

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-K-1923

CARRIE ANN LUCAS, DEBBIE LANE, and JULIE REISKIN, for themselves and all others
similarly situated,

Plaintiffs,

v.

KMART CORPORATION,

Defendant.

AMENDED CLASS ACTION COMPLAINT

Plaintiffs Carrie Ann Lucas, Debbie L. Lane and Julie Reiskin, by and through their attorneys, Fox & Robertson, P.C., and Kevin Williams, hereby bring this Amended Class Action Complaint against Defendant Kmart Corporation (“Kmart”) for violation of the Americans with Disabilities Act, 42 U.S.C. § 12182 et seq. (“ADA”) and the Colorado Anti-Discrimination Act, C.R.S. § 24-34-601 et seq. (“CADA”).

INTRODUCTION

1. On July 26, 1990, President Bush signed the ADA, thereby establishing the most important civil rights law for persons with disabilities in our country’s history. The ADA was effective as to Kmart on January 26, 1992. One of the principal goals of the ADA was the integration of people with disabilities into our economic and social life. Kmart’s actions frustrate this purpose and continue to impede the important goals of the ADA.

2. Over nine years later – and despite extensive publicity – Kmart continues to discriminate against persons who use wheelchairs. Among other violations, Kmart provides insufficient parking for persons with disabilities, has counters that are too high for persons who use

wheelchairs, fails to provide accessible check-out aisles to persons who use wheelchairs, fails to provide accessible fitting rooms and blocks access to merchandise aisles for persons who use wheelchairs. Kmart has failed to remedy this discrimination despite being told about these problems on numerous occasions by Plaintiff Carrie Ann Lucas.

JURISDICTION

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 and pendent jurisdiction over the state law claims alleged herein.
2. Venue is proper within this District pursuant to 28 U.S.C. § 1391.

PARTIES

1. Plaintiff Carrie Ann Lucas is and was at all times material hereto a resident of Colorado. As a result of a bone infection and bone tumor and related treatment, Ms. Lucas is substantially impaired in several major life activities and requires a wheelchair for mobility. Ms. Lucas has shopped at Kmart stores in various locations in Colorado and other states and plans to continue to do so in the near and distant future.

2. Plaintiff Debbie L. Lane is and was at all times material hereto a resident of Colorado. As a result of epilepsy and spastic paraparesis, Ms. Lane is substantially impaired in several major life activities and requires a power wheelchair for mobility. Ms. Lane has shopped at Kmart stores in various locations in Colorado and plans to continue to do so in the near and distant future.

3. Plaintiff Julie Reiskin is and was at all times material hereto a resident of Colorado. As a result of multiple sclerosis, Ms. Reiskin is substantially impaired in several major life activities and requires a power wheelchair for mobility. Ms. Reiskin has shopped at Kmart stores in various locations in Colorado and plans to continue to do so in the near and distant future.

4. Defendant Kmart Corporation is a corporation incorporated in Michigan with its principal place of business in Troy, Michigan. Kmart is registered to do business in the state of Colorado.

Kmart owns and operates over 2,000 large retail stores selling general merchandise throughout the United States. In 1999, Kmart had almost \$36 billion in sales.

CLASS ACTION ALLEGATIONS

1. Plaintiffs seek to maintain this action as a class action under Rule 23(b)(1) and/or Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class consists of all persons with disabilities who use wheelchairs or scooters for mobility who have been denied, or are currently being denied, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any public accommodation that was designed or constructed by or is owned, operated, or leased by or leased to Kmart anywhere in the United States.
2. The class identified in Paragraph 9 is believed to consist of well over 1,000 members, and joinder of all of such members in this lawsuit is impracticable.
3. There are numerous questions of law and fact common to the class including, though not limited to, the following:
 - a. Whether Kmart stores are “public accommodations” under the ADA;
 - b. Whether Kmart stores deny the full and equal enjoyment of their goods, services, facilities, privileges, advantages, or accommodations to people who use wheelchairs, in violation of the ADA;
 - c. Whether Kmart is required by the ADA to maintain access for persons who use wheelchairs to its displayed merchandise;
 - d. Whether Kmart is required to maintain access for persons who use wheelchairs to accessible restrooms and dressing rooms;
 - e. Whether Kmart is required by the ADA to maintain open, accessible, check-out aisles during store hours;

f. Whether it would be readily achievable, given Kmart's resources, to bring those Kmart stores built prior to the effective date of the ADA into compliance with the ADA; and

g. What measures are legally required to bring Kmart stores into compliance with the ADA.

4. Plaintiffs' claims are typical of the claims of the members of the class. They – like other members of the class – use wheelchairs for mobility and claim Kmart has violated the ADA by failing to make its stores accessible to people who use wheelchairs.

5. Plaintiffs will fairly and adequately protect the interests of the class. They are all familiar with the requirements of the ADA and committed to ensuring access for people who use wheelchairs through enforcement of its provisions. None of the Plaintiffs has any interest that conflicts in any way with the interests of the class.

6. In addition, Plaintiffs have retained counsel with extensive experience in litigation, including class action litigation. Plaintiffs' counsel have been found by this Court on two occasions to be qualified to represent a class in bringing claims under the ADA. Two of Plaintiffs' counsel, Timothy Fox and Kevin Williams, are thoroughly familiar with issues concerning people who use wheelchairs because both are tetraplegics and both have used wheelchairs for more than 13 years.

7. This action may be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(b)(1) because separate actions against Kmart for its violations of the ADA would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Kmart.

8. This action may be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) because Kmart's violations of the ADA – including but not limited to inaccessible aisles, insufficient parking, insufficient accessible check-out aisles and inaccessible

changing rooms – are applicable to all members of the class. Therefore, an injunction requiring compliance with the ADA is appropriate. Declaratory and injunctive relief is the only relief sought on behalf of the class.

FACTS

1. Plaintiff Carrie Lucas often shops at Kmart stores in Colorado and elsewhere. Her experiences shopping at Kmart stores include but are not limited to those described below.
2. In November or December of 1996, Plaintiff Lucas went to Kmart store number 4131 located at 200 W. Belleview Avenue in Englewood, Colorado (“the 200 W. Belleview Kmart”) to shop. At that time, Plaintiff’s disability had not progressed to the point where she required a wheelchair; rather, at that time, she used crutches to ambulate.
3. When she arrived at the 200 W. Belleview Kmart, she was unable to find any accessible parking. It was snowing at that time. Because she had no choice, Ms. Lucas parked in the fire lane in order to be able to leave her car and access the store.
4. During that visit, Ms. Lucas complained to the manager on duty about the parking situation. The manager on duty told Ms. Lucas that she would relay her concerns to the manager.
5. Ms. Lucas returned to the 200 W. Belleview Kmart several months later and discovered that the problem had not been remedied and that, in fact, only four spaces were designated for parking for persons with disabilities in a parking lot of over 400 spaces. The spaces that were so designated were not the correct size. A parking lot of this size should have at least nine accessible spaces with at least one van-accessible space of the dimensions required by the Americans with Disabilities Act Accessibility Guidelines (“ADAAG”).
6. During this second visit, Ms. Lucas wrote a note to the manager, Rick Mercurio and asked the Kmart employees at the customer service counter to relay the message to him. The employees stated they would do so.

7. Ms. Lucas spoke with Mr. Mercurio soon thereafter. She explained the problem with the parking spaces and Mr. Mercurio said he would look into it. A few weeks later Ms. Lucas received a letter from Mr. Mercurio stating that Kmart was looking into the problem and would come into compliance. She heard nothing further from Mr. Mercurio or Kmart until she contacted the former over a year later in the spring of 1998.

8. Sometime in the spring of 1998, Ms. Lucas again went to the 200 W. Belleview Kmart. By this time, Ms. Lucas's disability had progressed to the point where she was using a manual wheelchair for mobility. Ms. Lucas attempted to park but was unable to find an accessible parking space. As a result, because she had no choice, she parked in the fire lane in order to be able to exit her vehicle. When she went into the store, she asked to speak with Mr. Mercurio but was told that he was not in the store at the time. Although she had gone to the store to assess the parking situation and contact Mr. Mercurio, she was interested in doing some shopping while she was there. However, there was a great deal of merchandise in the aisles, making shopping difficult. As such, she left without buying anything.

9. Ms. Lucas called Mr. Mercurio after this visit to inquire concerning the parking situation. Mr. Mercurio stated that he believed Kmart had a sufficient number of spaces for the lot.

10. Following this conversation, Ms. Lucas filed a complaint with the Department of Justice ("DOJ"). In or about July of 1998, Ms. Lucas received word from the DOJ that her complaint was being referred to mediation. In October of 1998, she was contacted by Jinu Evan of the Key Bridge foundation. Ms. Evan stated that she had spoken with Kmart and that she did not think the issue would need to go to mediation because Kmart appeared to be willing to remedy the problem.

11. Several weeks later, Ms. Evan contacted Ms. Lucas to report that Kmart claimed to have remedied the problem.

12. On or about November 18, 1998, Ms. Lucas went to the 200 W. Belleview Kmart to ascertain whether the problem had been remedied. It had not: while the proper number of spaces were designated for use by persons with disabilities, very few of them were of the required dimensions. For example, most did not have any access aisles – necessary for people who use wheelchairs or have other mobility impairments to get out of their cars – and none had a van-accessible aisle. In addition, some of the spaces did not have correct signage.

13. Ms. Lucas called Ms. Evan and stated that the parking situation at the 200 W. Belleview Kmart was still out of compliance with the ADA and ADAAG.

14. In approximately late November, 1998, Ms. Evan contacted Ms. Lucas and told her that Kmart did not want to mediate, so the Key Bridge Foundation would be sending the complaint back to the DOJ.

15. On or about November 18, 1998, Ms. Lucas shopped at Kmart store number 7303 at 363 S. Broadway in Denver, Colorado (“the 363 S. Broadway Kmart”). When she arrived, the handbaskets were stacked so high that she could not reach them, some of the aisles were blocked by merchandise, and no accessible check-out aisles were open. When Ms. Lucas inquired why no such aisle was open, she was told by a Kmart employee that the cashier was on break. There were other – non-accessible – check-out aisles open at that time. Finally, the automatic door was broken and the other doors were too heavy for Ms. Lucas to open on her own.

16. On or about November 27, 1998, Ms. Lucas shopped at Kmart store number 4224 at 2150 S. Monaco Parkway, Denver, Colorado (“the 2150 S. Monaco Kmart”). On prior occasions when Ms. Lucas had shopped at this location, no accessible check-out aisles had been open. When she entered the store on this occasion, one such line was open. However, by the time she had completed her shopping and was ready to check out, there were no accessible check-out aisles open. When she complained to the manager about this situation, she was told that the cashier was on break. There were other, non-accessible, check-out aisles open at that time. In

addition, throughout the store merchandise was left in aisles, and in other places displayed in the aisles. In the clothing sections the racks were too close together. This impeded Ms. Lucas's access to merchandise and caused her to knock some clothing off of racks and onto the floor.

17. In or about May, 1999, Ms. Lucas shopped at the 2150 S. Monaco Kmart. Again, when she entered the store an accessible check-out line was open. And again, by the time she had completed her shopping and was ready to check out, there were no accessible check-out aisles open though there were other, non-accessible, check-out aisles open at that time. Ms. Lucas went to the customer service counter to request that an accessible check-out aisle be opened and Kmart did so.

18. On or about August 20, 1999, Ms. Lucas shopped at Kmart store number 3627 at 8500 W. Crestline Avenue in Littleton ("the 8500 W. Crestline Kmart"). As she entered the store, Ms. Lucas noted that there were two accessible check-out aisles, but that neither of them was open. She paused after she came through the door at which point a Kmart employee at the customer service counter by the name of Jennifer asked Ms. Lucas if she needed help. As such, Kmart was aware that Ms. Lucas – now using a power wheelchair – was shopping in the store.

19. Ms. Lucas was unable to access parts of the gardening, school supplies, furniture and household departments because numerous aisles were blocked by merchandise and other items. The electronics check-out counter was 41 inches high throughout. The women's fitting room had no bench and had clothes hooks that were mounted at a height of approximately 60 inches.

20. When Ms. Lucas went to check out, neither of the accessible check-out aisles was open. She got in the shortest inaccessible line but when she reached the front of the line, was unable to get through the aisle. She informed the clerk that she was unable to get through the aisle and that there were no accessible aisles open. The clerk responded by leaving the aisle – and Ms. Lucas and the line of customers behind her. Several minutes later the store opened another aisle – though still not one of the accessible aisles. Ms. Lucas continued to wait at the now-abandoned

aisle but when the clerk did not return and no accessible aisle opened, she proceeded to the customer service counter to complain. The woman by the name of Jennifer – who had initially asked Ms. Lucas whether she needed help – made clear that she knew Kmart was required to keep an accessible check-out aisle open but informed Ms. Lucas that the clerk on that aisle was on break.

21. Ms. Lucas asked to speak with a manager. She explained the problem to floor manager Craig Bass. Mr. Bass shrugged and offered to help Ms. Lucas at the customer service counter. While this counter had a lowered portion, it was covered with boxes, notebooks and merchandise and, as such, was not usable by Ms. Lucas. Mr. Bass refused to open an accessible check-out aisle.

22. The 8500 W. Crestline Kmart has approximately 363 total parking spaces, only four of which are accessible and none of which is wide enough to be van-accessible. Two of the four allegedly accessible spaces do not comply with the requirements of ADAAG. Two additional spaces on the north end of the building are marked as if to be accessible but were blocked by a roll-off trash container on the day Ms. Lucas shopped there. There is, in any event, no curb cut to the sidewalk near those two spaces.

23. On or about August 20, 1999, Ms. Lucas shopped at the 200 W. Belleview Kmart. She was unable to access merchandise in various areas throughout the store because of items blocking the aisles. In addition, the single accessible fitting room was unusable because it was filled with a shopping cart full of merchandise. The electronics checkout counter was 41 inches high throughout.

24. On or about August 20, 1999, Ms. Lucas shopped at Kmart store number 4187 located at 2770 W. Evans Avenue in Denver, Colorado (“the 2770 W. Evans Kmart”). She was unable to access merchandise in various areas throughout the store because of items blocking the aisles. In addition, the route to the accessible fitting room was blocked so that Ms. Lucas was unable to get

to it. The electronics checkout counter was 41 inches high throughout. The women's restroom did not have an accessible stall.

25. The 2770 W. Evans Kmart has approximately 423 total parking spaces only seven of which are accessible. Many of the spaces are improperly marked, causing confusion and often leading to the situation in which cars are parked too close to one another for proper access.

26. On or about October 19, 1999, Ms. Lucas was in the Nashville, Tennessee area to attend to matters related to the adoption of her daughter. At that time, she went to Kmart store number 3716 at 4646 Lebanon Pike in Hermitage, Tennessee. She needed to get some pictures developed and to purchase a few other items. She had trouble finding an accessible space in which to park her rented van. When she attempted to make her purchases, most of the aisles she attempted to enter were blocked by merchandise. Because she was ultimately unable to access the merchandise she had come to purchase, she left without buying anything.

27. On a number of occasions since October, 1999, Ms. Lucas has shopped at the 363 S. Broadway Kmart. On several of these occasions, she was accompanied by her daughter who also uses a wheelchair. Each time, Ms. Lucas and, at times, her daughter, have encountered barriers, policies and treatment that deny them the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store, including but not limited to: problems related to parking; aisles obstructed by merchandise; failure to open an accessible check-out aisle and/or failure to open a sufficient number of accessible check-out aisles; failure of store employees to assist in removal of barriers; and rude treatment in response to requests for reasonable accommodation.

28. Plaintiff Debbie L. Lane often shops at Kmart stores. She has shopped at Kmart stores in Colorado and elsewhere. Her experiences shopping at Kmart stores include but are not limited to those described below.

29. On a number of occasions since October, 1999, Ms. Lane has shopped at Kmart store number 4181, located at 3325 28th Street in Boulder, Colorado (the “28th Street Kmart”). On many of the occasions she has shopped at the 28th Street Kmart, Ms. Lane has encountered aisles that are blocked by merchandise. Because of these barriers to access, she has been unable to get to the merchandise on her own and has had to enlist the assistance of a non-disabled friend to move items out of her way or to reach merchandise she was blocked from reaching. In addition, on none of the occasions that she has shopped at the 28th Street Kmart has there been an accessible check-out aisle open. On more than one occasion, Ms. Lane has asked store personnel to open an accessible check-out aisle. She has been instructed to use the customer service counter instead. Although she was able to pay for her merchandise at the customer service counter, this transaction was rendered more difficult because the customer service counter is too high.

30. Plaintiff Julie Reiskin often shops at Kmart stores in Colorado. Her experiences shopping at Kmart stores include but are not limited to those described below.

31. On at least ten occasions over the past two years, Ms. Reiskin has shopped at the 363 S. Broadway Kmart. On many of those occasions, Ms. Reiskin has encountered barriers, policies and treatment that deny her the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the store, including but not limited to: aisles obstructed by merchandise; display racks situated too close together; failure to open an accessible check-out aisle and/or failure to open a sufficient number of accessible check-out aisles; and designation of the only accessible check-out aisle as limited to patrons buying a limited number of items.

32. On information and belief, Kmart store number 4276, located at 2244 S. Reynolds Road in Toledo, Ohio has features that deny the full and equal enjoyment of the store’s goods, services, facilities, privileges, advantages, and/or accommodations to persons who use

wheelchairs or scooters. These features include but are not limited to the fact that the aisles are used to display merchandise and/or to store merchandise prior to stocking the shelves and clothing racks are placed too close together.

33. On information and belief, Kmart store number 7230 located at 3316 Denton Highway in Haltom City, Texas has features that deny the full and equal enjoyment of the store's goods, services, facilities, privileges, advantages, and/or accommodations to persons who use wheelchairs or scooters. These features include but are not limited to the fact that the sidewalk in front of the store is used to display merchandise, leaving a path that is too narrow to traverse in a wheelchair and that objects, including boxes and rolling ladders, are positioned in aisles so as to block access to persons in wheelchairs. In addition, on information and belief, the store provides insufficient wheelchair-accessible parking.

34. On information and belief, Kmart store number 4806 located at 1013 Riley Street in Folsom, California has features that deny the full and equal enjoyment of the store's goods, services, facilities, privileges, advantages, and/or accommodations to persons who use wheelchairs or scooters. These features include but are not limited to the fact that the aisles are used to display merchandise and/or to store merchandise prior to stocking the shelves and the customer service desk does not have a lowered portion.

35. On information and belief, Kmart store number 7579, located at 13450 Maple Road in Omaha, Nebraska, has features that deny the full and equal enjoyment of the store's goods, services, facilities, privileges, advantages, and/or accommodations to persons who use wheelchairs or scooters. These features include but are not limited to the following: using the aisles to display merchandise and/or to store merchandise prior to stocking the shelves; dressing rooms that are too small and that are blocked by racks of return merchandise; merchandise displayed on the sidewalk in front of the store, blocking or impeding access to the store; clothing

racks that are placed too close together for a wheelchair to pass; and inaccessible and unusable bathrooms.

36. On information and belief, Kmart has over 2,000 stores nationwide, many of which have the same and other features that deny the full and equal enjoyment of their goods, services, facilities, privileges, advantages, or accommodations to people who use wheelchairs or scooters in violation of the ADA.

FIRST CLAIM FOR RELIEF

(On behalf of Plaintiffs and all others similarly situated
for violation of the Americans with Disabilities Act)

1. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 - 52 above as if fully set forth herein.

2. 42 U.S.C. § 12182(a) of the ADA provides that:

No individual shall be discriminated against 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.

1. Kmart owns, operates, leases and/or leases to places of public accommodation.

2. 42 U.S.C. § 12183(a) of the ADA requires that new construction be readily accessible to and usable by persons with disabilities.

3. On information and belief, some of the Kmart stores described above were designed and constructed for first occupancy after January 26, 1993 but are not readily accessible to and usable by persons with disabilities.

4. Through the actions and architectural barriers described above and other barriers at its stores and its failure to provide facilities that are readily accessible to and usable by persons in wheelchairs, Defendant Kmart has denied Plaintiff the full and equal enjoyment of its goods,

services, facilities, privileges, advantages, or accommodations in violation of the Americans with Disabilities Act, including but not limited to 42 U.S.C. §§ 12182 and 12183 and its implementing regulations.

5. Plaintiffs and similarly-situated individuals have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

6. Plaintiffs intend to continue to shop at Kmart stores in the near future.

SECOND CLAIM FOR RELIEF

(On behalf of named Plaintiffs for violation of the Colorado Anti-Discrimination Act)

1. Plaintiffs reallege and incorporate by reference the allegations set forth in paragraphs 1 - 60 above as if fully set forth herein.

2. The Colorado Anti-Discrimination Act states, “It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . .” C.R.S. § 24-34-601(2).

3. The CADA defines a “place of public accommodation” to include “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public . . .” C.R.S. § 24-34-601(1).

4. Kmart stores are places of public accommodation as defined in the CADA.

5. By maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described above, Kmart has, directly and/or indirectly, refused, withheld from, and denied to named Plaintiffs, because of their disabilities, the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations.

6. Named Plaintiffs have been damaged and will continue to be damaged by this discrimination as more fully set forth above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray:

1. That this Court assume jurisdiction;
2. That this Court certify the class described in Paragraph 9 pursuant to Rule 23(b) of the Federal Rules of Civil Procedure and certify Plaintiffs as representatives of that class;
3. That this Court issue an Order declaring Defendant to be in violation of the ADA and the CADA;
4. That this Court issue an injunction ordering Kmart to bring all places of public accommodation in the United States that it designed, constructed, owns, operates, leases or leases to others into compliance with the ADA;
5. That this court award statutory damages of \$500 for each instance of discrimination experienced by the named Plaintiffs pursuant to C.R.S. § 24-34-602;
6. That this Court award Plaintiffs their reasonable attorneys' fees and costs; and

7. That this Court award such additional or alternative relief as may be just, proper and equitable.

Respectfully submitted,

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