

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LAW OFFICES
KRING & CHUNG, LLP
2151 RIVER PLAZA DR.
SUITE 310
SACRAMENTO, CALIFORNIA 95833
TELEPHONE (916) 564-7000

Shane Singh, Attorney Bar No. 202733
Attorney for Defendant, DOLLAR TREE STORES, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GYPSIE JONES,)	CASE NO. 2:04-cv-2002-MCE-KJM
Plaintiff,)	
vs.)	JUDGMENT IN A CIVIL CASE
RALPHS GROCERY COMPANY dba FOODS)	
CO #355; DOLLAR TREE STORES, INC. dba)	
DOLLAR TREE #2041; GABRIEL H. CHIU &)	
LAI HAR CHIU, Co-Trustees of the CHIU)	
FAMILY TRUST; and DOES 1 through 10,)	
Defendants.)	

On May 19, 2006, this Court partially granted Defendant DOLLAR TREE STORES, INC.'s Motion for Summary Judgment. The Court granted Defendant DOLLAR TREE STORES, INC.'s Motion for Summary Judgment on the claims that: 1) there is no accessible check stand; 2) the signage on the women's restroom door creates an accessibility barrier, and 3) the pressure required to open the women's restroom door creates an inaccessibility barrier. The Court denied Defendant DOLLAR TREE STORES, INC.'s Motion for Summary Judgment on Plaintiff's claims that: 1) the ISA signage is improperly mounted on the entrance door, and 2) there is no signage identifying the accessible check stand.

///
///




1 On November 17, 2006, this Court issued a Memorandum and Order dismissing Plaintiff
2 JONES' Complaint after it concluded that no claims remained against Defendant DOLLAR TREE
3 STORES, INC.

4 Judgment is entered in favor of Defendant DOLLAR TREE STORES, INC. and against
5 Plaintiff GYPSIE JONES.

6 IT IS SO ORDERED.

7
8 Dated: December 13, 2006

9
10 
11 MORRISON C. ENGLAND, JR.
12 UNITED STATES DISTRICT JUDGE

13 _____
14 _____

15
16
17
18
19
20
21
22
23
24
25
26
27
28



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GYPSIE JONES,

No. 2:04-cv-2002-MCE-KJM

Plaintiff,

v.

MEMORANDUM AND ORDER

RALPH'S GROCERY CO., et al.,

Defendants.

_____ /
The present matter came on for hearing on October 31, 2006, with Mark W. Emmett appearing on behalf of Plaintiff and Shalend Singh appearing on behalf of Defendant.

The Court first resolved the Parties' Motions in Limine. See Docket No. 108. The Court then moved to a discussion of the claims presented in the consolidated case of *Jones v. Dollar Tree Stores, Inc., et al.*, Case No. 2:06-cv-1636-WBS-CMK. After considering the nature of all the claims presented in both actions, the Court severed the claims presented in Case No. 2:06-cv-1636-WBS-CMK leaving only two unresolved claims in Case No. 2:04-cv-2002-MCE-KJM, *Jones v. Ralph's Grocery Co., et al.*


///

1 Counsel for Defendant presented evidence that the two remaining
2 defects alleged in Case No. 2:04-cv-2002-MCE-KJM had been
3 remedied rendering Plaintiff's request for injunctive relief
4 moot. Plaintiff concurred on this issue and moved to dismiss
5 both those claims which the Court granted. There being no
6 remaining claims, Case No. 2:04-cv-2002-MCE-KJM, *Jones v. Ralph's*
7 *Grocery Co., et al.* is dismissed with prejudice. The Clerk of
8 the Court is directed to close the file.

9 In the matter of Case No. 2:06-cv-1636-WBS-CMK, *Jones v.*
10 *Dollar Tree Stores, Inc., et al.*, the Pretrial Scheduling Order
11 dated July 25, 2006, is hereby vacated. The matter is reopened
12 and reassigned to Judge Morrison C. England, Jr. and the Parties
13 shall comply with the attached Order requiring joint status
14 report. Henceforth, the caption on documents filed in the
15 reassigned case shall be shown as 2:06-cv-1636-MCE-KJM, *Jones v.*
16 *Dollar Tree Stores, Inc., et al.*

17 IT IS SO ORDERED.

18 DATED: November 16, 2006

19
20
21 
22 MORRISON C. ENGLAND, JR.
23 UNITED STATES DISTRICT JUDGE
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GYPSIE JONES,

Plaintiff,

v.

DOLLAR TREE STORES, INC., dba
DOLLAR TREE #2041,

Defendant.

2:04-CV-2002-MCE-KJM

MEMORANDUM AND ORDER

-----oo0oo-----

Plaintiff Gypsie Jones ("Plaintiff") filed the instant action against Defendant Dollar Tree Stores, Inc. ("Defendant") alleging that Dollar Tree Store #2041, located at 3615 Northgate Boulevard, Sacramento, California ("Store #2041"), is in violation of California's Unruh Civil Rights Act ("Unruh Act"), Cal. Civil Code §§ 51 et seq. and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 et seq. She seeks damages pursuant to the Unruh Act and injunctive relief pursuant to the ADA.

///
///

1 The case is now before the Court on Defendant's Motion for
2 Summary Judgment.¹ For the reasons explained below, Defendant's
3 motion is granted in part and denied in part.²

4
5 **BACKGROUND**

6
7 Plaintiff is a paraplegic who requires the use of a
8 wheelchair for mobility. Plaintiff visited Store #2041 twice in
9 2004 and claims that, during those visits, she encountered
10 architectural barriers that made it difficult or impossible for
11 her to have full and equal access to the goods and services
12 provided by Defendant. Plaintiff's first visit occurred in the
13 Spring of 2004. Shortly thereafter, Plaintiff sent a letter to
14 the management of Store #2041 describing the barriers she
15 encountered and requested that they be remedied. Upon returning
16 to Store #2041 in the summer of that same year, Plaintiff alleges
17 the barriers she identified on her first visit had not been
18 resolved. Consequently, on September 27, 2004, Plaintiff filed
19 the instant action.

20 ///

21 ///

22
23 ¹While Defendant does not specifically ask for partial
24 summary judgement, the Court has discretion to adjudicate
25 individual claims when it believes the criteria for summary
26 adjudication are met. See Fed. R. Civ. P. 56(d) (indicating
that, on denying a motion for summary judgement on the whole
case, the court may determine whether partial summary judgment is
appropriate).

27 ²Because oral argument will not be of material assistance,
28 the Court orders this matter submitted on the briefs. E.D. Cal.
Local Rule 78-230(h).

1 In her Complaint, Plaintiff identifies five potential access
2 issues including (1) the lack of an International Symbol of
3 Accessibility ("ISA") on the store's entrance door, (2) the lack
4 of an accessible check stand, (3) the dimensions of the checkout
5 counter, do not match the requirements prescribed by the ADA
6 Accessibility Guidelines ("ADAAG"), (4) the lack of at least one
7 36 inch wide route through the store, and (5) the lack of an
8 accessible route to the restroom.³ (Compl. at Ex. A.)

9 Approximately one year after filing her Complaint, Plaintiff
10 sent her expert, Joe Card ("Card"), to Store #2041 to audit the
11 facility. Card was to confirm the ADA violations allegedly
12 encountered by Plaintiff and to search for additional violations.
13 Although Card's inspection report included more than thirty
14 potential accessibility issues,⁴ Plaintiff is pursuing only the
15 following thirteen issues:

- 16 (1) The ISA sticker on the entrance door is mounted at the
17 wrong height;
- 18 (2) The pressure required to open the entrance door exceeds
19 the legal limit;
- 20 (3) The store's accessible checkstand does not provide a
21 sign mounted above the checkstand that states "This
22 check stand to be open at all times for customers with
23 disabilities;"
- 24 (4) One of the store's exit doors is locked and blocked
25 with merchandise;

26 ³ Plaintiff's Complaint contains fifteen additional alleged
27 violations related to the parking lot and a public telephone
28 located outside the store. As indicated above, the parking lot
is controlled by Defendant's landlord. The same is true of the
public telephone. Because Plaintiff has already settled with
Defendant's landlord, these fifteen claims are now moot.

⁴ Plaintiff has chosen not to pursue the remainder of these
potential claims for reasons not disclosed. Accordingly, the
Court considers those claims abandoned.

- 1 (5) The automated teller machine (ATM) located at the
2 accessible checkstand is not visible to users;
- 3 (6) The signage on the women's restroom door is mounted at
4 the wrong height;
- 5 (7) The pressure required to open the door to the women's
6 restroom exceeds the legal limit;
- 7 (8) The women's restroom does not contain an ISA on the
8 accessible stall door;
- 9 (9) The women's restroom lavatory does not provide at least
10 29 inches of knee clearance as required by law;
- 11 (10) The women's restroom's lavatory's drainpipes are not
12 properly insulated;
- 13 (11) The women's restroom's accessible stall has boxes in
14 the required clear floor space;
- 15 (12) The women's restroom's accessible stall has shelves
16 mounted at a height which improperly protrudes into the
17 head clearance space of a potential user; and
- 18 (13) The toilet paper dispenser and a trash can in the
19 women's restroom's accessible stall improperly protrude
20 into the required clear floor space.⁵

21 See Card Decl. in Supp. Mot. Summ. J.

22 **STANDARD**

23 The Federal Rules of Civil Procedure provide for summary
24 judgment when "the pleadings, depositions, answers to
25 interrogatories, and admissions on file, together with
26 affidavits, if any, show that there is no genuine issue as to any

27 ⁵Plaintiff's Complaint also alleges the following two
28 violations: (1) failure to maintain at least one 36 inch wide
route through the store, and (2) improper dimensions with respect
to the checkstand counter. While Plaintiff has alleged these
barriers in her Complaint, she makes no further mention of them
in her filings with this Court. Accordingly, the Court considers
those claims abandoned.

1 material fact and that the moving party is entitled to a judgment
2 as a matter of law." Fed. R. Civ. P. 56(c). One of the
3 principal purposes of Rule 56 is to dispose of factually
4 unsupported claims or defenses. Celotex Corp. v. Catrett, 477
5 U.S. 317, 325 (1986).

6 Rule 56 also allows a court to grant summary adjudication on
7 part of a claim or defense. See Fed. R. Civ. P. 56(a) ("A party
8 seeking to recover upon a claim ... may ... move ... for a
9 summary judgment in the party's favor upon all or any part
10 thereof."); See also Allstate Ins. Co. v. Madan, 889 F. Supp.
11 374, 378-79 (C.D. Cal. 1995); France Stone Co., Inc. v. Charter
12 Township of Monroe, 790 F. Supp. 707, 710 (E.D. Mich. 1992).

13 The standard that applies to a motion for summary
14 adjudication is the same as that which applies to a motion for
15 summary judgment. See Fed. R. Civ. P. 56(a), 56(c); Mora v.
16 ChemTronics, 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998).

17 Under summary judgment practice, the moving party
18 always bears the initial responsibility of informing
19 the district court of the basis for its motion, and
20 identifying those portions of 'the pleadings,
21 depositions, answers to interrogatories, and admissions
22 on file together with the affidavits, if any,' which it
23 believes demonstrate the absence of a genuine issue of
24 material fact.

22 Celotex Corp. v. Catrett, 477 U.S. at 323 (quoting Rule 56(c)).

23 If the moving party meets its initial responsibility, the
24 burden then shifts to the opposing party to establish that a
25 genuine issue as to any material fact actually does exist.
26 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
27 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.
28 253, 288-89 (1968).

1 In attempting to establish the existence of this factual
2 dispute, the opposing party must tender evidence of specific
3 facts in the form of affidavits, and/or admissible discovery
4 material, in support of its contention that the dispute exists.
5 Fed. R. Civ. P. 56(e). The opposing party must demonstrate that
6 the fact in contention is material, i.e., a fact that might
7 affect the outcome of the suit under the governing law, and that
8 the dispute is genuine, i.e., the evidence is such that a
9 reasonable jury could return a verdict for the nonmoving party.
10 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52
11 (1986); Owens v. Local No. 169, Assoc. of Western Pulp and Paper
12 Workers, 971 F.2d 347, 355 (9th Cir. 1987). Stated another way,
13 "before the evidence is left to the jury, there is a preliminary
14 question for the judge, not whether there is literally no
15 evidence, but whether there is any upon which a jury could
16 properly proceed to find a verdict for the party producing it,
17 upon whom the onus of proof is imposed." Anderson, 477 U.S. at
18 251 (quoting Improvement Co. v. Munson, 14 Wall. 442, 448, 20
19 L.Ed. 867 (1872)). As the Supreme Court explained, "[w]hen the
20 moving party has carried its burden under Rule 56(c), its
21 opponent must do more than simply show that there is some
22 metaphysical doubt as to the material facts Where the record
23 taken as a whole could not lead a rational trier of fact to find
24 for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-87.

26 ///

27 ///

28 ///

1 In resolving a summary judgment motion, the evidence of the
2 opposing party is to be believed, and all reasonable inferences
3 that may be drawn from the facts placed before the court must be
4 drawn in favor of the opposing party. Anderson, 477 U.S. at 255.
5 Nevertheless, inferences are not drawn out of the air, and it is
6 the opposing party's obligation to produce a factual predicate
7 from which the inference may be drawn. Richards v. Nielsen
8 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
9 aff'd, 810 F.2d 898 (9th Cir. 1987).

11 ANALYSIS

12
13 The Americans with Disabilities Act, 42 U.S.C. §§ 12101 et
14 seq. mandates that places of public accommodation and commercial
15 facilities be accessible to persons with disabilities. For
16 commercial facilities and places of public accommodation, this
17 mandate is encompassed within Title III of the ADA, 42 U.S.C. §§
18 12181 et seq. ("Title III"). Title III's provisions are
19 implemented through regulations promulgated by the Department of
20 Justice which include guidelines for new construction and
21 alterations. See 42 U.S.C. § 12186(a); 28 C.F.R. Part 36
22 Appendix A. These guidelines are known as the Americans with
23 Disabilities Act Access Guidelines or ADAAG. In addition to
24 these federal enactments, California has promulgated similar
25 rules in its Building Code. See Cal. Code of Regs., tit. 24
26 (2001). Together these laws form the framework for assuring that
27 disabled persons have equal access and enjoyment of commercial
28 facilities.

1 It is Plaintiff's contention that Dollar Tree Stores, Inc. has
2 violated the foregoing rules and regulations at Store #2041.
3 Defendant disagrees and, through the present Motion, seeks to
4 have Plaintiff's claims dismissed.

5
6 **1. Standing**

7
8 The United States Constitution limits the jurisdiction of
9 federal courts to the resolution of "cases" and "controversies."
10 U.S. Const. Art. III § 2, cl. 1. This limitation is given effect
11 by the constitutional standing requirements, which ensure that
12 the exercise of judicial power is restricted to litigants who can
13 show that they have been adversely affected by the action which
14 they seek to have the court adjudicate. Valley Forge Christian
15 Coll. v. Ams. United for Separation of Church and State, Inc.,
16 454 U.S. 464, 473 (1982). To satisfy Article III's standing
17 requirements, a plaintiff must show that: (1) she has suffered an
18 "injury in fact" that is (a) concrete and particularized, and (b)
19 actual or imminent, not conjectural or hypothetical; (2) the
20 injury is fairly traceable to the challenged action of the
21 defendant; and (3) it is likely, as opposed to merely
22 speculative, that the injury will be redressed by a favorable
23 decision. Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.,
24 Inc., 528 U.S. 167, 180-181 (2000).

25 The injury in fact prong is generally considered the
26 "principal limitation imposed by Article III." Grand Lodge of
27 Fraternal Order of Police v. Ashcroft, 185 F.Supp.2d 9, 14 (D.C.
28 Cir. 2001) (citations omitted).

1 In order to determine whether a plaintiff has established the
2 requisite injury in fact, courts look to the facts in existence
3 at the time an action is filed. Friends of the Earth, Inc., 528
4 U.S. at 170.

5 In the context of ADA litigation, courts are split over
6 whether a plaintiff can sue for access barriers never encountered
7 or known about prior to filing suit. Some courts have held that
8 to satisfy the injury in fact prong, an ADA plaintiff must either
9 personally encounter the barrier complained of, or have reason to
10 know of the barrier and be deterred from visiting a public
11 accommodation because of that barrier at the time the complaint
12 is filed. Martinez v. Longs Drug Stores, Inc., 2005 WL 2072013,
13 *4 (E.D. Cal.); White v. Divine Investments, Inc., 2005 WL
14 2491543, *3 (E.D. Cal.). Other courts find that, so long as an
15 ADA plaintiff encounters one access barrier prior to filing suit,
16 the plaintiff has standing to sue for any other violations
17 subsequently discovered. Steger v. Franco, 228 F.3d 889, 893-894
18 (8th Cir. 2000); Wilson v. Pier 1 Imports, Inc., 412 F.Supp.2d
19 1130, 1131-1136 (E.D. Cal.). For the reasons below, it is this
20 Court's finding that Plaintiff lacks standing for certain of her
21 claims because she cannot show a "concrete" or "particularized"
22 injury.

23 The Ninth Circuit has clarified that in order to show a
24 concrete or particularized injury, Plaintiff must show that she
25 is affected in a personal and individual way. Pickern v. Holiday
26 Quality Foods, Inc., 293 F.3d 1133, 1137-38 (9th Cir. 2002).

27 ///

28 ///

1 Specifically, Plaintiff may seek redress only for those
2 violations which she personally encountered, or which she knew
3 of, or had reason to know of, and which deterred her from
4 visiting Store #2041 at the time her Complaint was filed. Id. at
5 1136-38. Upon review of the thirteen claims currently pending,
6 the Court finds that only five have any relationship to the
7 violations alleged in Plaintiff's Complaint. In particular, the
8 Court concludes that Plaintiff's standing is limited to the
9 following five claims: (1) the mounting height of the ISA on
10 Store #2041's entrance door; (2) the lack of signage stating
11 "this check stand to be open at all times for customers with
12 disabilities" on the store's accessible checkstand; (3) alleged
13 visibility problems with respect to an automated teller machine
14 (ATM) located at the store's accessible checkstand; (4) the
15 mounting height of signage on the women's restroom door; and (5)
16 the pressure required to open the door to the women's restroom.

17 Plaintiff's remaining claims are not identified in
18 Plaintiff's Complaint and were only identified upon Mr. Card's
19 inspection of Store #2041 nearly a year after Plaintiff's
20 Complaint was filed.⁶ Plaintiff did not personally encounter
21 those barriers nor was she aware of them at the time she filed
22 her Complaint. Under this Court's analysis, she lacks standing to
23 pursue them. Accordingly, those claims are dismissed.

24
25 ⁶For example, Plaintiff's expert alleges that the pressure
26 required to open Store #2041's entrance door exceeds the legal
27 limit; however, there is nothing in Plaintiff's Complaint to
28 indicate that Plaintiff encountered that barrier. Similarly,
Plaintiff's Complaint is devoid of any reference to accessibility
issues with respect to the store's exit doors or to the six
alleged violations found inside the women's restroom.

1 **2. Entrance Door ISA**

2 Plaintiff alleges that Store #2041 is not in compliance with
3 either federal or state access laws in that the ISA signage at
4 the entrance of the store is improperly mounted. In fact, Card's
5 report shows that the ISA sign is mounted approximately 29 inches
6 from its center point to the finished floor. See Card Decl. in
7 Supp. Mot. Summ. J., p. 6. Plaintiff contends that both the
8 ADAAG section 4.30.6 and CBC section 1117B.5.7 require the ISA
9 sign be mounted at a height of 60 inches from its center point to
10 the finish floor. As support for her argument, Plaintiff points
11 to ADAAG section 4.1.2(7)(c) which provides as follows:

12 "[e]lements and spaces of accessible facilities which
13 shall be identified by the International Symbol of
14 Accessibility and which shall comply with 4.30.7 are:
15 (c) Accessible entrances when not all are accessible
16 (inaccessible entrances shall have directional signage
to indicate the route to the nearest accessible
entrance."

17 28 C.F.R. Part 36, App. A. This section clearly requires that,
18 when not all entrances to a commercial facility are accessible,
19 those that are must be identified by an ISA.

20 Defendants contend that even if the entrance at issue is the
21 only handicap accessible entrance, there is no requirement under
22 either federal or state law that the ISA be mounted sixty inches
23 from the finish floor. The Court disagrees.

24 ADAAG section 4.30.6 reads

25 "[w]here permanent identification is provided for rooms
26 and spaces, signs shall be installed on the wall
adjacent to the latch outside of the door ...
27 [m]ounting height shall be 60 inches (1524 mm) above
the finish floor to the center line of the sign."

28 Id. Precisely that same language is found in California's

1 Building Code ("CBC") section 1117B.5.7. See Cal. Code of Regs.
2 tit. 24, § 1117B.5.7 (2001). As is clear from a plain reading of
3 the foregoing provisions, the ADAAG and the CBC expressly require
4 that where permanent signage is provided, it must be mounted at
5 60 inches from its center to the finish floor.

6 While Defendant may be correct in asserting that there is no
7 mandate under either federal or state law that this particular
8 entrance factually requires the posting of an ISA, Defendant has
9 failed to meet its burden of establishing either that the
10 entrance at issue is the only accessible entrance or that the
11 signage posted at the entrance is not permanent.

12 Assuming, as the Court must, that this entrance is not the
13 only accessible entrance and that Defendant's ISA is a permanent
14 sign, there is no question it must be mounted 60 inches above the
15 finish floor. It is undisputed that Store #2041's ISA is mounted
16 at 29 inches, well below the minimum 60 inch requirement for
17 permanent signs. Consequently, summary adjudication on this
18 claim is inappropriate and is, therefore, denied.

19
20 **3. Accessible Check Stand**

21
22 Plaintiff also contends that Store #2041 is in violation of
23 both the ADAAG and the CBC because it does not provide a sign
24 mounted above the check stand stating "This check stand to be
25 open at all times for customers with disabilities."

26 California's building code section 1110B.1.3 states:

27 ///

28

1 "accessible checkstands ... shall be identified by a sign
2 clearly visible to those in wheelchairs ... The sign shall
3 display the international symbol of accessibility ... and
4 shall state 'This checkstand to be open at all times for
5 customers with disabilities.'"

6 Plaintiff's expert found that Store #2041's accessible check
7 stand, although providing the required ISA, failed to display the
8 above language. Plaintiff does not dispute this finding.
9 Accordingly, Defendant's Motion for Summary Judgment on this
10 claim is denied.

11 4. Accessible Check Stand ATM Screen

12
13 Plaintiff alleges that Store #2041's ATM screen in the
14 accessible check stand is not visible to the user in violation of
15 the CBC. CBC section 1117B.7.5 provides:

16 LED, cathode ray, or other screen devices intended to
17 be viewed by the user shall be positioned so they are
18 readily visible to and usable by a person sitting in a
19 wheelchair with approximate eye level of 45 inches
(1143 mm), and shall comply with the following
20 requirements:

21 **3. Horizontally mounted screen devices.** If mounted at an
22 angle between 60 degrees and 90 degrees tipped away from the
23 viewer, the center line of screens and other screen devices
24 shall be located a maximum of 34 inches (864 mm) above
25 grade.

26 Contrary to Plaintiff's assertion, the Court finds the card
27 reader in question fully compliant with CBC section 1117B.7.5.
28 First, the CBC merely requires that the card reader be "visible
to and usable by a person sitting in a wheelchair." See Cal.
Code of Regs. tit. 24, § 1117B.5.7 (2001).

///

1 With respect to visibility, the card reader must be
2 positioned at a height of "approximately 45 inches." Id. It is
3 undisputed that the card reader at issue is positioned at a
4 height of 44 inches when attached to the check stand rendering it
5 substantially in compliance with the CBC for purposes of
6 visibility. See Card Decl. in Supp. Mot. Summ. J., p. 9.

7 With respect to whether the card reader is "usable" by a
8 wheelchair bound patron, the Court finds the card reader at issue
9 is, in fact, usable as required by the CBC. Specifically, CBC
10 section 1117B.7.5, subsection 3, which governs horizontally
11 mounted screen devices, requires the center line of horizontally
12 "mounted" screen devices to be located at a maximum of 34 inches
13 above grade. The card reader at issue is not "mounted" to the
14 check stand. Indeed, Store #2041's card reader is readily
15 removable from its position by wheelchair bound patrons as it is
16 attached by velcro. This mobility permits handicapped patrons to
17 easily utilize the card reader as required by the CBC.

18 Here, the Court finds the flexibility offered by Defendant's
19 card reader in compliance with the CBC because it is visible and
20 useable by disabled patrons. For the foregoing reasons,
21 Defendant's Motion for Summary Judgment on this claim is granted.
22

23 5. Women's Restroom Signage

24

25 CBC section 1115B.5 mandates that women's restroom
26 facilities are identified by signage centered on the door and
27 mounted at a height of 60 inches. Cal. Code of Regs. tit. 24, §
28 1115B.5 (2001).

1 Similarly, the ADAAG 4.30.6 provides that signage designating
2 permanent rooms and spaces shall be installed on the wall
3 adjacent to the latch side of the door at a mounting height of
4 60" (1525 mm) above the finish floor to the centerline of the
5 sign.

6 Plaintiff contends that the symbol identifying Store #2041's
7 women's restroom is mounted at 59 3/4 inches rendering it
8 noncompliant with ADA accessibility requirements. Through this
9 claim, Plaintiff is ultimately seeking a judgment from this Court
10 that interior signage posted 1/4" at variance with the strict
11 terms of the ADAAG entitles her to damages and injunctive relief.
12 The Court disagrees.

13 The ADA, by and through the ADAAG, mandates that places of
14 public accommodation and commercial facilities be accessible to
15 persons with disabilities, which includes dimensional
16 requirements for various elements of the accessible environment,
17 such as signage, water closets, grab bars, lavatories, and
18 placement of emergency alarm notification devices. These
19 guidelines, however, also permit equivalent facilitation. ADAAG
20 § 2.2. Equivalent facilitation applies to all sections of the
21 ADAAG and generally permits alternative technologies or designs
22 to be used to create substantially equivalent or greater access
23 to or usability of facilities. ADAAG § 2.2; see also 56 F.R.
24 35408, comments on "4.30 Signage" (pagination not available).

25 ///

26 ///

27 ///

28 ///

1 Pursuant to the doctrine of equivalent facilitation, employing
2 alternatives which provide equal or greater access to disabled
3 patrons does not violate the ADA merely by virtue of the fact
4 those alternatives do not comply with the strict terms of the
5 ADAAGs. Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.,
6 2001 U.S. Dist. LEXIS 6660, 28-30 (D. Fla. 2001).

7 It has been noted that the reason for the 60" mounting
8 height is to provide uniformity of sign location and consistency
9 in Braille location for visually impaired persons. See 56 F.R.
10 35408, comments on "4.30 Signage" (pagination not available)
11 (stating that original recommendation of a range of 54" to 66"
12 was discarded in favor of a fixed dimension of 60" because that
13 height places the sign at a more comfortable reading distance for
14 users of Braille and raised characters.) In fact, the ADAAG
15 Manual itself recognizes this purpose and recommends that "signs
16 containing pictograms or other non-tactile information ... should
17 be measured to the centerline of the raised/Braille portion so
18 that it is not too low (or high)." ADAAG Manual p. 106.

19 Given that the strictures of the 60" height requirement are
20 subject to equivalent facilitation as set forth in the ADAAG
21 section 2.2 and that a 1/4" variation provides at least
22 equivalent access to Plaintiff, her claim must fail.

23 The Court finds that Store #2041's signage height provides
24 Plaintiff with equivalent facilitation because the 59 3/4" height
25 gives her at least equivalent access to the facilities and is
26 therefore in compliance with the ADA pursuant to the ADAAG
27 section 2.2. Accordingly, Defendant's Motion for Summary
28 Adjudication of this claim is granted.

1 **5. Women's Restroom Door Pressure**

2
3 Plaintiff alleges that the door to the women's restroom
4 violates the ADA because it requires 12 pounds of pressure to
5 open rather than 5 pounds as required under the ADA. Defendant
6 answers that its restroom facilities are not open to the public
7 and, consequently, the pounds of pressure required to open the
8 door does not pose a barrier to Plaintiff.

9 In Louie v. Ideal Cleaners, 1999 WL 1269191 (N.D. Cal.), the
10 district court was confronted with exactly the same issue.
11 There, defendants operated a dry cleaning business that provided
12 restroom facilities to employees, but not to the general public.
13 The court held that since the restroom facilities were not made
14 available to customers in general, they did not need to be made
15 available to disabled customers. The Louie court's holding was
16 based, in part, on its interpretation of California Health &
17 Safety Code § 19955. That section provides that "[w]hen sanitary
18 facilities are made available for the public, clients or
19 employees ... they shall be made available for the handicapped."
20 Cal. Health & Safety Code § 19955 (2006).

21 The language of the statute is capable of two different
22 interpretations. Plaintiff interprets the statute to say that if
23 a business provides restroom facilities to employees but not the
24 general public, it nonetheless must provide those facilities to
25 disabled individuals, including disabled members of the general
26 public.

27 ///

28 ///

1 The Louie court correctly rejected this interpretation. As
2 an equal access statute, Health & Safety Code section 19955 is
3 intended to ensure that a disabled individual is able to utilize
4 public accommodations to the same extent as would be possible if
5 the individual were not disabled. See Louie, 1999 WL 1269191 at
6 *3; see also Donald v. Café Royale, Inc., 218 Cal.App.3d 168,
7 182-183 (1990). Consequently, the Louie plaintiff was not denied
8 equal access because no members of the public - disabled or not -
9 were permitted to use the dry cleaner's employee-only restroom.
10 Louie, 1999 WL 1269191 at *3. The fact that section 19955
11 required the restroom to be made accessible to disabled employees
12 was irrelevant since the plaintiff was not an employee. Id.

13 Plaintiff argues that the Louie court was incorrect, and
14 offers a 1971 committee analysis from the Assembly Committee on
15 Commerce and Public Utilities as evidence that her interpretation
16 is in fact what the Legislature intended. (Opp. at 7-10, Ex.
17 A:3-4.) The Court is not persuaded by Plaintiff's argument. The
18 analysis proffered by Plaintiff involved legislation predating
19 the current version of section 19955. The version of section
20 19955 now in effect was enacted over two years later by an
21 entirely different Legislature, a point Plaintiff freely
22 conceded. Consequently, the Court agrees with Louie and holds
23 that section 19955 requires Defendant to provide accessible
24 restrooms for disabled customers only if restrooms are provided
25 for non-disabled customers as well.

26 Plaintiff next alleges that Store #2041's women's restroom
27 is, in fact, open to the public.

28 ///

1 Defendant, however, has steadfastly maintained that Store #2041's
2 restrooms have been closed to the public since long before
3 Plaintiff's first visit to the store. The only evidence
4 supporting Plaintiff's contention is her declaration filed in
5 opposition to the present motion. This declaration marks the
6 first time Plaintiff has alleged that she personally encountered
7 barriers inside the women's restroom.⁷

8 The Court views Plaintiff's later filed declaration with
9 skepticism. As an initial matter, Plaintiff's Complaint makes no
10 reference to any barriers inside the women's restroom. Rather,
11 she simply claims there was "no accessible route to the
12 restroom." Compl. at Ex. A. More importantly, Plaintiff sent a
13 letter to Defendant after her initial visit to Store #2041
14 wherein she complained "when I tried to use your rest room [sic]
15 a sign said it was out of order., [sic] so I hurriedly checked
16 out to find another facility." Jones Decl. at Ex. A. It is only
17 now, in opposition to Defendant's assertion that the restrooms
18 are for employee use only, that Plaintiff alleges she encountered
19 barriers therein.

20 As a general matter, the evidence presented by a party
21 opposing a summary judgement motion is to believed by the Court.
22 However, the opposing party must demonstrate that the evidence is
23 such that a reasonable jury could return a verdict for the
24 nonmoving party.

25
26 ⁷At no point in her declaration does Plaintiff claim that
27 she entered the women's restroom. She merely claims that she
28 "encountered the following barriers on the inside of the Store."
(Jones Decl. at 2:10-11). She then lists the alleged barriers
identified by her expert. Id.

1 Therefore, "before the evidence is left to the jury, there is a
2 preliminary question for the judge, not whether there is
3 literally no evidence, but whether there is any upon which a jury
4 could properly proceed to find a verdict for the party producing
5 it." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986)
6 (quoting Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L.Ed.
7 867 (1872)).

8 The Court finds that no credible evidence has been produced
9 by Plaintiff that she encountered barriers inside the women's
10 restrooms during her visit to Store #2041. As a result,
11 Defendant's Motion for summary adjudication on this claim is
12 granted.

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

The Court grants Defendant's Motion for Summary Judgment on the following claims: 1) there is no accessible check stand; 2) the signage on the women's restroom door creates an accessibility barrier; and 3) the pressure required to open the women's restroom door creates an accessibility barrier. The Court denies Defendant's Motion for Summary Judgment on the following claims: 1) the ISA signage is improperly mounted on the entrance door; and 2) there is no signage identifying the accessible checkstand.

IT IS SO ORDERED.

DATED: May 19, 2006


MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE