



TO: House Judiciary Committee

FROM: Freda Levenson, Senior Staff Attorney, ACLU of Ohio

DATE: January 22, 2014

RE: House Bill 333

To: Chairman Butler, Vice Chair Pelanda, Ranking Minority Member Stinziano, and Members of the House Judiciary Committee, my name is Freda Levenson, and I am an attorney at the American Civil Liberties Union of Ohio. Thank you for providing this opportunity to express our opposition to House Bill 333.

In 1990, when signing the American with Disabilities Act (ADA) into law, then-president George H.W. Bush proclaimed: "Let the shameful wall of exclusion finally come tumbling down."

And it did. In the nearly quarter century since, with barriers lifting, individuals with physical disabilities - including the approximately 8.5% of Ohioans with a mobility disability - have become increasingly able to participate in life and contribute to our society.

Now, however, H.B. 333 threatens to set the clock back by imposing new kinds of barriers - this time legal barriers - on disabled people.

In crafting the ADA, Congress was aware of its impact on the business community and carefully balanced this by providing a 2-year phase-in to give adequate time to comply. Also, for existing facilities, in order to eliminate any undue cost on businesses, the ADA required (and requires) barrier removal only where it is "readily achievable."

H.B. 333 will allow Ohio businesses to ignore accessibility laws. The bill removes the only incentive to comply: the desire not to get sued and have to pay attorney's fees. A business would have no motive to comply until (and unless) a disabled person actually encounters a barrier, and then follows up by preparing and serving a detailed notice. Even then, after receiving the notice, the business may take 5 additional months to comply... without any consequence for all of the time it flouted the law.

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The ADA has been the law of our country for more than two decades. Why should businesses, even ones that intentionally break the law, be given still more notice, and be permitted to delay compliance until months after causing someone to suffer indignity and inconvenience?

H. B. 333 will undermine voluntary compliance. Businesses will take their chances that no one will complain, and barriers will begin again to proliferate.

Even now, under present law, most disabled people who encounter a barrier will simply turn away, and not bother to sue. First, most people do not relish the nuisance of a lawsuit. Also, an ADA suit provides no financial benefit to the plaintiff. (An ADA suit can get a violation remedied, but it will not award a plaintiff damages.)

If a disabled person does file and win an ADA access suit, he will get his legal costs and attorneys fees reimbursed, but this is not a big upside; this is breaking even.

As far as plaintiffs' attorneys go, they may only be paid if they win, so there is no incentive even for them to bring non-meritorious lawsuits. If they do, they receive nothing, and face possible sanctions as well. And even when fees are awarded, it is only what the judge finds, after scrutiny, to be "reasonable."

Indeed, in all of the proponent testimonials supplied to this committee, there has been mention of only 3 plaintiffs. (And, if the proponents' stories overlap, which they may, there might actually be fewer than 3 plaintiffs under discussion.) The truth is that, in Ohio, for the reasons stated above, there are not large numbers of plaintiffs filing these suits, and fewer still who file suits with no merit.

The legislature should not make bad policy based on the conduct of a just a few rogue actors. Abuse by a few is not a reason to seriously diminish the benefit of a good law, to detriment of the blameless people with disabilities who constitute 8.5% of the people of our state.

Moreover, if an Ohio attorney files a vexatious lawsuit, he can be curbed using existing procedures. Courts award sanctions against those filing abusive suits, and state bar associations discipline attorney misconduct. Courts also have the capacity to prevent plaintiffs from filing too many ADA suits: at least one plaintiff in California has been barred from filing lawsuits without prior court permission.

Just about any area of law can be employed vexatiously; the ADA is not unique in this respect. But the cure has never been to eviscerate the law itself so that it fails to protect the people it is designed to help.

Not only would H.B. 333 be a step back into the bad old days, it would be an affront to justice. The ADA was duly enacted by Congress to protect the civil rights of a substantial number of our populace. It is the law of our land. But H.B. 333 perversely provides that breaching the ADA is excused... unless and until someone complains.

The question arises: how can this be? What other laws may be intentionally breached until after someone complains? I can't think of any.

If the legislature is going to begin excusing compliance with a law until someone complains, what about that pesky ordinance requiring a fence around my swimming pool? May I wait until a child has drowned before I need to put up a fence? Can my factory spew pollution until I receive notice, (and then I get 5 additional months to pollute before I actually need to stop?) If I'm caught driving too fast, will the policeman just tell me not to drive so fast in the future?

H.B. 333 would infringe on the civil rights of the disabled. No other civil rights laws operate like this. If a person is refused entry to a business because of her race, sex, or religion, she is not required to send a letter before she can sue. If she cannot enter because she is disabled, she will have to wait five months to see whether the business owner changes his mind. Why should disabled people be singled out as the only group of Ohioans required to give notice, and have a waiting period, before being permitted to seek redress for discrimination?

Because many businesses simply will not make corrections until they have to, the most visible effect of H.B. 333 will be the proliferation of violations. As baby boomers age, a larger percentage of our citizenry is going to need accessibility. Keeping the ADA in place is the right thing to do for the people of our state.

Thank you for your consideration.