No. 00-1303

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEVIN W. WILLIAMS

Plaintiff-Appellant

v.

HERMANSON FAMILY
LIMITED PARTNERSHIP I,

Defendant-Appellee

On Appeal from the United States District Court for the District of Colorado

The Honorable Alan B. Johnson, United States District Judge
Civil Action No. 96-WY-2490-AJ

OPENING BRIEF OF APPELLANT KEVIN W. WILLIAMS

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STATEMENT REGARDING ORAL ARGUMENT
Oral argument is requested.

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STATEMENT OF RELATED APPEALS

There are no prior or related appeals in this case.

JURISDICTIONAL STATEMENT

The District Court's subject-matter jurisdiction arose under Title III of the Americans with Disabilities Act, 42 U.S.C. § 12188(a) (incorporating by reference 42 U.S.C. § 2000a-3(a)) and 28 U.S.C. § 1343, because Plaintiff-Appellant Kevin W. Williams alleges discrimination on the basis of disability by Defendant-Appellee Hermanson Family Limited Partnership I in violation of Title III.

This Court's jurisdiction arises under 28 U.S.C. § 1291 because Plaintiff-Appellant appeals from a final judgment of the United States District Court for the District of Colorado entered on June 29, 2000. Plaintiff-Appellant filed his Notice of Appeal on July 26, 2000, within 30 days of the entry of judgment. This appeal is therefore timely pursuant to Fed. R. App. P. 4(a)(1)(A). This appeal is from a final judgment disposing of all claims.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the plaintiff's evidence that ramping a single step at the front entrance of an existing retail store was "readily achievable" under 42 U.S.C. § 12182(b)(2)(A)(iv) was sufficient to survive a motion to dismiss his case at the close of his proof at trial.

STATEMENT OF THE CASE

Plaintiff-Appellant Kevin W. Williams, an individual with a disability, filed this lawsuit against Defendant-Appellee Hermanson Family Limited Partnership I ("Hermanson") under Title III of the Americans with Disabilities Act ("ADA"). Specifically, Williams sought readily achievable removal of architectural barriers from existing public accommodations pursuant to 42 U.S.C. § 12182(b)(2)(A)(iv).

This case was tried to the court starting on April 20, 1998. On April 22, 1998, following the close of Williams's evidence, the court orally granted Hermanson's motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure on the ground that Williams had failed to satisfy his burden of proof. On June 22, 2000, the district court issued its opinion on the Rule 50(a) motion. Judgment entered in Hermanson's favor on June 29, 2000.

Williams originally filed several suits -- involving multiple parties and claims -- that were consolidated by the District Court. The only issue remaining before this Court, however, is that Williams seeks to cause Hermanson to ramp the single step that blocks entrance to the Crawford Building for people who use wheelchairs.

STATEMENT OF FACTS

Hermanson owns many of the buildings on the 1400 block of Larimer Street in Denver, Colorado, an historic block of shops and restaurants often referred to as "Larimer Square." Among the shops it owns is the space at 1439 Larimer Street, known as the "Crawford Building," which it purchased in 1993. (Aplt. App. at 550.) The Crawford Building has at its only entrance a single 5½-inch step that prevents people who use wheelchairs from getting in. (Id. at 439.) The width of the sidewalk between this step and the curb is approximately 23½ feet. (Id.) Photographs of the Crawford Building show the step, the entrance, and the adjacent sidewalk. (Id. at 268, 734-36.)

Kevin W. Williams is a Denver attorney who uses a power wheelchair as a result of a spinal cord injury.[1] (Id. at 260.) From the time he moved to Denver in

[1] At the time the present lawsuit was filed, Williams was a third-year law student at the University of Denver. By the time of trial, Williams was General Counsel to the Colorado Cross-Disability Coalition, a position he holds today. The

approximately 1990, Williams had been a regular visitor to Larimer Square for shopping and dining, and had noticed that there were many stores -- including the Crawford Building -- that were inaccessible to him. (Id. at 258-59, 261-62, 269.) In October of 1996, Williams went to Larimer Square both to shop and to record the continued lack of access he had previously observed. (Id. at 269-70.) On that trip, he attempted to enter the Crawford Building, which at the time housed a shoe store by the name of "Nine West." He was unable to get in the store because of the 5½-inch step at its only entrance. (Id. at 264, 270.) He testified further that he would like to be able to get into that store if it were accessible to him. (Id. at 264-65.)

At trial, Williams called Noré Winter, an expert in historic preservation in architecture.[2] Winter testified that the front entrance to the Crawford Building could be made accessible without threatening or destroying the historic significance of the building or the district. (Id. at 310-11, 328-33, 432-33.) He explained that he had drafted a plan to ramp the 5½-inch step that called for a portion of the sidewalk to be raised to the level of the stoop. (Id. at 333, 417, 742.) Winter testified further that he had reviewed the report of Hermanson's expert, John Salmen, and that Salmen "suggest[ed] that this approach would be a valid one, but that he would recommend extending [the raised area] out the full width of the sidewalk." (Id. at 334.)[3]

Colorado Cross-Disability Coalition is a statewide disability rights organization. (Aplt. App. at 259-60.)

[2] Winter's resume was admitted into evidence at trial. (Id. at 309, 737.)

[3] Extending the raised area would reduce the "cross slope," that is, the slope perpendicular to the path of travel along the sidewalk. See id. at 439-40 (Winter testifying concerning the cross slope resulting from Salmen's approach). Cross slope is the ratio of the rise of the slope to the length of the slope. There are 282 inches in 23½ feet, hence the cross slope of the sidewalk resulting from the plan on which both experts agreed would be 5.5:282 or approximately 1:51. This complies

Winter concluded that both his original plan and Salmen's approach would be "relatively easy to accomplish." (Id. at 335.) He estimated the cost of his plan at approximately $4,300, (id.), and testified that Salmen's suggestions would probably increase the cost by a factor of two and a half, (id. at 336), for a total of approximately $10,750.[4]

The previous owner of Larimer Square had formulated an "Americans with Disabilities Act Compliance Plan" that included, as one of it "1994 Goals," to build a ramp at the Crawford Building. (Id. at 583, 746.)[5] This plan was developed under the direction of general manager Susan Spencer who remained as general manager of Larimer Square after the properties were purchased by Hermanson. (Id. at 550.) Spencer received a number of estimates of the cost to do this work. In July 1992, a contractor estimated that it would cost $2,195 to build a ramp at the Crawford Building by cutting the cast iron stoop. (Id. at 600, 752.) In November 1992, the same contractor estimated that it would cost $2,272 to build

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with the DOJ's Standards for Accessible Design, which permit a sidewalk to have a cross slope that is less steep than 1:50. See Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A ("Standards") § 4.3.7.

[4] This Court may take judicial notice of mathematical calculations. See Fed. R. Evid. 201(b) (judicial notice permissible where a fact is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); Miller v. Federal Land Bank of Spokane, 587 F.2d 415, 422 (9th Cir. 1978), cert. denied 441 U.S. 962 (1979); see also United States v. Burch, 169 F.3d 666, 671 (10th Cir. 1999) (holding that "[j]udicial notice may be taken at any time, including on appeal.").

[5] A store called "Laura Ashley" occupied the Crawford Building until approximately 1994, (id. at 578), after which time it was occupied by a "Nine West" store. (Id. at 610.) Its address is 1439 Larimer Street. (Id. at 263.) References in the record to "Laura Ashley," "Nine West," "9 West," and "1439 Larimer" all pertain to the Crawford Building. (See, e.g., id. at 746, 749, 751, 752.)

an external ramp at that building. (Id. at 602, 751.) A consultant hired by Hermanson in 1995 to review ADA compliance suggested that a ramp be installed at the Crawford Building and estimated the cost at $2,500. (Id. at 640-42, 749.)

Williams called expert accountant Robert Aucone to testify concerning Hermanson's financial resources. Aucone testified that he had had experience advising clients on the affordability of property and equipment purchases based on analyses very similar to the one he had performed of Hermanson's finances. (Id. at 469-70.) Because Williams's claims for ramps at four different stores were tried together, Aucone's testimony addressed the financial feasibility of installing ramps at all four locations simultaneously. Aucone was asked to assume that these four ramps would cost a total of approximately $67,000, (id. at 473), or more than six times the roughly $10,000 that Winter estimated it would take to ramp the Crawford Building using Hermanson's expert's plan.

Aucone testified that the ramps could be purchased outright or they could be paid for over time by obtaining a loan. (Id. at 477, 531.) Given Hermanson's financial resources for the years 1995 and 1996, Aucone testified that purchasing the ramps outright would have been "easily accomplishable and able to be carried out without much difficulty or expense." (Id. at 468.) For example, paying for a ramp at the Crawford Building would have represented only 3.4% of Hermanson's 1995 cash flow from operations, 3.7% of that figure for 1996, and only 1.8% of the total for 1995 and 1996.[6] Aucone also examined Hermanson's discretionary

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[6] Cash flow from operations is the cash available from operating a business. This amount includes net income, interest income, and "paper" deductions, such as depreciation and amortization, that are deducted from income for tax purposes but are not actually paid by a business. (Id. at 474, 495.) The percentages set forth in text were calculated by taking Winter's estimate for the cost of raising the sidewalk outside the Crawford Building ($10,750) as a percentage of Hermanson's cash flow from operations, which was $313,567 in 1995, $291,264 in 1996 and $604,831 for both years. (See id. at 494-95, 519.)

expenditures of cash, that is, expenditures beyond "mandatory" expenditures such as paying bills. (Id. at 483) The cost of the proposed ramp at the Crawford Building represented only 1.3% of Hermanson's discretionary expenditures in 1995 and 1996.[7] Finally, installing a ramp at the Crawford Building would have represented 0.7% of Hermanson's 1995 expenses, 1.4% of its 1996 expenses, and only 0.5% of its combined expenses for 1995 and 1996.[8]

Aucone also testified that it would have been easily accomplishable and able to be carried out without much difficulty or expense for Hermanson to finance the ramp through debt, (id. at 531), and that if Hermanson had financed the ramp over several years by obtaining a loan, the impact on annual cash flow would have been less than financing it outright. (Id. at 477.) Financing all four ramps originally at issue through borrowing would have increased Hermanson's 1995 debt/equity ratio from 1.93:1 to 1.97:1, and would have increased Hermanson's 1996 debt/equity ratio from 2.8:1 to 2.85:1. (Id. at 479.) Aucone testified that these are insignificant increases. (Id.)[9] A $10,750 loan -- to pay for a ramp at the Crawford

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[7] This was calculated by taking $10,750 as a percentage of Hermanson's discretionary expenditures in 1995 and 1996. In these two years, distributions to Hermanson's partners totaled $514,306. (Id. at 484.) In addition, Hermanson made a loan of at least $297,718 in 1996. (Id.)

[8] This was calculated by taking $10,750 as a percentage of Hermanson's expenses, which were $1,486,607 in 1995 and $792,000 in 1996, for a two-year total of $2,278,607. (See id. at 485.)

[9] These calculations were based on a loan of $67,000, the cost of installing four ramps. The increase in Hermanson's debt/equity ratio resulting from a loan of $10,750 (the cost of a ramp at the Crawford Building) would be even less significant.

Building -- would have represented only 0.3% of Hermanson's total liabilities in 1995 and 0.3% in 1996.[10]

SUMMARY OF ARGUMENT

Hermanson was not entitled to judgment as a matter of law because Williams had presented an unrebutted, prima facie case that it would be readily achievable to remove the barrier at the entrance to the Crawford Building.

Title III of the ADA requires owners of places of public accommodation to remove architectural barriers in existing facilities where it is readily achievable to do so. The proper allocation of the burden of proof under that provision requires a plaintiff to describe a plan for removing an architectural barrier and put on evidence that the plan is readily achievable. Upon such a showing, the burden shifts to the defendant to prove, based on its particular circumstances, that removal of the barrier is not readily achievable.

Williams presented evidence (1) that the 5½-inch step at the entrance to the Crawford Building constituted a barrier to people who use wheelchairs; (2) that experts for both parties agreed on a simple solution to remove the barrier by raising the sidewalk up to the level of the step; and (3) that the cost of this solution was very low, especially in light of Hermanson's financial resources. The plain language of the ADA, its implementing regulations, its legislative history and the cases that have applied Title III all demonstrate that this evidence was sufficient to satisfy Williams's burden of proof.

The District Court erroneously concluded that Williams had not satisfied his burden of proof. It failed to analyze Williams's proposal to remove the barrier at the Crawford Building on an individual basis and, as a result, attributed to the Crawford Building objections that were not relevant to that building. The District

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[10] This was calculated by taking $10,750 as a percentage of Hermanson's liabilities, which were $3,237,000 in 1995 and $3,618,000 in 1996. (See id. at 481.)

Court also required Williams to make showings that should not have been part of his burden of proof. Finally, the District Court erroneously concluded that Hermanson had satisfied its burden under Title III of the ADA.

ARGUMENT

The District Court Erred in Granting Hermanson's Motion for Judgment as a Matter of Law

I. Standard of Review: This Court Is to Review the District Court's Decision De Novo.

This Court reviews de novo a lower court's grant of a motion for judgment as a matter of law, applying the same legal standard as the lower court and construing the evidence and inferences in the light most favorable to the nonmoving party, without weighing the evidence or passing on the credibility of witnesses. Greene v. Safeway Stores, Inc., 98 F.3d 554, 557 (10th Cir. 1996). As this Court has stated, judgment as a matter of law is appropriate

> only where the evidence and all inferences to be drawn therefrom are so clear that reasonable minds could not differ on the conclusion. Unless the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion, judgment as a matter of law is improper.

Id. (citations omitted).

II. Williams Satisfied His Burden of Proof to Demonstrate That it Would Be Readily Achievable to Ramp the Step at the Entrance to the Crawford Building.

Under 42 U.S.C. § 12182(b)(2)(A)(iv),[1] Williams "bear[s] the initial burden of suggesting a method of barrier removal and proffering evidence that [his] suggested method meets the statutory definition of 'readily achievable.'" Pascuiti v. New York Yankees, 98 Civ. 8186 (SAS), 1999 U.S. Dist. LEXIS 18736, at *3

[1] Statutory citations are to Title 42 of the United States Code unless otherwise noted.

(S.D.N.Y. Dec. 6, 1999).[2] If the ADA is to be effective in bringing about the removal of architectural barriers from existing facilities when doing so is readily achievable, a disabled plaintiff surely meets his burden of proof by:

- retaining an expert architect who describes a facially reasonable plan for ramping a single step and estimates the cost of the plan;
- introducing evidence that the defendant's expert agreed with this plan; and
- retaining an expert accountant to show that, in light of the defendant's finances and other expenses, the cost of the proposed ramp would be very inexpensive.

In view of the obligation to construe the evidence and inferences in the light most favorable to Williams, the fact that Williams introduced evidence that both parties' experts agreed on a single barrier removal plan -- standing alone -- makes judgment as a matter of law improper. Furthermore, if the showing made by Williams falls short of a prima facie case under §12182(b)(2)(A)(iv), it will be virtually impossible for people with disabilities to challenge architectural barriers and achieve the independence and participation in society that is at the heart of the ADA's purpose. See § 12101(a)(8).

A. The ADA Requires Businesses to Remove Architectural Barriers When it Is Readily Achievable to Do So.

The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." § 12101(b)(1). In the statute, Congress made explicit findings that "individuals

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[2] The plaintiff also bears the burden of proving that (1) he has a disability; (2) defendant's business is a place of public accommodation; and (3) he was denied full and equal treatment because of his disability. (See Aplt. App. at 197.) Hermanson does not contest that Williams established these three elements. (See Aplt. App. at 172-73 (Defendant Hermanson Family Limited Partnership I's Trial Brief at 8-9).)

with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of architectural . . . barriers [and] . . . failure to make modifications to existing facilities . . .," that "people with disabilities, as a group, . . . are severely disadvantaged . . . economically, . . ." and that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." § 12101(a)(5), (6) & (8).[3]

Title III of the ADA prohibits discrimination on the basis of disability by those who own and/or lease to places of public accommodations. § 12182(a). The Crawford Building and the retail business that occupies it are public accommodations covered by Title III. See § 12181(7)(E) (stating that clothing stores and other sales and rental establishments are places of public accommodation). Among other things, Title III requires owners of places of public accommodation to remove architectural barriers in existing facilities where it is "readily achievable" to do so. § 12182(b)(2)(A)(iv). "Readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." § 12181(9). Title III further provides that, "where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable," the entity is required to make its goods and services available through alternative methods. § 12182(b)(2)(A)(v) (emphasis added).

The ADA, like other civil rights laws, should be liberally construed to effect its remedial purpose. See Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996) (stating, in the context of a statute prohibiting employment discrimination on the basis of race, that "[a] statute which is remedial in nature should be liberally construed") (citations omitted); see also Steger v. Franco, Inc.,

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[3] These findings are entitled to deference. Martin v. Kansas, 190 F.3d 1120, 1127-28 & n.6 (10th Cir. 1999).

No. 99-2294, --- F.3d ---, 2000 U.S. App. LEXIS 24818, at *11 (8th Cir. Oct. 3, 2000) (holding, in a Title III barrier removal case, that "the ADA is a remedial statute, and should be broadly construed to effectuate its purpose") (citations omitted); Tyler v. City of Manhattan, 849 F. Supp. 1429, 1441 n.20 (D. Kan. 1994) (stating, with respect to the ADA, that the court had a "duty to construe remedial legislation liberally to effectuate its purpose").

The ADA was signed into law on July 26, 1990 but its effective date was delayed to "'permit adequate time for businesses to become acquainted with the ADA's requirements and to take the necessary steps to achieve compliance.'" Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1070 (D. Haw. 2000) (quoting Statement on Signing the Americans with Disabilities Act of 1990, 26 Weekly Comp. Pres. Doc. 1165, 1166 (July 26, 1990)). The effective date of Title III was January 26, 1992, eighteen months after enactment; lawsuits against small businesses were barred for another year, until January 26, 1993. 28 C.F.R. § 36.508.[4] Hermanson purchased the Crawford Building in 1993, (Aplt. App. at 550), after the effective date of the ADA. Five years later -- at the time of trial in April 1998 -- it had not ramped the single step at the entrance to that building.

The plain language of the statute and its findings and purpose mandate that disabled plaintiffs be able to establish a prima facie case for removing an architectural barrier by taking the basic yet comprehensive steps that Williams took: putting on evidence as to the ease and inexpensiveness of a facially reasonable plan to remove the challenged barrier.

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[4] See also Pinnock v. International House of Pancakes, 844 F. Supp. 574, 584 (S.D. Cal. 1993) ("The ADA provided an 18 month notice period in which businesses could comply with the Act's requirements, and no liability was imposed prior to the end of that period. . . . Small businesses were given an even lengthier notice period."), cert. denied sub nom International House of Pancakes v. Pinnock, 512 U.S. 1228 (1994).

A. The ADA's Regulations and Legislative History Suggest That it Will Generally Be Readily Achievable to Ramp a Single Step.

Congress directed the Department of Justice ("DOJ") to issue regulations implementing Title III. § 12186(b).[5] These regulations, which were promulgated in July 1991, specifically list "[i]nstalling ramps" as an example of barrier removal under § 12182(b)(2)(A)(iv). 28 C.F.R. § 36.304(b)(1). The commentary to this regulation identifies installing ramps as one of the "modest measures" to remove barriers that are "likely to be readily achievable" and states:

> A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. Ramping a single step, however, will likely be readily achievable, and ramping several steps will in many circumstances also be readily achievable.

Preamble to Regulation on Nondiscrimination on The Basis of Disability by Public Accommodations And in Commercial Facilities, 28 C.F.R. Part 36, Appendix B ("Preamble") at 646 (1999). This is in accord with the legislative history of the ADA, which states, in its discussion of the "readily achievable" standard, that "[t]he kind of barrier removal which is envisioned . . . includes . . . the simple ramping of a few steps." H. R. Rep. No. 101-485, Pt. 2, at 110 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 393; see also S. Rep. No. 101-116, at 66 (1989)(same).

The DOJ also provided an order of priority in which various types of barriers ought to be removed: "First, a public accommodation should take measures to

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[5] The Supreme Court has held that the DOJ's Title III regulations carry significant weight: "As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the Department's views are entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 646 (1998) (citing Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp . . ." 28 C.F.R. § 36.304(c)(1). The commentary explains that "the highest priority [is] on measures that will enable individuals with disabilities to physically enter a place of public accommodation." Preamble at 647. This reflects common sense: Until a person with a disability can get through the door, other aspects of architectural access are useless.

Here, of course, priorities are not even at issue. One and only one aspect of access is in question: Whether it is readily achievable to ramp a single step and permit people who use wheelchairs to get in the door of the Crawford Building. The evidence offered by Williams shows that it is readily achievable to do this. Thus, the trial should have continued, with Hermanson put to the burden of showing why the Crawford Building presented the unusual circumstances in which ramping a single step is not readily achievable.

A. Williams Has Satisfied his Burden of Proof to Demonstrate That Ramping the Single Step at the Crawford Building Is Readily Achievable.

At a trial eight years after the ADA was passed, seven years after the DOJ issued regulations stating that ramping a single step was likely to be readily achievable, six years after the statute and regulations took effect, and five years after Hermanson purchased the Crawford Building, wheelchair-user Kevin Williams testified that he wanted to enter a place of public accommodation that remained blocked by a single 5½-inch step. In this context, it should be sufficient to satisfy his burden of proof and to shift the burden to Hermanson that Williams proposed a method of barrier removal supported by expert testimony to both its feasibility and its modest cost. This is the only way to give meaning to the plain language of the statute, including both the requirement of readily achievable barrier removal that § 12182(b)(2)(A)(iv) imposes on owners of public

accommodations and the language of § 12182(b)(2)(A)(v), which provides that "where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable," the entity must make its goods and services available through alternative methods. (Emphasis added).[6] This language places the ultimate burden of demonstrating that a change is not readily achievable on the entity regulated by Title III.

1. The Evidence Williams Presented was Sufficient to Satisfy his Burden of Proof.

Several district courts have analyzed the burdens of proof in readily achievable barrier removal cases under §12182(b)(2)(A)(iv). Though no circuit court has yet addressed that precise question, the Fifth Circuit has analyzed the burden on the plaintiff under a separate provision of Title III. All of these cases -- described in detail below -- support the conclusion that Williams established a prima facie case for ramping the step at the Crawford Building.

> In a case brought under § 12182(b)(2)(A)(iv), the plaintiff:
> bear[s] the initial burden of suggesting a method of barrier removal and proffering evidence that [his] suggested method meets the statutory definition of "readily achievable." If the plaintiff[ ] meet[s] this burden, the [defendants] then bear the ultimate burden of proving that the suggested method of removal is not readily achievable.

Pascuiti v. New York Yankees, 1999 U.S. Dist. LEXIS 18736, at *3. The plaintiffs in that case brought suit under § 12182(b)(2)(A)(iv) for the removal of various architectural barriers at Yankee Stadium, a major league baseball stadium. The court held that the plaintiffs would meet their initial burden by considering the

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[6] See also 28 C.F.R. § 36.305(a) ("where a public accommodation can demonstrate that barrier removal is not readily achievable," it must make goods and services available through alternative methods) (emphasis added); Preamble at 646 (referring to the "readily achievable defense") (emphasis added).

various factors in the definition of readily achievable and "proffer[ing] evidence, including expert testimony, as to the ease and inexpensiveness of their proposed method of barrier removal." Id. at *12. Once the plaintiffs had made such a showing, the burden would shift to the defendants, where it would remain. Construing § 12182(b)(2)(A)(iv) and (v) together, the court held that the defendants would bear "the ultimate burden of convincing the trier of fact, by a preponderance of the evidence, that the suggested method of barrier removal is, more likely than not, too difficult and too expensive to be 'readily achievable.'" Id. at *14.

Similarly, in Lieber v. Macy's West, Inc., 80 F. Supp. 2d 1065 (N.D. Cal. 1999), the plaintiffs sought to remove various architectural barriers throughout a department store. The court held that:

> 26. The Americans with Disabilities Act, enacted in 1990, requires places of public accommodation such as Macy's Union Square to remove barriers to the extent readily achievable. 42 U.S.C. § 12182(b)(2). Continued efforts are required of places of public accommodation over time to remove any remaining barriers to the extent readily achievable. 42 U.S.C. § 12181(9); 28 C.F.R. § 36.304. The U.S. Department of Justice issued regulations pursuant to Title III of the ADA detailing such barrier removal obligations. 28 C.F.R. Part 36.
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> 27. Plaintiffs bear the burden of establishing the existence of access barriers throughout Macy's Union Square. Plaintiffs also bear the burden of putting forward reasonable modifications. The burden then shifts to Macy's to show that the requested modifications would fundamentally alter the nature of its public accommodation.

Id. at 1077.[7] This allocation of burdens tracks Pascuiti: the plaintiff must "put[ ] forward" a solution, whereupon the burden shifts to the defendant to show why the solution will not work.

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[7] The court used the wrong terminology, inserting the "reasonable modification" language from § 12182(b)(2)(A)(ii) into a discussion of readily

The approach adopted in Pascuiti and Lieber comports with that adopted by the only circuit to address the allocation of the burden of proof under Title III of the ADA. In Johnson v. Gambrinus/Spoetzl Brewery, 116 F.3d 1052 (5th Cir. 1997), the Fifth Circuit established a burden-shifting procedure for § 12182(b)(2)(A)(ii), the provision of Title III requiring reasonable modifications to policies and procedures. That court held that the plaintiff meets his burden "by introducing evidence that the requested modification is reasonable in the general sense, that is, reasonable in the run of cases." Johnson, 116 F.3d at 1059 (emphasis added). Once the plaintiff has made such a showing, the burden shifts to the defendant to rebut this showing with evidence specific to its circumstances and those of the plaintiff. Id. at 1059-60. This approach has been adopted in a number of other cases under § 12182(b)(2)(A)(ii). See, e.g., Dahlberg v. Avis Rent A Car Sys., Inc., 92 F. Supp. 2d 1091, 1106 (D. Colo. 2000); Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 934 (N.D. Ind. 1999), aff'd, 205 F.3d 1001 (7th Cir. 2000); Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1248 (D. Or. 1998), aff'd, 204 F.3d 994 (9th Cir. 2000); cert. granted sub nom PGA Tour, Inc. v. Martin, --- U.S.L.W. ---, 2000 U.S. LEXIS 4865 (Sep. 26, 2000); Bingham v. Oregon Sch. Activities Ass'n, 24 F. Supp. 2d 1110, 1116-17 (D. Or. 1998).[8]

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achievable barrier removal. It is clear from the passage quoted above that the court is addressing removal of barriers in existing facilities and that it has established a burden-shifting regime very similar to that in Pascuiti.

[8] See also Guckenberger v. Boston Univ., 974 F. Supp. 106, 146 (D. Mass. 1997) (adopting the Johnson approach in analyzing reasonable modifications under Title II of the ADA). The Fifth Circuit adopted the burden-shifting approach in Johnson from cases applying the requirement of Title I of the ADA that employers provide reasonable accommodations to employees with disabilities. See Johnson, 116 F.3d at 1058-59 (citing Riel v. Electronic Data Sys. Corp., 99 F.3d 678, 683 (5th Cir. 1996) and § 12112(b)(5)(A)). One district court in this Circuit has also taken this approach. See Dahlberg, 92 F. Supp. 2d at 1105-06 & n.9 (adopting Johnson and Title I framework in analyzing reasonable modifications under Title III and noting that, "[t]he same analytical framework and allocation of burdens of

The allocation of burdens of proof in Pascuiti, Lieber, and Johnson properly recognizes the imbalance in information between the plaintiff and defendant in a barrier removal case. The plaintiff will understand his own disability and the fact that he cannot enter the defendant's store and can -- as Williams did here -- retain experts to testify to a proposed solution and its inexpensiveness in the context of the defendant's finances. It makes no sense to place on a plaintiff the burden of anticipating -- and retaining experts to rebut -- a series of potential objections to the proposed barrier removal that may never materialize. Rather, it is the defendant -- who will always understand the requirements of its own business and property better than the plaintiff -- who should have the burden to demonstrate the specific problems, if any, that the plaintiff's proposal may present for the public accommodation in question.

In Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1085-88 (D. Haw. 2000), the court cited to the burden-shifting discussion in Pascuiti and then directly addressed the ultimate issue in the present case: whether it was readily achievable to install a ramp at the defendant's restaurant.[9] The court concluded that replacing the ramp at the defendant's restaurant was readily achievable based on the following evidence: testimony of an expert contractor who stated that "barrier removal for these barriers would involve minimal cost and effort" and who

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proof have also been employed by numerous courts in the context of removal of architectural barriers under title III."). This Court has allocated the burdens under Title I of the ADA as follows: "Once the plaintiff produces evidence sufficient to make a facial showing that accommodation is possible, the burden of production shifts to the employer to present evidence of its inability to accommodate." White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995), quoted in Dahlberg, 92 F. Supp. 2d at 1106 n.10.

[9] The District Court in the present case cited L & L Drive Inn but did not discuss its analysis of the evidence necessary to establish that installing a ramp is readily achievable. (See Aplt. App. at 197.)

"suggested various reasonable alternatives for the removal of these barriers;" testimony of the defendant's president "acknowledg[ing] that barrier removal [was] 'very inexpensive;'" photographs that "indicate[d] that it would not be difficult or expensive to remediate the barriers at issue;" and the fact that the defendant had annual revenues of approximately $500,000 to $600,000. Id.

The evidence Williams presented before the District Court was equivalent or superior to the evidence held by the L & L Drive Inn court to establish that installing a ramp was readily achievable and it was more than sufficient to satisfy the burdens enunciated in Pascuiti, Lieber and Johnson. Williams retained an expert historical architect, Noré Winter, who described a plan for removing the barrier that was facially reasonable: raising the sidewalk 5½ inches over a width of 23½ feet. (Aplt. App. at 333-34, 742.)[10] Winter testified that Hermanson's expert, John Salmen, agreed with this plan, that the plan was "relatively easy to accomplish," and that it would likely cost around $10,750.[11] (Aplt. App. at 333-36.) The photographs that Williams introduced provide vivid proof of the simplicity of the problem and Williams's proposed solution. (Id. at 734-36.) Finally, beyond merely pointing to Hermanson's revenues, Williams called an expert accountant who testified based on his experience advising companies

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[10] Winter also testified that this solution would not threaten or destroy the historic significance of the building or the district. (Aplt. App. at 310-11; 328-33.) This satisfies the relevant standard in the regulations. See 28 C.F.R. § 36.405(b); Standards, § 4.1.7.

[11] There was also evidence in the record that the previous owner -- under the direction of the general manager who remained in the employ of Hermanson after it acquired the Crawford Building -- had formulated an "Americans with Disabilities Act Compliance Plan" that included, as one of its "1994 Goals" to build a ramp at the Crawford Building, (see Aplt. App. at 746), and that the same general manager had received three estimates to ramp the step at the Crawford Building ranging from $2,195 to $2,500. (See id. at 550, 600, 602, 640-42, 748-52.)

concerning expenditures of funds and who presented an extensive financial analysis that addressed, for example, how Hermanson might finance the ramp through borrowing, with an insignificant impact on its debt/equity ratio, and how the expense associated with barrier removal compared with Hermanson's other expenses. (Aplt. App. at 478-79, 485.) This expert concluded that, from a financial perspective, Williams's proposal would be "easily accomplishable and able to be carried out without much difficulty or expense,"[12] (id. at 468), the definition of readily achievable. See § 12181(9).

Williams thus "proffer[ed] evidence, including expert evidence, as to the ease and inexpensiveness of [his] proposed method of barrier removal." See Pascuiti, 1999 U.S. Dist. LEXIS 18736, at *3. This satisfies the requirement of Lieber that he "put[ ] forward" a solution, 80 F. Supp. 2d at 1077, and of Johnson that the proposed solution be readily achievable "in the general sense." 116 F.3d at 1059. The court's conclusion in L & L Drive-Inn is an apt one in the present case as well: "It is obvious to this Court that correcting these barriers would merely involve some asphalt and some planning. This Court is confident that [the defendant] can accomplish this without much difficulty or expense." 96 F. Supp. 2d at 1088.

2. DOJ Regulations and Commentary Lend Additional Strength to Williams's Prima Facie Case.

Williams presented sufficient evidence to establish a prima facie case under § 12182(b)(2)(A)(iv). This conclusion is strengthened by DOJ regulations and commentary stating that ramping a single step is likely to be readily achievable. The Fifth Circuit's decision in Johnson suggests that DOJ regulations should play a

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[12] Aucone was asked to assume that Hermanson would build ramps at all four stores that were originally at issue at a cost of approximately $67,000. (Aplt. App. at 473.) Naturally, if only one ramp were built for approximately $10,750, his conclusions would apply with even greater force.

significant role in determining the quantum of evidence necessary to carry the plaintiff's burden under Title III. The plaintiff in Johnson was a blind man who sought to bring his service animal on a public tour of the defendant's brewery in spite of the brewery's no animals policy. The Fifth Circuit quoted one of the DOJ's Title III regulations that stated, "[g]enerally, a public accommodation shall modify policies . . . to permit the use of a service animal . . ." 28 C.F.R. § 36.302(c)(1), quoted in Johnson, 116 F.3d at 1060. The court in Johnson held that this regulation and its commentary satisfied the plaintiff's burden because they "reflect an administrative determination that modifying a no animals policy to allow a service animal full access with its owner in a place of public accommodation is generally reasonable, or . . . reasonable in the run of cases." Id. That is, it met the standard the court had established for the plaintiff's burden of proof.

The regulations and commentary stating that ramping a single step is "likely to be readily achievable"[13] likewise reflect an administrative determination that the removal of a barrier like that blocking the Crawford Building is generally readily achievable. As was the case with the service animal regulation and commentary relied on in Johnson, the readily achievable commentary is in accord with the relevant legislative history[14] and is, thus, entitled to deference under the standard established in Chevron, 467 U.S. at 842. See Johnson, 116 F.3d at 1060 (citing Chevron). Like the service animal commentary, the readily achievable commentary acknowledges that there may be circumstances under which a plaintiff's proposal is not acceptable.[15] Following the Fifth Circuit's holding in

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[13] See 28 C.F.R. § 36.304(b)(1) and Preamble at 646.

[14] See supra p. 17 (citing H. R. Rep. No. 101-485, Pt. 2, at 110; S. Rep. No. 101-116, at 66).

[15] Compare Preamble at 642 (acknowledging that, "in rare circumstances, accommodation of service animals may not be required"), quoted in Johnson, 116

Johnson, however, it should be up to the defendant to prove that the specific circumstances at issue fall outside the administrative determination of what is generally reasonable or likely to be readily achievable.

Williams is not suggesting that he may point to the regulations and rest his case but rather that the DOJ's administrative determination that the requested barrier removal is likely to be readily achievable should be given considerable weight in determining the quantum of additional evidence necessary to establish a prima facie case and shift the burden to the defendant. In cases such as this one, where a plaintiff seeks to remove a barrier that is at the top of the list of "modest measures . . . that are likely to be readily achievable,"[16] and to which the DOJ has given the highest priority,[17] the burden to produce additional evidence should not be heavy. Williams's evidence -- considered together with the DOJ's regulations and commentary -- suffices to shift the burden of proof to Hermanson to show specific problems, if any, with the proposal to raise the sidewalk outside the Crawford Building.

III. The District Court Erred in Holding That Williams Had Not Satisfied His Burden of Proof

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F.3d at 1060, with Preamble at 646 (acknowledging that "the inclusion of a measure on this list does not mean that it is readily achievable in all cases").

[16] See 28 C.F.R. § 36.304(b)(1); Preamble at 646.

[17] See 28 C.F.R. § 36.304(c)(1).

The District Court incorrectly concluded that Williams failed to satisfy his burden of proof under § 12182(b)(2)(A)(iv). The District Court's error stemmed from four primary sources: its erroneous statement that Williams "admitted in [his] responsive argument that [he] could not meet the burden of proving ready achievability, . . ." (Aplt. App. at 196); its failure to consider individually evidence relating to the Crawford Building; its requirement that Williams demonstrate -- as part of his prima facie case -- elements that he should not have been required to prove; and its conclusion -- based on evidence not in the record -- that Hermanson had satisfied its duty under Title III.

A. The District Court Erred in Stating That Williams Had Admitted That He Could Not Meet His Burden to Prove That Barrier Removal Was Readily Achievable.

The District Court stated in its opinion that Williams "admitted in [his] responsive argument that [he] could not meet the burden of proving ready achievability, characterized by [him] as a high burden." (Id. at 196.)[1] This is simply incorrect. Nowhere did Williams's attorneys, in responding to the defendants' motions for judgment as a matter of law or at any other time during the trial, make any such admission or characterization. Rather, Williams's attorneys argued vigorously that it was readily achievable to remove all of the barriers at issue in the litigation. (See generally id. at 685-708 (response to motions for judgment as a matter of law); see also id. at 218-39 (opening statement by counsel for Williams).)

[1] The District Court's opinion consistently refers to "plaintiffs" in the plural. Although the Colorado Cross-Disability Coalition was originally a plaintiff in the case, it was dismissed on its own motion on July 11, 1997, long before the trial in April 1998. (Id. at 7, 19.)

B. The District Court Erred in Failing to Consider Individually the Evidence in Support of Ramping the Single Step at the Crawford Building.

Williams originally filed four separate lawsuits, each of which requested installation of a ramp at a separate store in Larimer Square. The cases were consolidated for both discovery and trial,[2] and the District Court issued a single order granting Hermanson's motion for judgment as a matter of law as to all four locations. For reasons not reflected in the record, Williams appeals this decision as to only one of the original suits and locations: the Crawford Building.

Nowhere in its Order Granting Motions for Judgment as a Matter of Law does the District Court individually assess the evidence concerning the Crawford Building on its own merits. (See generally id. at 189-201.) Instead, the District Court appears to have lumped the four locations together and assessed the evidence on an all-or-nothing basis. For example, the District Court's opinion states that Williams's expert "estimated probable costs of ramping from $7,800 to $18,000 to $36,000 . . ." (Id. at 194.) None of these figures applied to the Crawford Building.[3] The District Court also stated that Winter "expressed no opinion as to whether the concepts [for removing barriers] were in fact workable in the specific buildings at issue." (Id. at 196.) This ignores the fact that Winter testified that he and Salmen, Hermanson's expert, agreed on a plan to raise the sidewalk in front of

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[2] See id. at 6.

[3] See id. at 327 (Winter testifying that an external ramp at the Ann Taylor store would cost approximately $7,800); 408-10 (Hermanson's counsel cross-examining Winter on the cost of the ramps at the Ann Taylor and Chatelaine stores in the Congdon Building and asking about the $18,000 it cost to build a ramp at a location not at issue in this litigation); and 411 (Winter stating that internal ramps at two other locations could cost $36,000 to $40,000).

the Crawford Building to the level of the step and that Winter opined that Salmen's plan for the Crawford Building was "relatively easy to accomplish." (Id. at 334-35.) There was no discussion in the district court's opinion concerning:

- the fact that both parties' experts had agreed on a plan to remove the barrier at the Crawford Building;
- the facial simplicity of that plan, which would raise the sidewalk by 5½ inches over 23½ feet;
- the projected cost of ramping the Crawford Building; or
- regulations, commentary and legislative history stating that ramping a single step was likely readily achievable.

In the absence of any individual analysis, it must be assumed that the discussion in the District Court's opinion applies to all of the locations then before that court. If that is the case, the claim now on appeal -- that it would be readily achievable to ramp the single step at the Crawford Building -- was dismissed in part based on factors completely irrelevant to the physical realities of that building. The core of the District Court's holding that Williams did not satisfy his burden of proof was that Williams did not consider (1) the effect of the proposed ramp on adjacent businesses, (2) engineering and structural requirements, or (3) possible approvals and permits required to build a ramp. (Id. at 194, 198 & n.1.) None of these factors is an appropriate part of a plaintiff's case in chief; the first two are utterly irrelevant to the proposal to raise the sidewalk outside the Crawford Building.[4] There was no evidence or even cross-examination to the effect that raising the sidewalk from the step to the curb in front of the Crawford Building would impact adjacent businesses or bring structural considerations into play.

[4] The third -- permits and approvals -- is addressed below. See infra pp. 36-38.

(See generally id. at 348-431.)[5] It cannot be a plaintiff's burden to anticipate and account for non-existent objections to proposed barrier removal. To the extent the District Court based its decision to grant the motion for judgment as to the Crawford Building on the lack of evidence as to structural requirements or adjacent businesses, this decision was unsupported by the evidence.

If, instead, these factors were not intended by the District Court to apply to the Crawford Building, the District Court erred because it had the obligation to consider each of the proposals for barrier removal at each of the locations on its own merits. Each store was, individually, a place of public accommodation,[6] and Williams had a separate claim -- as to each store -- that building a ramp was readily achievable there. Even within a single public accommodation, where a plaintiff has requested the removal of multiple barriers, courts analyze the requests separately, often granting some while denying others. See, e.g., L & L Drive Inn, 96 F. Supp. 2d at 1088-89 (granting request to replace ramp; denying request to relocate accessible parking space); Parr v. Waianae L & L, Inc., Civil No. 97-01177 FIY, 2000 U.S. Dist. LEXIS 7373**,** at * 70-74 (D. Haw. May 16, 2000) (granting request to remove barriers at the dining entrance and the employee door; denying request to lower sales counter); see also Long v. Coast Resorts Inc., 32 F. Supp. 2d 1203, 1215 (D. Nev. 1998) (applying standards for new construction under § 12183; ordering certain requested alterations while denying others); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 785-86

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[5] The only discussion of structural considerations in connection with the Crawford Building related to a different possible solution: cutting the cast-iron stoop and tilting it to create a ramp. (See id. at 399-400.) Winter testified that this was a less desirable option and that he preferred the option of raising the sidewalk to the level of the stoop, the plan on which he and Salmen agreed. (Id. at 416-17.) There were no structural objections to this latter plan.

[6] See § 12181(7)(E) (defining public accommodation to include "a . . . clothing store . . . or other sales or rental establishment").

(D. Or. 1997) (same). In the present case, even if the District Court had determined that there was insufficient evidence to constitute a prima facie case that barrier removal was readily achievable at the other locations, it had the obligation to consider the Crawford Building separately. Had it done so under the proper standard, it would not have granted Hermanson's motion for judgment as to that location.

C. The District Court Erred in Requiring Williams to Prove Facts That Were Not Appropriately Part of His Prima Facie Case.

The reasons provided by the District Court for granting the motions for judgment demonstrate that it imposed on Williams the burden of proving facts that went beyond the appropriate burden on a plaintiff under § 12182(b)(2)(A)(iv). For example, in support of its conclusion that Williams did not carry his burden of proof, the District Court stated that Williams "did not consider . . . [that] [a]ny exterior ramping proposal would have required approval and permits from the City. The City was not a party to this case." (Aplt. App. at 198 & n.1) This suggests that Williams had an obligation to call witnesses from the relevant permitting offices of the City and County of Denver to render advisory opinions that the proposed ramp would have received necessary approvals.[7] The statutory definition of readily achievable does not, however, include the requirement that the proposed barrier removal be approved by relevant permitting agencies, see § 12181(9), and the District Court provides no support for this requirement.

To the extent the permitting process is relevant to the question whether a proposed barrier removal is readily achievable, the defendant should bear the burden of putting on some evidence that the relevant agencies would reject the plan in question. This is an excellent example of the proper operation of the burden-

[7] Curiously, later in its opinion, the district court states that, "[t]he plaintiff[ ] did not need to provide . . . permits . . ." (Aplt. App. at 200.)

shifting in Pascuiti, Lieber and Johnson: Williams should have the burden to propose a plan to ramp the Crawford Building; if there are special circumstances that suggest that the City would not approve such a ramp, it should be up to Hermanson to prove the existence of such circumstances; and only then should Williams have the obligation, in rebuttal, to call a witness from the City to testify that a permit would, in fact, be issued.

There was no evidence in the present case that the City and County of Denver would reject a proposal to raise the sidewalk outside the Crawford Building. Indeed, the only evidence in the record concerning the reaction of the City and County of Denver to ramps on Larimer Square suggests that such a request would be granted. Hermanson's former general manager testified -- with reference to a building not at issue in the litigation -- that the City had initially stated that a ramp could not be constructed in the right-of-way but, with some persuasion by the DOJ, had ultimately approved the ramp in question. (Aplt. App. at 606-08.) In any event, DOJ regulations suggest that the City would be required to approve a proposal to ramp the entrance to the Crawford Building. Title II of the ADA requires public entities to make reasonable modifications in their policies, practices, and procedures to avoid disability discrimination. 28 C.F.R. § 35.130(b)(7). The DOJ's Technical Assistance Manual for Title II of the ADA notes that a municipality may be required to grant a zoning variance to permit installation of a ramp at a business. Title II of The Americans with Disabilities Act: Technical Assistance Manual, § II-3.6100, illus. 1 (1993); see also Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730-32 (9th Cir. 1999) (citing § II-3.6110 and holding that Title II of the ADA applied to zoning ordinances); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45-46 (2d Cir. 1997) (same).

The District Court also stated that Williams's expert, Noré Winter, was "not a cost expert" and "offered nothing but speculative concepts." (Aplt. App. at 194,

198.) In fact, Winter explained that, while he was not an expert in costs, he was "illustrating from our experience the relative range of costs that we would anticipate projects like this might involve." (Id. at 350.) He also explained that his drawing of the proposal for the Crawford Building was a "sketch for a concept of a warped-plane sidewalk to provide access into the Crawford." (Id. at 333, 742.) In using this terminology, Winter was simply clarifying that his illustrations were not intended to be construction-ready drawings. (Id. at 333-34.) There was nothing speculative about the plan to raise the sidewalk up to the level of the 5½-inch step or about the fact that Hermanson's expert, John Salmen, reviewed the plan, suggested a slightly different approach, and then endorsed it. (See id.) There was also nothing speculative about the fact that Winter declared his plan and Salmen's plan to be "relatively easy to accomplish." (Id. at 335.) Finally, there was nothing speculative about Winter's estimate of the cost of carrying out Salmen's plan, which Winter testified was "based on the written description in [Salmen's] report." (Id. at 337.)

A standard that requires a plaintiff to call witnesses from permitting agencies, to commission construction-ready drawings or to hire a separate "cost expert" (once he has already hired an architect to propose a solution and estimate its cost based on his own experience) goes far beyond the burden any court has placed on any plaintiff under § 12182(b)(2)(A)(iv). Such a burden would not be consistent with the remedial purpose of the ADA and the concomitant requirement that it be liberally interpreted to effect this purpose. See, e.g., Berry, 74 F.3d at 985; Steger, 2000 U.S. App. LEXIS 24818, at *11; Tyler, 849 F. Supp. at 1441 n.20. It demands far too much of a single individual with a disability who -- eight years after passage of the ADA -- simply wants to get into a shop with a 5½-inch step at its entrance.

D. The District Court Erred in Concluding That Hermanson Had Satisfied its Obligations Under the ADA Through an Alternative Plan That Was Not in Evidence.

The District Court correctly noted that "the ADA places an affirmative duty on owners and operators of places of public accommodation to make reasonable accommodations and to take steps to ensure that disabled persons have equal access to the goods and services such places offer." (Aplt. App. at 199.) It incorrectly concluded, however, that

> [t]he evidence elicited at trial demonstrated that the defendant had a plan in place for achieving compliance with the ADA and making Larimer Square accessible to all of the public. No evidence at trial suggested that the defendants' voluntary and apparently comprehensive plan for eliminating physical barriers is not workable.

(Id.) No such plan was in evidence.

Hermanson introduced a document containing an earlier ADA compliance plan created by its predecessor in approximately 1992. (Id. at 583, 743-47.) This plan listed as one of its goals for the year 1994, "Build ramp at Laura Ashley" (the then-tenant of the Crawford Building). (Id. at 746.) Hermanson's current plan was not, however, in evidence -- a fact that Hermanson's attorney confirmed on the record in his argument in support of Hermanson's motion for judgment.[8] The only references to Hermanson's current plan came in opening statements,[9] Hermanson's counsel's cross-examination questions,[10] and argument on the Rule 50 motion.[11]

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[8] See id. at 699 ("There's not been evidence as to what our plan is, Your Honor.").

[9] See id. at 220, 224, 232-37, 242-43, 247-50. The only references to Hermanson's alternative plan for the Crawford Building came in Williams's counsel's opening statement, when she pointed out that it required people who use wheelchairs to access that building through a second property not owned by Hermanson. (Id. at 232-33.) Hermanson's counsel did not mention Hermanson's alternative plan for the Crawford Building. (See id. at 247-50.)

[10] Id. at 401-07.

Indeed, counsel for the Crawford Building's tenant stipulated at trial that the tenant was not aware of any plan to make the Crawford Building accessible to persons who use wheelchairs.[12] The only testimony concerning Hermanson's current plan came when Hermanson's attorney cross-examined Williams's expert. Winter testified that he had seen Hermanson's current plan and disapproved of it from an historical perspective: "My concern about the alternative scheme that I did see is that it basically asks you to come in through a side party wall which historically was a solid wall. . . . I would . . . question a solution going through another property to gain access into a store. I would look for some shared solution that wouldn't require that." (Id. at 402-03.) As is clear from this discussion, no direct evidence had been admitted concerning Hermanson's alternative plan and the adequacy of that plan would have been vigorously contested had it been introduced.

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[11] Hermanson's counsel argued the superiority of its plan for one of the other buildings. (See id. at 682-84.) His argument did not address the alternative plan for the Crawford Building. See generally id. at 658-85; 709-16.

[12] Id. at 658.

CONCLUSION

The evidence before the District Court was more than sufficient to satisfy Williams's burden to show that it would be readily achievable to raise the sidewalk outside the Crawford Building and thereby remove the barrier to people who use wheelchairs. This is especially so in light of DOJ regulations stating that the measure Williams proposed was likely to be readily achievable. This conclusion is reinforced by this Court's standards for motions for judgment as a matter of law, which required the District Court to construe the evidence and inferences in the light most favorable to Williams. Williams's evidence establishes a prima facie case under § 12182(b)(2)(A)(iv) and judgment as a matter of law in favor of Hermanson was error.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary because this case raises a matter of first impression before this Court and one that has been addressed by only one other circuit and by very few district courts: the allocation of burdens of proof under Title III of the ADA. This is an important matter in the enforcement of Title III and the ability of people with disabilities to have access to public accommodations.

CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), and that this brief contains 9,819 words. Counsel relied on the word count of Word Perfect 8.0, which was used to prepare this brief.

Respectfully submitted this 10th day of October, 2000.

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Certificate of Service

I hereby certify that on October 10, 2000, a copy of the foregoing Opening Brief of Appellant Kevin W. Williams, as well as the Addendum of Appellant Kevin W. Williams, and Volumes I, II, and III of the Appendix of Appellant Kevin W. Williams was served by hand on:

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