Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

IOWA CIVIL RIGHTS COMMISSION	)	
	)	DIA No. 17ICRC001
v.	)	
	)	
MACHINE SHED LLC,	)	**PROPOSED DECISION**
Respondent.	)	

This case involves a complaint filed by Jerry Weiss with the Iowa Civil Rights Commission (the Commission) against Respondent Machine Shed LLC. In the complaint, Weiss alleges that Respondent discriminated against him on the basis of disability in the area of public accommodation. After an investigation, the Commission determined that probable cause existed with regard to Weiss's allegations. The Commission filed a Statement of Charges and transferred the matter to the Department of Inspections and Appeals for a contested case hearing.

Hearing in the matter was held on October 4, 2017. Assistant attorney general Katie Fiala represented the Commission. Attorneys John Fatino and Nicholas Gral represented Respondent. The following witnesses testified: Jerry Weiss; Bonnie Weiss; Debra Stewart; Emigdio Lopez-Sanders; Daniel Oliver; and Kirk Whalen. Commission Exhibits 1 through 30 and 32 through 44 were admitted as evidence. Respondent's Exhibits A through M, including J1 and J2, were admitted as evidence.

At hearing, arrangements were made to hold the record open until October 19, 2017 for the Commission to submit a post-hearing brief; until November 2, 2017 for Respondent to submit a post-hearing brief; and until November 9, 2017 for the Commission to submit a reply brief. The Commission timely submitted a post-hearing brief and reply brief and Respondent timely submitted a post-hearing brief.

Motions in Limine

Prior to hearing, Respondent submitted Motions in Limine Nos. I-III. Respondent's Motions in Limine were addressed at the start of hearing, with both parties offering argument. Rulings on the motions in limine were made at hearing and are summarized below.

Motion in Limine No. I: Respondent requested that the Commission be prevented from seeking requests for relief that are wholly unsupported by the facts or law. Specifically, Respondent cited the request in the Statement of Charges for Respondent to cease and desist from unfair or discriminatory practices, for Respondent to engage in anti-discrimination training, and for payment of any attorney fees to

Complainant. The Commission resisted Respondent's motion. Respondent's motion was denied as premature. The issue of relief is one that is properly considered at the conclusion of the evidence.

Motion in Limine No. II: Respondent requested exclusion of any testimony beyond the knowledge, skill, experience, training, or education of Emigdio Lopez-Sanders, a witness identified by the Commission as an expert in accessibility, design, and construction under the Fair Housing Act, Americans with Disabilities Act, and the Iowa Civil Rights Act. Respondent specifically identified concerns regarding testimony by Lopez-Sanders on engineering and structural matters and feasibility of modifications. The Commission asserted that it did not intend to elicit testimony from Lopez-Sanders on issues outside of his training and experience. Ruling on this motion in limine was deferred and Respondent was directed to make specific objections to testimony during the Commission's examination of Lopez-Sanders, at which time the specific objections would be ruled upon.

Motion in Limine No. III: Respondent requested exclusion of investigative reports of Debra Stewart and Lopez-Sanders as hearsay. Respondent argued that such records are not neutral facts, but partisan documents prepared to bolster the Commission's case. The Commission resisted Respondent's motion, but asserted that it did not intend to offer Stewart's report as evidence. Respondent's motion was denied as to Lopez-Sanders' report.

FINDINGS OF FACT

Jerry Weiss is a 69 year old man who uses a wheelchair for mobility as he is unable to walk or stand independently. Weiss is paralyzed from the chest down and has used a wheelchair for mobility for the last 25 years. The wheelchair that Weiss had at the time of the relevant events was a standard sized manual wheelchair, approximately two feet wide and 32 inches deep. (Weiss, Stewart testimony).

Respondent operates the Machine Shed restaurant in Urbandale, Iowa. The restaurant, located at 11151 Hickman Road, received a Certificate of Occupancy from the city of Urbandale in 1991, reflecting that the building is safe for the intended occupancy and the plans meet relevant codes and specifications. The total assessed value of the property on which the restaurant is located, including the land and the structure, was $1,860,000 in 2015. The total occupancy of the building is 774. (Lopez-Sanders, Oliver testimony; Exh. 28, 38, 39).

On August 5, 2015, Weiss and his wife, Bonnie Weiss, dined at Respondent's restaurant. After eating, Weiss went to use Respondent's men's restroom facility. Weiss had some trouble maneuvering his wheelchair into the main area of the restroom due to a floor dryer and a trash can positioned near the door on the floor. With the assistance of a teenage patron who was in the restroom, Weiss was able to move these items enough so

that he could enter the restroom. When Weiss attempted to get into the designated handicapped restroom stall, he was not able to get his wheelchair in far enough to be able to close the door behind him. Likewise, Weiss was unable to turn his wheelchair around once in the stall. The configuration of the stall was such that Weiss was also unable to back his chair into the stall and do a sideways transfer. In order to get onto the toilet, Weiss had to grab the toilet seat with his left hand, slide onto the front of his wheelchair, hold onto the grab bar with his right hand, and scoot onto the stool. Weiss had to reverse this process in order to get back into his chair. Throughout this process, the door to the stall remained open and multiple people who were in the restroom were able to view Weiss in a state of undress and using the toilet. (Weiss testimony).

After Weiss exited the restroom, he approached an employee of Respondent who was standing by some display racks. Weiss told the employee that the restroom was not accessible. The employee responded, "OK, fine." Weiss was angry that the employee handled his complaint in what he perceived as a dismissive manner. Weiss does not know the name or job title of this employee. (Weiss testimony).

Weiss subsequently wrote a letter to Respondent's general manager dated August 10, 2015 explaining what had happened. Weiss described the situation as follows in his letter:

> [T]he door to the men's restroom swings into the room, going from left to right. Upon entering the room, one needs to make a sharp right turn (around the opened door) to get into the main part of the room. I was unable to easily make that turn because a floor dryer and two trash cans were along the wall in front of the door and there was not enough space for me to turn my wheelchair. I had to take the footrests off of my chair and place them in my lap in order to have enough clearance to make the turn. The handicapped accessible stall had a door wide enough for my chair to enter but the stall was not deep enough for me to enter the stall and close the door behind me; nor was there space beside the stool for me to back into the stall and then close the door. A baby changing device hung on the left wall and it also prevented me from getting turned around in the stall. The only way I could get close enough to the stool to reach the grab bars was to pull the chair up to the front of the stool and in doing so, it eliminated any possibility of using the bars to transfer on to the stool. In addition, I would have been forced to slide forward on to the stool rather than turning around and sitting on the stool in the normal fashion. In short, in order to use the facility, I had to lower my pants, place one hand on the toilet seat and one hand on the arm of my chair to transfer. All this while my wheelchair was only part way into the stall and the door remained wide open. I then had to wiggle around of the stool seat with my pants down; which was a physical challenge due to the lack of adequate space. Everyone using the vanity had a clear view of my predicament,

> including a couple of men and three boys between the ages of ten and fifteen. Once I was finished, I had to repeat the performance in order to get back into my wheelchair; this time with a new audience standing at the vanity sinks.

(Exh. 1).

After Weiss did not hear back from Respondent regarding the situation, he filed a complaint with the Commission on August 18, 2015. (Weiss testimony; Exh. 1).

Restroom Dimensions and Specifications in August 2015

In August 2015, on the date of Weiss's visit to the restaurant, the men's restroom contained three stalls and two urinals. Of the three stalls, one was larger than the other two and was designated for use by persons with disabilities. This is the stall that Weiss used on August 5. (Lopez-Sanders, Weiss testimony).

Emigdio Lopez-Sanders, an employee of the Commission who specializes in accessibility and design and construction under the ADA, the Fair Housing Act, and the Iowa Civil Rights Act, conducted an on-site visit to Respondent's restaurant on June 13, 2016. Lopez-Sanders examined the men's restroom and took measurements related to its accessibility to persons with disabilities. Lopez-Sanders authored a memo in conjunction with his visit in which he outlined Respondent's compliance with the applicable standards from the 1991 Americans with Disabilities Act Accessibility Guidelines (ADAAG).[1] Lopez-Sanders noted a number of areas in which the men's restroom met the guidelines outlined in the ADAAG, including the clear opening width of the entrance doorway, the clear width of the path from the entrance door of the restroom to the bathroom stall designated as reserved for persons with disabilities, and the clear opening width of the stall door. (Exh. 26, pp. 1-4).

Lopez-Sanders also noted that the men's restroom was not in compliance with the guidelines outlined in the ADAAG with regard to two items: 1) the wheelchair turning space needed to make a 180 degree turn; and 2) the clear floor space required to accommodate a single, stationary wheelchair and occupant. The ADAAG specifies that clear floor space of 60 inches diameter or a T-shaped space with each leg of the T measuring at least 60 inches by 36 inches is necessary for a wheelchair to make a 180 degree turn. A clear space of 30 by 48 inches is needed to accommodate a single, stationary wheelchair and occupant. In the stall in the men's restroom reserved for persons with disabilities, the floor width is 44 inches. The length of the stall from the door to the rear wall is 59 inches; this includes, however, the floor space that the toilet

---

1 *See* 28 C.F.R. Part 36, Appendix A. These guidelines, published July 26, 1991, were to be applied during design, construction, and alteration of buildings and facilities to the extent required by the ADA. These standards were in effect for new construction and alterations until March 14, 2012, when the 2010 ADA Standards for Accessible Design became effective.

occupies as well as clear floor space. The floor from the front of the toilet to the stall door measures 31 5/8 inches. The clear floor space in front of the toilet, then, measures 44 inches wide by 31 5/8 inches long. (Exh. 23-24, Exh. 26, pp. 6, 9, 12; Lopez-Sanders testimony).

Lopez-Sanders also observed that a changing table mounted on the side wall of the stall reserved for persons with disabilities extended approximately four inches out from the wall. (Exh. 26, p. 5; Lopez-Sanders testimony).

Lopez-Sanders testified regarding several possible improvements he believed could address the situation of wheelchair access in the men's restroom: 1) extending the stall vertically at least 10 inches toward the restroom sinks; 2) removing the partition between the disability access stall and the stall next door to make one large stall with a sink inside the stall; 3) extending the permanent wall of the restroom so as to enlarge the restroom as a whole; 4) removing the changing table and locating it elsewhere in the restroom; 5) posting signage indicating that the restroom is not accessible to persons in wheelchairs. (Lopez-Sanders testimony).

Daniel Oliver, senior architect for Heart of America, the parent company of Respondent, examined the men's restroom at the restaurant to determine whether it could be retrofitted to allow access for persons with disabilities under the ADA. Oliver determined that elongating the restroom vertically would not allow for the clear width required to access the stall. Oliver also determined that removing the partition between the disability access stall and the stall next to it would not be feasible as this would not comply with the Uniform Plumbing Code adopted by the city of Urbandale and later statewide. The Uniform Plumbing Code uses a mathematical formula to determine the number of fixtures required based on the occupancy of the building. Under the local requirements, taking one stool out would leave the restroom one fixture short. The wall adjacent to the disability access stall is a load bearing wall, therefore Oliver determined it would be technically infeasible to move this wall. To do so would require jackhammering the floor, reinstalling underground plumbing, and providing temporary support for the roof. Oliver determined that repositioning of the load bearing wall would not be possible without great expense or damage to the structure. (Oliver testimony).

Subsequent Restroom Renovations

On September 25, 2015, Respondent filed an application for a building permit with the city of Urbandale to complete a "family restroom interior addition." A certificate of occupancy was issued related to the permit on November 4, 2015. Respondent added a unisex restroom that allows for wheelchair access. A unisex restroom is one way that a public accommodation can comply with the ADA and provide an accessible stall. (Exh. H; Lopez-Sanders testimony).

In 2014, press releases issued by Respondent's marketing department touted a "remodel" of the restaurant's kitchen, dining room, bar area, and gift shop. When the restaurant actually closed in 2014, however, the closure was related to a plumbing issue in the kitchen in which emergency repairs had to be made. No additional remodeling was done. The remodel that the press release announced was actually done in 2015 at the same time that the accessible restroom was added. (Oliver testimony; Exh. 29, 30).

In preparation for the remodel, Respondent looked at the stall in the men's restroom designated for persons with disabilities and concluded that it did not meet the current ADA specifications. As discussed above, Respondent rejected as technically infeasible moving the load bearing walls in the restroom to make the stall larger. With regard to moving the partitions for the disability access stall, Respondent determined that making one stall out of two would not be possible because it would bring the restaurant below the number of fixtures required under the Uniform Plumbing Code. With regard to elongating the stall vertically, Respondent determined that this would not allow the clear width required to access the stall. (Oliver testimony).

CONCLUSIONS OF LAW

The Iowa Civil Rights Act (ICRA) provides:

> It shall be an unfair or discriminatory practice for any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof:
>
> a. To refuse or deny to any person because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability the accommodations, advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any person because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in the furnishing of such accommodations, advantages, facilities, services, or privileges.[2]

A public accommodation includes each and every place or establishment that offers services, facilities, or goods for a fee or charge to nonmembers.[3] The parties do not dispute that Respondent is a public accommodation under the ICRA. Likewise, there is no dispute that Weiss is a person with a disability.

As an initial matter, the parties disagree regarding the appropriate analytical model for evaluating this claim of discrimination. The Commission argues that it is appropriate to look to Title III of the Americans with Disabilities Act (ADA) for guidance in evaluating

2 Iowa Code § 216.7(1).
3 Iowa Code § 216.2(13)(a).

public accommodation claims that relate to access for persons with disabilities under the ICRA. Respondent argues that, since the Commission does not have authority to enforce Title III of the ADA, Title III and the case law interpreting it are inapplicable to this action. Respondent further notes that the ICRA was passed in 1965, and amended to include disability as a protected class in 1972, while the ADA was passed in 1990. Respondent argues that the fact that the Iowa legislature has not amended the ICRA to adopt or incorporate the federal regulatory scheme implemented with the passage of the ADA signals that the legislature did not intend for the ICRA to be informed by the ADA or its implementing regulations.

A. *Race-Based Public Accommodation Claims: Prima Facie Case*

Respondent argues that the appropriate framework for evaluating the public accommodation claim at issue here is the one set forth in *Kirt v. Fashion Bug #3253, Inc.* In that case, the court held that a complainant alleging discrimination in public accommodation must show that: 1) s/he is a member of a protected class; 2) s/he sought to enjoy the accommodations, advantages, facilities, services or privileges of a public accommodation; 3) s/he did not enjoy the accommodations, advantages, facilities, services, or privileges of the public accommodation in that (a) s/he was refused or denied the accommodations, advantages, facilities, services, or privileges of the public accommodation under circumstances giving rise to an inference of discrimination, or (b) s/he was allowed to use the accommodations, advantages, facilities, services, or privileges of the public accommodation, but was otherwise discriminated against in the furnishing of those accommodations, advantages, facilities, services, or privileges by being subjected to markedly hostile conduct that a reasonable person would find objectively unreasonable under circumstances giving rise to an inference of discrimination. Markedly hostile conduct is conduct that is: 1) so profoundly contrary to the manifest financial interests of the merchant and/or her employees; 2) so far outside of widely accepted business norms; and 3) so arbitrary on its face that the conduct supports a rational inference of discrimination.[4]

The problem with using the prima facie case articulated in *Kirt* in this case, however, is that it was extrapolated from cases interpreting 42 U.S.C. § 1981, which deals with discrimination on the basis of race in making and enforcing contracts.[5] In those cases, the relevant inquiry relates to whether the denial or treatment experienced by the complainant was as a result of race. Since a race-based motivation must often be proven by indirect evidence, the prima facie case is designed to tease out race-based motivations in denial of public accommodation. This case is, at its core, about restroom access for a person with disabilities and is based not on any particular conduct by any restaurant employee or manager at the time of the event, but rather upon the design and

4 479 F.Supp.2d 938, 963 (N.D. Iowa 2007).
5 *See Kirt*, 479 F.Supp.2d at 961; *see also Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694 (D.Md. 2000); *Williams v. Staples, Inc.*, 372 F.3d 662, 668 (4th Cir. 2004).

configuration of the restroom and alleged obstacles to its equal use by a person with a disability. The facts articulated by Weiss in his complaint and by the Commission in the statement of charges relate to the configuration of the restroom and Weiss's inability to use it in the same fashion as individuals not in a wheelchair. Trying to shoehorn this case into the prima facie case articulated for cases of race discrimination in public accommodation is an inexact way of getting at whether the type of disability discrimination Weiss alleges occurred.

B. *Federal Guidance in Interpreting the ICRA*

In a 1997 case, *Bearshield v. John Morrell & Co.,* the Iowa Supreme Court explicitly endorsed using the ADA and its implementing regulations to develop standards under the ICRA:

> Given the common purposes of the ADA and the ICRA's prohibition of disability discrimination, as well as the similarity in the terminology of these statutes, we will look to the ADA and underlying federal regulations in developing standards under the ICRA for disability discrimination claims.[6]

Many Iowa cases since that time involving claims under the ICRA have endorsed looking to federal statutes, among them the ADA, to establish a framework for analyzing ICRA claims.[7] In *Goodpaster v. Schwan's Home Service, Inc.*, the Iowa Supreme Court extensively examined the ADA – specifically its 2008 amendments and federal regulations and agency rules promulgated to implement the amendments – in order to determine whether multiple sclerosis was a disability in a claim brought under the ICRA.[8] In so doing, the Court noted:

> Federal law does not necessarily control our interpretation of a state statute. Iowa employers must follow federal law, but it is axiomatic that an amendment to a federal statute does not simultaneously and automatically amend a parallel or even identical Iowa statute. Just as "we

---

6 570 N.W.2d 915, 918 (Iowa 1997).
7 *See, e.g.*, *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 7 (Iowa 2009) (looking to case law interpreting the federal Pregnancy Discrimination Act in determining whether a person disabled by pregnancy includes a woman who has recently given birth or taken maternity leave); *Fuller v. Iowa Dep't of Human Servs.*, 576 N.W.2d 324, 329 (Iowa 1998) ("In considering a disability discrimination claim brought under Iowa Code chapter 216, we look to the ADA and cases interpreting its language. We also consider the underlying federal regulations established by the Equal Employment Opportunity Commission, the agency responsible for enforcing the ADA. Cases interpreting the Rehabilitation Act also remain instructive, since the ADA's definition of 'disability' is substantially the same as that term is defined in the Rehabilitation Act.") (citations omitted).
8 849 N.W.2d 1, 8-10 (Iowa 2014).

> are not bound by federal cases construing a federal statute when we are called upon to construe our own Civil Rights Act," *Loras Coll. v. Iowa Civil Rights Comm'n*, 285 N.W.2d 143, 147 (Iowa 1979), we are not bound by the language of federal statutes when interpreting language of the ICRA, *cf. DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 7 (Iowa 2009) ("[W]e must be mindful not to substitute 'the language of the federal statutes for the clear words of the [ICRA].'" (*quoting Hulme v. Barrett*, 449 N.W.2d 629, 531 (Iowa 1989))).
>
> Notwithstanding, we recognize the Iowa Act "only pronounced a general proscription against discrimination and we have looked to the corresponding federal statutes to help establish the framework to analyze claims and otherwise apply our statute. *Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003).[9]

C. *Title III of the ADA*

Title III of the ADA, 42 U.S.C. § 12181 *et seq.*, prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[10] Discrimination includes:

> (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable[.][11]

Discrimination also includes, for facilities first occupied later than 30 months after July 26, 1990, failure to design and construct in a manner that is readily accessible to and usable by individuals with disabilities. Additionally, where a pre-existing facility is altered in a manner that affects or could affect the usability of the facility, discrimination includes a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.[12]

The general proscription against discrimination articulated in Title III of the ADA is very similar to the language in the ICRA; the ICRA likewise prohibits discrimination on the basis of disability "in the furnishing of [] accommodations, advantages, facilities, services, or privileges." The Commission's regulations provide that discrimination

---

9 *Id.* at 9.
10 42 U.S.C. § 12182(a).
11 42 U.S.C. § 12182(b)(2)(A).
12 42 U.S.C. § 12183(a).

includes providing any service or benefit that is different, or provided in a different manner, from that provided to other members of the general public and restricting an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit provided to other members of the general public.[13] Under *Bearshield*, the common purposes and similarity in terminology of the ICRA and ADA prohibitions of disability discrimination in public accommodation permit consideration of the ADA and its implementing regulations in interpreting cases under the ICRA.

Respondent's restaurant was first occupied in 1991, which was prior to 1993, the year in which the new construction provisions of the ADA became applicable. Consequently, the applicable analysis under Title III interpretive standards involves determining: 1) whether there was an architectural barrier that Respondent failed to remove; and 2) whether such removal was readily achievable.

With regard to the first question, there is no dispute that the men's restroom stall designated for use with individuals with disabilities at Respondent's restaurant was not adequate to permit an adult in a standard sized manual wheelchair to enter the stall and close the door. Likewise, the dimensions did not permit an adult in a standard sized wheelchair to turn the wheelchair once in the stall. Respondent has not argued that an architectural barrier did not exist under an analysis applying the standards of Title III.

Title III itself is silent with regard to which party bears the burden of proving that removal of an architectural barrier is readily achievable. The parties agree that the burden shifting framework adopted by the 10th Circuit Court of Appeals in *Colorado Cross Disability Coal. v. Hermanson Fam. Ltd. P'ship I* is the appropriate standard under Title III.[14] In that case, the Court concluded that the complaining party must initially produce evidence tending to show that the suggested method of barrier removal is readily achievable under the circumstances. If such evidence is produced, the respondent then bears the ultimate burden of persuasion that barrier removal is not readily achievable.[15]

Readily achievable is defined under the ADA as easily accomplishable and able to be carried out without much difficulty or expense. Factors to be considered in the analysis include:

> (A) the nature and cost of the action needed under this chapter;
> (B) the overall financial resources of the facility or facilities involved in the

---

13 161 Iowa Administrative Code (IAC) 10.2(1), (3).
14 264 F.3d 999, 1005-06 (10th Cir. 2001) (summarizing district court cases examining the issue and concluding that a defendant bears the ultimate burden of persuasion regarding the affirmative defense that a suggested method of barrier removal is not readily achievable); *see also Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1274 (11th Cir. 2006).
15 *Colorado Cross*, 264 F.3d 1002-03.

> action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
> (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.[16]

The Commission posits five alternatives that it argues are readily achievable to remove the architectural barrier: 1) providing a clear pathway by removing trash cans and floor fans; 2) removing the changing table in the stall; 3) placing signage informing patrons that the restroom is not accessible to persons in a wheelchair; 4) moving the partitions in the disability access stall to make a larger stall; and 5) moving the permanent walls of the restroom in order to make the stall larger.

Proposal #1: Providing a clear pathway by removing trash cans and floor fans

The evidence does not reflect that Weiss was prevented from entering the restroom due to the placement of movable objects like trash cans and floor fans. While Weiss testified that these objects made his entry into the general restroom space more difficult, he was able to enter. Consequently, these items do not constitute an architectural barrier. Additionally, there is no evidence that repositioning the trash cans and floor fans would have made any difference in Weiss's ability to enter the restroom stall and access the toilet, which is at the heart of the complaint.

Proposal #2: Removal of changing table

Weiss credibly testified at hearing that the changing table placed in the restroom stall he attempted to enter was at the approximate height of his wheelchair arms, making turning in the stall difficult. It is clear, however, based upon the dimensions and specifications that were admitted into evidence that the floor space in the stall Weiss used would not have permitted him to turn his wheelchair even if the changing table had been removed. Additionally, removal of the changing table would have had no impact on Weiss's inability to fully enter the stall and close the door. Consequently, the removal of the changing table does not constitute a readily achievable manner of dealing with the accessibility of the stall to a person in a wheelchair.

16 42 U.S.C. § 12181(9).

Proposal #3: Posting signage

The Commission argues that signage outside the restroom notifying Weiss of "the room's shortcomings" would have eliminated the problem Weiss experienced. The Commission asserts that, had signage existed, Weiss could have had a member of the restaurant's staff temporarily close the restroom so he could use the toilet in private. The Commission concedes that this is "not an ideal situation," but it argues that it would have eliminated privacy concerns and a large part of the humiliation that Weiss experienced.

The Commission has cited no authority for the proposition that signage advising individuals with disabilities of architectural barriers is a feasible method for removing the architectural barrier. Indeed, the federal regulations that list examples of steps a public accommodation may take to remove architectural barriers do not include any options that merely serve to highlight the barrier, rather than removing it.[17] As discussed above with regard to the Commission's proposal regarding removal of the changing table, the primary issue impeding Weiss's access to the restroom stall was the floor space available in the stall. Having someone stand at the door so that people could not see Weiss using the restroom does not rectify the issues relating to his inability to turn his wheelchair in the stall and the problems that created with regard to how he had to access the toilet. Additionally, this proposal does not provide the same access to Weiss as is provided to individuals without disabilities. Under these circumstances, the Commission's proposal to remove the barrier with signage is not a readily achievable method of removing the barrier.

Proposal #4: Changing partition configuration

At hearing, Lopez-Sanders testified to two proposals related to changing the configuration of the partitions in the men's restroom. First, he testified that the designated stall could be extended vertically at least 10 inches to create more clear floor space in front of the stall. Second, he testified that the partition between the disability access stall and the stall next to it could be removed to create a single stall. Respondent argues that the Commission has not set forth any "specific design" that accomplishes removal of the barrier. Further, Respondent argues that the Commission's suggestions regarding moving the partition were negated by the testimony of Oliver.

As an initial matter, the ADA's implementing regulations provide that one example of a step to remove an architectural barrier is rearranging toilet partitions to increase maneuvering space.[18] The regulation does not indicate, however, that this step will always be readily achievable; that analysis must be conducted on a case-by-case basis.[19]

---

17 *See* 28 C.F.R. § 36.304(b).
18 28 C.F.R. § 36.304(b)(13).
19 *See Colorado Cross*, 264 F.3d at 1009.

With regard to the idea of extending the stall partition vertically to include an additional 10 inches of floor space, the Commission did not present any information about how this would impact the accessibility of the stall as a whole. The Commission did not present as evidence any sketch or schematic of the proposed design that shows how this proposal fits within the fixed parameters of the restroom's footprint. While there is a blueprint of the restroom from the restaurant's original construction in evidence, there was also credible evidence presented that the actual measurements of the restroom do not comport precisely with the blueprint. Without more, it is impossible to know how much space would remain between the stall partition and the sink if the Commission's proposal were implemented. Likewise, without more detailed measurements it is impossible to know whether there would be adequate space for the restroom door, which opens outward, to fully open if the stall partition were extended outward toward the sink as proposed.

The Commission likewise did not present any evidence regarding the cost of this proposal or the overall financial resources of the facility. Lopez-Sanders merely testified that he thought the situation could be improved by moving the partition vertically forward at least 10 inches. Lopez-Sanders acknowledged that his investigation did not include any inquiry to Respondent about why the ideas he proposed, including this one, were not implemented.

A complainant making a claim under Title III must articulate, at a minimum, a "plausible proposal for barrier removal, 'the costs of which, facially, do not clearly exceed its benefits.'"[20] In an 11th Circuit case where plaintiffs were arguing that modification of wheelchair seating at a historic theatre was readily achievable, the Court found that the plaintiffs failed to show that proposed modifications were "inexpensive" where they not only did not produce a financial expert to link the estimated costs of their proposals with the theater's ability to pay for them, but "failed to take even the rudimentary steps of formulating what those estimated costs might be or providing any evidence of [defendant's] financial position and ability to pay those costs."[21] The Court found inadequate the summary opinion of an ADA expert who stated that some of the modifications would be "low-cost" or "inexpensive," while others would be "more expensive."[22] While the Commission's proposal to vertically extend the stall is not technically complex, the Commission is nevertheless expected under the Title III readily achievable analysis to provide some evidence of the cost of the proposal. Such evidence is absent here.

---

20 *Roberts v. Royal Atlantic Corporation*, 542 F.3d 363, 373 (2d Cir. 2008) (*citing Borkowski v. Valley Central School District*, 63 F.3d 131, 138 (2d Cir. 1995)).
21 *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1275 (11th Cir. 2006).
22 *Id.*

Also important in this analysis is the fact that extending the partition vertically would only address one part of the accessibility issue that Weiss encountered in Respondent's restroom. The vertical extension, even if plausible within the fixed parameters of the restroom's footprint, would not address the issue of Weiss's inability to turn the wheelchair once in the stall. A 30x48 inch floor space is sufficient to accommodate a wheelchair and occupant, but not sufficient to allow for the wheelchair to turn. Even if Weiss had been able to fully enter the stall and close the door, he would still have been unable to turn his chair so that he could effectively transfer to the toilet using the grab bars and without having to hold onto the toilet seat. Under these circumstances, the Commission has not met its initial burden of producing evidence showing that either the proposal removes the barrier or that the proposal is readily achievable.

Second, the Commission proposed eliminating the partition connecting the disability access stall with the adjacent stall to create one larger stall that would allow a person in a wheelchair to enter the stall, close the door, and turn the wheelchair to effectuate a transfer to the toilet. The Commission did not present specific measurements to reflect what the dimensions of the proposed stall would be. The architectural blueprint from the original construction that is in evidence contains the only information about the dimensions of the adjacent stall and it was shown, as noted above, to be inaccurate as compared with the actual restroom dimensions. Additionally, as with the first proposal for moving the partition, the Commission did not produce any evidence of the cost of this proposal. This proposal, in addition to requiring the partition to be removed, requires removal of a toilet and possible addition of a sink in the new stall. Under these circumstances, the Commission has not met its burden of producing evidence that removing the barrier in this fashion is readily achievable.

Even if the Commission had produced sufficient evidence to meet its burden, Respondent presented undisputed evidence that modifying the restroom by eliminating one toilet would result in the restroom falling out of compliance with the Uniform Plumbing Code adopted by the city of Urbandale as it relates to the number of fixtures required. This would meet Respondent's burden of proving that the suggested method of removing the barrier is not readily achievable.

Proposal #5: Moving permanent restroom walls

The undisputed evidence in this case is that the permanent walls adjacent to the disability access stall in the men's restroom are load bearing walls that cannot be moved without significant time and expense. The Commission did not present any specific plan to move a particular wall of the restroom; rather, the Commission simply identified this as an option without further elaboration. The Commission presented no evidence of the cost of moving permanent, load bearing walls to enlarge the disability access stall. This type of non-specific proposal, without any cost analysis, fails to meet the Commission's

burden of producing evidence that the proposed method of removing the barrier is readily achievable.[23]

D. *Private Right of Action for Damages & Mootness*

Finally, Respondent makes two related arguments: 1) that the ICRA does not provide for a private right of action for damages for a claim analyzed under the Title III standards; and 2) that this action is moot because Respondent has subsequently constructed a wheelchair accessible restroom. Respondent asserts that because it has already provided a wheelchair accessible restroom, the Commission cannot maintain its public accommodation claim as there is no private right of action for damages for this type of claim.

Respondent is correct that Title III of the ADA does not provide a private right of action for damages; rather, it provides a private right of action for injunctive relief.[24] The ICRA, however, provides for a suite of remedies that may be available when a finding is made that a respondent has engaged in a discriminatory or unfair practice. While admission of an individual to a public accommodation is one such remedy, another remedy specifically allowed under the ICRA is payment to the complainant for damages for an injury caused by the discriminatory or unfair practice.[25] In at least one other state, individual damages for violation of the state's civil rights act have been allowed even where a defendant has removed barriers to access and thereby mooted the complainant's claim for injunctive relief under Title III of the ADA.[26]

The ICRA does provide for damages for an individual who has been subjected to a discriminatory or unfair practice, including exclusion from a public accommodation. Respondent's argument that the claim is moot based on subsequent construction of a wheelchair accessible restroom is not persuasive. Even where the alleged barrier has been subsequently removed, the ICRA permits a claim for damages on the basis of a violation, if one is proven.

ORDER

The Commission has not proven that Respondent committed an unfair or discriminatory practice in the area of public accommodation. All further proceedings are dismissed.

---

23 *See Gathright-Dietrich*, 452 F.3d at 1274-75.
24 *See* 42 U.S.C. § 12188(a)(1); *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000).
25 Iowa Code § 216.15(9)(a) (3), (8).
26 *See Johnson v. Wayside Property, Inc.*, 41 F.Supp.3d 973, 980-81 (E.D. Cal 2014).

Dated this 9th day of March, 2018.

Laura E. Lockard
Administrative Law Judge

cc: Katie Fiala, Assistant Attorney General
John Fatino, Attorney for Respondent
Eric Fisk, Attorney for Respondent

NOTICE

Any adversely affected party may appeal this proposed decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.[27] The appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. In addition, the appeal shall specify:

a. The parties initiating the appeal;
b. The proposed decision or order appealed from;
c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
d. The relief sought;
e. The grounds for relief.[28]

The Commission may also initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of the decision.[29]

27 161 IAC 4.23(1).
28 161 IAC 4.23(3).
29 161 IAC 4.23(2).