we have stated that deliberate indifference does not occur where a duty to act may simply have been overlooked, or a complaint may reasonably have been deemed to result from events taking their normal course. Rather, in order to meet the second element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness.

Duvall, 260 F.3d at 1139 (citation omitted).

Plaintiff claims that defendants' tolerance of various barriers at the wheelchair lift

constitutes deliberate indifference. To begin, plaintiff identifies four barriers (or categories of barriers) at the lift. First, plaintiff argues that there never should have been a lift, and that instead, EDD should have installed a ramp. Second, plaintiff claims that the lift was often inoperable, either because the lift itself was broken, or because the call button used to summon help from the facility was broken. Third, plaintiff claims that the lift was often dirty. Fourth, plaintiff claims that even when working, because a wheelchair mobile user could not use it without assistance from EDD personnel, the lift was not independently operable as required under the ADA.

As discussed more fully below, plaintiff is incorrect in his first assertion regarding the requirement for a ramp instead of a lift. Regarding the evidence that the lift was sometimes dirty, there was also evidence that EDD took active steps to remedy this condition, arranging to have the lift cleaned and eventually hiring an outside contractor to clean it daily. Similarly, while there was evidence of a history of mechanical problems, both with the lift itself and with the call button, there was also evidence that EDD took reasonably prompt steps to correct those problems. In sum, the evidence does not show that defendants were deliberately indifferent in responding to any of these barriers.

The allegation that the lift was not independently operable requires a more thorough inquiry. Although not entirely clear, it appears that for some time prior to and including the date upon which plaintiff visited the facility, it was necessary to summon someone from the EDD facility to get the key(s) necessary to operate the lift. Plaintiff argues that this practice violated clearly established law, and that thus the first prong of the deliberate indifference standard – notice – is satisfied. As an initial matter, the court does not agree that the law was so clearly established. Plaintiff cites two cases for the proposition that requiring a user to summon an employee with the keys violates ADAAG 4.11.3 which requires that "[i]f platform lifts are used then they shall facilitate unassisted entry, operation and exit from the lift (. . .)." The first is an unpublished opinion from this district, DeLil v. El Torito Restaurants, Inc., 1996 WL 807395 (N.D.Cal. 1996). In that case, plaintiff argued that El Torito's interior lift, which was kept locked and required the use of keys which were

maintained by management violated ADAAG 4.11.3. DeLil, 1996 WL 807395 at *5. El Torito responded that 4.11.3's requirement of unassisted operation conflicted with the American Society of Engineer's Safety Code Rule 2000.10 which requires that platform lifts "shall be controlled by a key." Id. The court found that the two sections were not in conflict. Id. However, the court also found that "key-lock lifts are not inherently illegal under the ADA and state law." Id. at *1. Moreover, the court found that plaintiff's suggested reconciling of the rules – leaving a key in the lock or leaving the lift unlocked "would defeat the important safety considerations that led the ASME to require key locks on wheelchair lifts as part of its Safety Code." Id. at *5. But that is exactly the solution that defendants adopted in October 2000 and that plaintiff contends defendants should have adopted earlier. Plaintiff cannot establish that defendants were deliberately indifferent in failing to follow an (unpublished) opinion by implementing a policy rejected by that opinion. Indeed, the opinion is somewhat vague in terms of what types of policies would comply with both rules. For instance, it suggests that El Torito could "give[] all wheelchair-bound patrons a key to the lift when they first enter the restaurant," but "expresses no opinion whether requiring a disabled patron to ask for a key in order to operate the lift violates the ADA." Id. at *6, n.4.[19]

Plaintiff also cites an opinion from a California Court of Appeal, Hankins v. El Torito Restaurants, Inc., 63 Cal. App. 4th 510 (1998). However, Hankins does little to clear up the picture. It assumes that El Torito was required to install the key-lock and cites the DeLil opinion with approval. Thus, just as plaintiff cannot rely on DeLil to establish deliberate indifference, it cannot do so with Hankins. Given the dearth of authority presented to the court by plaintiff regarding independent operability of key-lock lifts, the court cannot find that defendants were deemed to have been on notice of clearly established law.

Moreover, plaintiff cannot show that defendants failed to act. As noted above,

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[19] It is important to note that the DeLil case was before the court on a motion for summary judgment. The court was concerned with the existence of a factual dispute over whether the restaurant manager would allow plaintiff to operate the lift rather than setting out definitive parameters concerning how to comply with ADAAG 4.11.3.

Duvall recognized that "in some instances events may be attributable to bureaucratic slippage that constitutes negligence rather than deliberate action or inaction" and that "to meet the second element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness." Duvall, 260 F.3d at 1139. Here, any failure by defendants to act in a timely fashion is attributable to something akin to negligence if not less. It is undisputed that in 1995 the facility underwent a comprehensive remodeling and that at least one goal of that remodeling was to comply with the ADA. Plaintiff argued that Lynda Dionno put the defendants on notice regarding difficulties with the lift in 1996 and 1997, and defendants subsequently replaced the lift. As noted above, when put on notice regarding mechanical failures or cleanliness issues, defendants responded. Defendants did not have notice of complaints that the lift was not independently operable until July of 2000 when Mr. Van Fleet sent his letter to Ms. Bartolomeu. Mr. Van Fleet agreed that a response to his complaint was immediate and that he was satisfied with the response. Shortly thereafter, by the end of August 2000, the EDD instituted a practice of handing out keys to disabled patrons and by the end of October, EDD simply left the keys in the lift during business hours. Today, the EDD has entirely replaced the lift that plaintiff encountered and plaintiff has not presented any evidence that the lift is not currently independently operable.

Because plaintiff cannot establish deliberate indifference on the part of defendants, he is not entitled to compensatory damages.[20] The court next considers plaintiff's request for injunctive relief.

B. Plaintiff's Request For Injunctive Relief.

Generally speaking, a party is not entitled to injunctive relief unless he or she can show a threat of immediate and irreparable harm. See Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1042 (9th Cir. 1999). Plaintiff cites Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814 (9th Cir. 2001), for the proposition that where violation of a civil

[20] Accordingly, the issue of the exact date upon which plaintiff visited the facility, on which the court makes no finding, is moot.

rights statute is established, there is no requirement to show a likelihood of future injury to obtain injunctive relief. See Silver Sage, 251 F.3d at 827 ("where a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation."). However, while Silver Sage states that there is a presumption of irreparable harm, it does not state that proof of a previous violation establishes irreparable harm. Thus, defendants are not precluded from presenting proof that the alleged violations have been remediated, thereby overcoming any presumption of irreparable harm.

1. The Lift and Ramp.

Defendants have established that both the lift and the ramp leading to it that were encountered by plaintiff have been replaced and that the lift is now independently operable and otherwise in compliance with applicable regulations. Accordingly, plaintiff cannot show a likelihood of future injury and is not entitled to any injunctive relief concerning alleged barriers at the lift.

However, plaintiff also argues that the use of *any* lift instead of a ramp to the entrance violates the ADA. Plaintiff's argument is as follows. First, under the ADA, while lifts may be used as part of an accessible path when alterations are made to existing buildings, the lift must comply with "applicable state or local codes." ADAAG 4.1.6(3)(g) ("In alterations, platform lifts (wheelchair lifts) complying with 4.11 and applicable state or local codes may be used as part of an accessible route."). The California Building Code ("CBC") states that "lifts may be provided as part of an accessible route only" when four listed exceptions apply, none of which are applicable here. Title 24, Part 2, California Building Code, §1116B.2. Thus, plaintiff argues that because the use of a lift violates the CBC, it also violates ADAAG 4.1.6(3)(g). However, plaintiff's argument is foreclosed by the fact that the lift in question has been installed as an alteration to an existing building. The CBC includes three exceptions to §1116B, the third of which is applicable here: "The installation of lifts as part of an accessible route for additions or alterations is not limited to the four conditions required by Section 1116B." CBC, at §1116B.2.4. Because the new lift

was installed as part of an addition or alteration, plaintiff has not established that a ramp is required.

Finally, plaintiff argues that defendants refuse to concede that their earlier policy of keeping the lift locked and requiring patrons to seek assistance to operate it violated the ADA. Plaintiff seeks an order from this court declaring such a policy to be in violation of the law so that such a policy will not be used by defendants again in the future. However, defendants abandoned that policy at the request of community members close to two years ago, have installed a new lift that is independently operable and have given no indication that they intend to return to the former policy. Plaintiff's speculation as to what might occur in the future is not enough to overcome these facts (which successfully rebut any presumption of future irreparable harm). Accordingly, plaintiff's request for a judicial declaration is denied.

2. The Stall.

There is no dispute concerning the stall's dimensions. Rather, the dispute focuses on whether those dimensions constitute an equivalent facilitation. Equivalent facilitation is defined under ADAAG as follows:

> Departures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility.

ADAAG 2.2. As discussed above, the court finds that the stall's dimensions allow a user to execute front, diagonal and side transfers. As such, the stall provides "substantially equivalent" access. Plaintiff seems to argue that the doctrine of equivalent facilitation is inapplicable to the issue of accessible stall widths, but provides no support for this argument. Accordingly, the court finds that the stall, by way of an equivalent facilitation, does not violate the ADA and plaintiff's request for injunctive relief regarding the stall is denied.[21]

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[21] Plaintiff's expert report alleges other deficiencies in the stall dimensions. Plaintiff did not produce sufficient evidence of such deficiencies at trial. Even if he did, in light of equivalent facilitation and the concept of dimensional tolerances, plaintiff would not be able to

3. The Sidewalk.

Plaintiff's expert took measurements indicating impermissible slopes at multiple places on the sidewalk leading from the EDD parking lot to the facility. Defendants' expert did not bother taking any measurements and thus plaintiff's evidence stands unrefuted. However, the parties clashed largely over who has responsibility for the sidewalk. Plaintiff argued that defendants owned the property upon which the sidewalk is located and that even though the City of Eureka has an easement over that property, it is still defendants' responsibility to see that those sidewalks are ADA compliant. Defendants argued that it was the City's responsibility.[22]

While the question of whether defendants own the property upon which these public sidewalks are located is an interesting one and one for which plaintiff has not carried his burden of proof, it is also irrelevant. There is no dispute that the sidewalk in question is a public sidewalk. Plaintiff is claiming that the public sidewalk in question is not ADA compliant. However, pursuant to ADAAG, defendants only have the responsibility to provide an accessible path of travel *to and from* their facility and the public sidewalk:

> At least one accessible route *within the boundary of the site* shall be provided from public transportation stops, accessible parking, and accessible passenger loading zones, and public streets or sidewalks to the accessible building entrance they serve. *The accessible route shall, to the maximum extent feasible, coincide with the route for the general public.*

ADAAG 4.3.2(1) (emph. in orig.); see also ADAAG 4.1.2(1).

ADAAG defines "site" as "[a] parcel of land bounded by a property line or a designated portion of a public right of way." ADAAG 3.5. It is important to note that the EDD parking lot is separated from the EDD building by an alleyway. Defendants produced convincing evidence that the alleyway is a public right of way. Ex.A-59. Thus, the parking lot and the building are two separate sites as far as ADAAG is concerned. Thus, plaintiff has established neither (a) that defendants are responsible for maintaining the accessibility

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establish a violation.

[22] Plaintiff's expert agreed that sidewalks are the City's responsibility until plaintiff's counsel informed her of his opinion that the defendants owned the sidewalk in front of their property.

of sidewalks in front of its building nor (b) that defendants are responsible for providing an accessible path of travel between the accessible parking on one site and the accessible entrance to another site. Accordingly, plaintiff's request for injunctive relief regarding the sidewalk is denied.

4. The Transition Plan.

Finally, plaintiff argues that defendants' current transition plan is inadequate. There are two difficulties with this claim. The first is that plaintiff has not made any showing that a transition plan is currently required. A transition plan is required under 28 C.F.R. §13.150(d)(1) as follows:

> In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within 6 months of January 1992, a transition plan setting forth the steps necessary to complete such changes.

Plaintiff has not made a showing that any structural changes are necessary to achieve program accessibility. In other words, because plaintiff has not established any currently existing barriers, it is not at all clear that there is any kind of transition that needs planning. To the extent that any plan is required (and again, the court does not believe one is nor understand what such a plan could include), defendants have established that a new transition plan is being prepared and will be finished by January of 2003. In sum, there is clearly no danger of irreparable harm relating to this issue and plaintiff's claim for injunctive relief is denied.

CONCLUSION

In accordance with the foregoing, judgment shall be entered on Cacopardo's complaint in favor of defendants and against plaintiff. The clerk shall close the file.

IT IS SO ORDERED.

Dated: September 24, 2002

PHYLLIS J. HAMILTON
United States District Judge

Copies mailed to counsel of record