

BLIND PAINTBALLERS DISABILITY DISCRIMINATION CLAIM

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Many legal problems start out as a failure to communicate. People get angry then decide to vent their frustration in a costly and time consuming lawsuit for all involved. Apparently, such was the unfortunate situation in the case described herein, *Blind Industries and Services of Maryland v. Route 40 Paintball Park*. In this particular instance, a group of blind individuals became angry when told they would not be allowed to play paintball. As noted by the federal court, “at some point in the verbal exchange, communications seem to have broken down.”

According to the court, “the fact that Plaintiffs became angry and voices were raised would not be a factor in Route 40's defense” against a claim of discrimination against individuals with disabilities. In hindsight, although challenging under the circumstances, good customer relations may have been better served by more accommodation, as opposed to confrontation over facility policies and waiver forms.

In the case of *Blind Industries and Services of Maryland v. Route 40 Paintball Park*, 2012 U.S. Dist. LEXIS 172331 (Dist. Md. 12/5/2012), plaintiffs brought their lawsuit under Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12182. Title III prohibits discrimination against individuals with disabilities by those who offer public accommodations, i.e., a facility, operated by a private entity which provides services to the public. (Similarly, Title II of the ADA prohibits such discrimination by public entities.)

In response, defendant Route 40 had asserted that “the ADA and ‘old-fashioned common sense’ recognize that some activities involve sufficient risk that individuals with disabilities, like blindness, should only participate in those activities with assistance or under modified conditions.” The federal district court acknowledged that, perhaps, “Route 40 has legitimate concerns regarding Plaintiffs' abilities to safely play paintball.” On the other hand, the court recognized the possibility that “what is offered as ‘old fashioned common sense’ is really nothing more than paternalistic and unsupported assumptions about what individuals with disabilities are able to achieve and accomplish.”

As described below, while “the evidence points to a finding that Route 40 violated the ADA in denying Plaintiffs the opportunity to play paintball,” the federal district court acknowledged that “a reasonable jury might find otherwise.” As a result, the case described herein would be allowed to proceed to trial.

Regardless of the ultimate outcome, a full trial is a costly and time consuming process for all involved and better avoided if possible. Instead of asking “Why?,” with 20/20 hindsight, “Why Not?” may have been a better option. While not risk free, provide the opportunity to participate. Let them play and supervise their participants to ensure reasonable safety during the activity. In so doing, you may win some friends and supporters as opposed to creating potential adversaries for a lawsuit.

FACTS OF THE CASE

Plaintiff Blind Industries and Services of Maryland (BISM) is a statutory, non-profit education and training center for the blind. BISM describes its mission as both helping the blind reach their potential for living and working independently and also as enhancing the public's attitudes concerning blindness. One of the programs BISM offers is a Comprehensive Orientation, Rehabilitation, and Empowerment program (CORE) for blind adults. Participants in the CORE program are trained in Braille, cane travel, and other nonvisual mobility and life skill techniques.

One requirement of the CORE program is that each student must select, plan, organize, and lead a group social outing. In May 2011, one of the students in the CORE program, Darrell Holloway, selected paintball as his group social outing. Holloway located Defendant Route 40 Paintball Park (Route 40) on the internet.

Route 40 is owned by Miriam Maliszewski and operated by Miriam and Thomas Maliszewski and their son, Julian. The park consists of four playing fields, ranging from 150 feet by 120 feet to one acre in area. Participants typically play for two hour time slots, rotating between all four fields.

As described by Julian Maliszewski, "[t]he easiest way that I find it is to explain paintball is its capture the flag only we use paintball markers, so instead of the childhood version of tag we shoot each other with balls filled with paint." A typical paintball field, including those at Route 40, has large objects or "bunkers" placed throughout the field to provide players places to hide and from which to shoot at opponents.

Holloway called Route 40 and made reservations for fifteen people for Saturday, May 21, 2011, from noon to 2:00 p.m. When Holloway made the reservations, he was told to arrive 15 to 20 minutes before the scheduled time to complete waivers, secure the paintball guns and protective equipment, and to begin the mandatory safety orientation. Holloway did not mention in making the reservations that the participants were blind. No one in the group had previously been to this particular paintball park.

On the day of the reservation, a group led by Holloway and made up of two BISM instructors and six BISM students, traveled to the paintball park on foot from a bus stop that was several miles away. Holloway had some difficulty getting to the facility and Route 40 called Holloway's cell phone several times to confirm that the group was going to make their reservation. Holloway also called Route 40 as many as eight times asking for directions to the facility. There is a dispute in the record as to the exact time that the group finally arrived at the park. Some in the group testified that it was "around noon" and others at "around 12:15ish." Route 40 personnel testified that the group arrived between 12:45 p.m. and 1:00 p.m.

When the group arrived at the park, they were all wearing black "sleep shades." While all of the group members were legally blind, some were partially sighted and the purpose of the shades was to remove any residual vision. Plaintiffs explain that wearing the shades during the outing was one of the requirements of the CORE program. Because many of the participants in the CORE program have degenerative conditions that will eventually cause total blindness, one of the goals of the program is to teach the participants how to do everything non-visually.

As the group arrived at the park, the Route 40 personnel testified that they observed the group having difficulty navigating their way into the park. Several members of the group walked past the entrance and were directed back to the park by a sighted bystander. Once at the park, one of the participants collided with one of the four inch by four inch posts near the park entrance.

The group then met with Miriam and Julian Maliszewski and stated that they were there to play paintball. Consistent with Route 40's policies, the Maliszewskis insisted that each member of the group read, complete and sign its waiver form. When the group members explained that they could not read the forms and asked that the forms be read to them, the Maliszewskis refused.

Miriam Maliszewski explains in her deposition that she "didn't feel that that is right" to read the waiver. Julian stated that he did not believe that he was obligated to read the waiver and told them that they would have to supply their own sighted companion to read it. It also appears from the record that the Maliszewskis' refusal to read the waiver form was motivated by their belief that blind participants could not safely play paintball unless assisted by sighted companions.

The members of the group attempted to explain to the Maliszewskis how they would be able to safely play paintball using the specialized navigation skills that they possessed and that were taught as part of the CORE program, including the use of their canes, echo-location via sound, and the use of code words and other auditory signals. The Maliszewskis inquired if the group members had previously played paintball and while some responded that they had, they were unable to recall the names of the facilities at which they had played.

The Maliszewskis did not permit the group to play paintball but did offer to allow them to fire on the target range. The group members declined and brought suit in the federal district court. Plaintiffs petitioned the federal district court to declare Route 40's practices in violation of the ADA and issue a permanent injunction prohibiting that continued violation.

## EQUAL ENJOYMENT

As cited by the federal district court, "Title III of the ADA forbids discriminating against persons with disabilities in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodations." 42 U.S.C. § 12182(a). According to the court, to establish a claim under this provision, plaintiffs must show that: (1) they have a disability (in this case, blindness); (2) that the defendant is a place of public accommodation; and (3) that plaintiffs were denied full and equal treatment because of their disability.

In this particular instance, the court noted that there was no dispute that the individual plaintiffs were disabled for purposes of the ADA. Further, there was no dispute that Route 40 is a place of public accommodation under the ADA. The issue was, therefore, whether Route 40 denied plaintiffs "full and equal treatment because of their disability" in violation of the ADA.

Plaintiffs had alleged Route 40 discriminated against them by "failing to ensure effective communication of the park's waiver form in violation of 42 U.S.C. § 12182(b)(2)(A)(iii)." In so

doing, plaintiffs asserted "Route 40 had no braille or other accessible copy available and its staff repeatedly refused to read the form to Plaintiffs." As a result, plaintiffs claimed "Route 40 allegedly discriminated by imposing eligibility criteria that screened out persons with disabilities in violation of 42 U.S.C. § 12182(b)(2)(A)(i) through their waiver form." In particular, plaintiffs alleged Route 40 imposed a requirement that had "no relation to Plaintiffs' ability to play paintball" by requiring "the independent reading of the form as a precondition to playing paintball."

As characterized by the court, plaintiffs ADA claim "challenged Route 40's ultimate decision to deny them the opportunity to play paintball and to relegate them to the separate and unequal status and experience of firing on the shooting range." Specifically, as evidence of discrimination, plaintiffs cited Route 40's rule that "[b]ind shooting is not allowed. Look at what you are shooting." Plaintiffs contended "the adoption of this rule is 'facially illicit'." In other words, the rule violated the ADA because it would automatically "deny them the opportunity to play paintball without [Route 40] first making an individualized assessment of their individual ability to safely participate."

#### DIRECT THREAT

In response, Route 40 argued "the ADA permits public accommodations to impose eligibility criteria that will screen out individuals with disabilities when that eligibility criteria is 'necessary' for the activity." As characterized by Route 40, paintball is "a dangerous sport, involving the risk of serious injury or death." According to Route 40, these risks have prompted paintball facilities to "universally require players to sign liability waivers."

According to Route 40, paintball pellets "are capable of rendering a person unconscious and even killing." As a result, Route 40 argued as follows that the "no blind shooting" rule was justified in order to address "dangers and risks" in paintball:

First, it ensures that unsuspecting participants, including referees and teammates, are not randomly shot. Second, it is designed to limit shots to high risk areas. For instance, because paintball goggles do not cover the back of the head, players are at risk of being shot in the back of their heads, especially by their teammates, who are more likely to be behind them than their opponents. Shots to certain exposed parts of the head, like behind the ear, can produce serious injury. Third, the rule also helps to ensure that participants will not be shot at close range, which enhances the danger of the activity.

As cited by the federal district court, the "ADA does not require public accommodations to permit individuals with disabilities to participate in activities if that participation would pose a 'direct threat to the health or safety of others'." 42 U.S.C. § 12182(b)(3).

As characterized by the court, Route 40 claimed allowing plaintiffs to play paintball would pose a "direct threat to the health and safety of others" by creating an increased "risk to referees in the paintball fields and nearby bystanders who might be hit by errant shots."

In making the “determination as to whether Plaintiffs posed a direct threat to others,” plaintiffs maintained Route 40 was required to make a "fact intensive" assessment as to: "the nature, duration, and severity of the risk, and the probability that the potential injury will occur."

Plaintiffs stress that this assessment must be "individualized" and that a determination of the nature of the risk, the duration of the risk, the severity of the risk, the probability of the potential injury, and whether reasonable modifications would mitigate the risk must be made as to each of the potential participants.

Route 40, however, claimed “the group's late arrival was the single most important determining factor as to why the group was not permitted to play paintball.” In so doing, Route 40 further contended “the orientation process is ‘primarily visual’ and, thus, to orient blind individuals, significantly more time and personnel would be needed.”

[T]he process of complying with the park's prerequisites to playing, in light of the accommodations and modifications necessary to ensure that all of the safety information and instructions were adequately communicated to the group members, coupled with the additional steps needed for the group members to acquaint themselves with the paintball fields, would have consumed the entirety of the time remaining on their reservation, making it impossible for them to play before the groups reserving the four 2:00 p.m. slots were to begin.

As a result, Route 40 effectively contended “taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”

The federal district court, however, questioned “Route 40's factual assertion that Plaintiffs' late arrival made it impossible for them to play” based upon “a serious dispute of fact as to what time they actually arrived.”

Even assuming they had arrived at the latest of the proffered times, there is also a dispute as to how long it would take for them to receive the orientation and equipment and whether or not they could have played some games before the expiration of their reserved time.

That being said, the federal district court acknowledged plaintiffs’ “late arrival may have had some impact on their ability to play” under the circumstances:

It is undisputed that the paintball park was very crowded and busy on the date in question. If Plaintiffs did arrive as late as 1 o'clock, one hour and fifteen minutes later than the time that they were instructed to arrive, it is questionable whether that individualized assessment could be made, the orientation given, and equipment supplied, with sufficient time remaining to play paintball.

WAIVER FORM

As characterized by the court, Route 40 appears to argue that reading the form was somehow an "undue burden" by citing an illustration in the ADA Technical Assistance Manual § III-4.3000, i.e., "requirement of reading information to a blind shopper may be an undue burden if store is extremely busy." In the opinion of the court, Route 40's undue burden argument was "questionable at best" because "the one page form could be read in a matter of minutes."

Moreover, the court noted Route 40 as a "public accommodation must still provide an alternative auxiliary aid or service that would not result in an undue burden or fundamental alteration but that would ensure effective communication to the maximum extent possible, if one is available."

[I]f Route 40 had a legitimate reason for refusing to read the waiver, it still was under an obligation to provide some alternative form of effective communication... [T]he fact that providing a particular auxiliary aid or service would result in a fundamental alteration or undue burden does not necessarily relieve a public accommodation from its obligation to ensure effective communication. See ADA Technical Assistance Manual § III-4.3600

On the other hand, the federal district court acknowledged that "not making its waiver form available to the blind" would be irrelevant if Route 40 could prove "the rule against blind shooting is a necessary criteria or that allowing the blind to play would constitute a sufficient 'direct threat'."

In the opinion of the court the preliminary pretrial evidence "does not ultimately tip the scale one way or the other," but "the evidence on these issues weighs heavily against Route 40." Specifically, the court found it "interesting" that "Route 40 characterizes the rule as one 'requiring players to perceive what they are shooting'." Yet, the court noted plaintiffs maintained that they could indeed "perceive what they are shooting" based upon "the skills taught in the CORE Program" to allow them to do so "non-visually." Specifically, plaintiffs argued that if permitted to play, they would:

- use their canes to navigate the paintball field, including locating obstacles;
- strategically locate targets by listening for players moving on the course and using pre-established code words or sounds to differentiate between friend and foe;
- using a code word or sound strategy, fire their paintball guns only at someone they knew to be an opponent, and never at a close range;
- know how to distinguish between high and low targets;
- avoid shooting the referee by discussing with the referee beforehand where he will be and informing him of the code word strategy or encouraging the referee to announce himself during play.

According to plaintiffs, their "ability to use these techniques would also minimize the 'direct threat' Plaintiffs might pose to others by playing paintball." On the other hand, the court found "Route 40's conclusion that Plaintiffs were unable to safely play paintball had some basis":

Based upon the eight telephone calls made to Route 40 seeking assistance finding

the facility, Route 40 personnel would have some grounds to question the effectiveness of Plaintiffs' navigational skills. Miriam Maliszewski testified that, as the Plaintiffs arrived, she observed them walk past the facility and be redirected to the park by a sighted individual. Perhaps most significant, she states that she observed one of the group walk into a post.

Moreover, after observing plaintiffs' "difficulty in effectively and safely navigating to the park," the federal district court found "Route 40 made some attempt to make an individualized assessment of Plaintiffs' abilities to play paintball."

[Route 40] inquired about Plaintiffs' prior experience with the sport but those that had played previously were unable to recall where it was that they had played. Route 40 also correctly notes that, while Plaintiffs have presented to the Court expert testimony explaining how they would have been able to use their training to safely play, that expert testimony was not available at the time.

## CONCLUSION

As a result, having found "some evidence favoring Route 40's position," the federal district court refused to enter judgment in favor of plaintiffs based on the pretrial record. The case would, therefore, proceed to trial for a jury to fully consider plaintiffs' ADA claims.

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A search for "Route 40 Paintball" on YouTube yielded several hits which provide participant videos of the paintball park, e.g., <http://www.youtube.com/watch?v=ujuVITCfzOI>

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