UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

A.L., by and through D.L., as Next Friend, Parent and Natural Guardian; D.L., Individually,

Plaintiffs,

Case No. 6:14-cv-1544-Orl-22GJK

v.

WALT DISNEY PARKS AND RESORTS US, INC.

Defendant.
_____/

PLAINTIFF A.L.'S, OPPOSITION TO DEFENDANT'S AMENDED CONSOLIDATED MOTION *IN LIMINE* [D178]

Plaintiffs, A.L. by and through D.L., as Next Friend, Parent and Natural Guardian, and D.L., Individually, offer the following arguments and authorities in opposition to Defendant's Amended Consolidated Motion *in Limine* and Incorporated Memorandum of Law (Doc. 178).

I. Introduction

Taken as a whole, Disney attempts to write its own script for the trial, one which includes no potentially unfavorable evidence. The motion to bar all unfavorable evidence should be denied in its entirety.[1]

II. Standard for Consideration of a Pretrial Motion in Limine

Begging the Court's indulgence with an extended quotation, the Middle District has outlined the standard of consideration of a motion in limine thus:

> A Motion In Limine presents a pretrial issue of admissibility of evidence that is likely to arise at trial, and as such, the order, like any other interlocutory order. The real purpose of a Motion In Limine is to give the trial judge notice of the

[1] While Disney's motion expressly seeks a ruling in limine as to particular evidence, the motion refers to Plaintiff's motion for summary judgment evidence on no less than eight (8) different occasions. As such, the motion appears directed more at striking summary judgment evidence than barring evidence at trial.

> movant's position so as to avoid the introduction of damaging evidence which may irretrievably effect the fairness of the trial. A court has the power to exclude evidence in limine only when evidence is clearly inadmissible on all potential grounds. The court excludes evidence on a Motion In Limine only if the evidence is clearly inadmissible for any purpose. Motions In Limine are disfavored; admissibility questions should be ruled upon as they arise at trial. Accordingly, if evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial to allow questions of foundation, relevancy, and prejudice to be resolved in context. Denial of a Motion In Limine does not insure evidence contemplated by the motion will be admitted at trial. Instead, denial of the motion means the court cannot determine whether the evidence in question should be excluded outside the trial context. The court will entertain objections on individual proffers as they arise at trial, even though the proffer falls within the scope of a denied Motion In Limine. "Indeed, even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling."

Stewart v. Hooters of Am., Inc., 2007 WL 1752843, *1 (M.D. Fla. 2007) (internal citations omitted). Accord, *In re Mirabilis Ventures, Inc.*, 2011 WL 3236027, *4 (M.D. Fla. 2011).

Pretrial motions in limine are routinely denied as premature, for the reason that they cannot be adequately evaluated until the context of admission of the evidence becomes clear. See, e.g., *Bodden v. Quigley*, 2014 WL 5461807, *1 (S.D. Fla. 2014); *United States v. Posner*, 594 F. Supp. 923, 928 (S.D. Fla. 1984) *aff'd*, 764 F.2d 1535 (11th Cir. 1985); *Kona Spring Water Distrib., Ltd. v. World Triathlon Corp.*, 2007 WL 842968, *2 (M.D. Fla. 2007).

In the present action, dispositive motions are pending before the Court which stand to substantially reduce the issues in dispute. Ruling on a motion in limine should be deemed premature where the Court might eliminate by separate Order the issue for which the evidence is to be offered.

III. Disney's Motion to Exclude Evidence of Other Victims of Discrimination

a. Generally

Similar act evidence is not admissible purely for the purpose of proving bad character, but it is admissible to show motive, knowledge or intent. Generally, similar acts evidence is

admissible in a discrimination case, to show evidence of discriminatory intent. *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 521 (3d Cir. 2003); *Finley v. Cowles Bus. Media*, 1994 WL 665019, *2 (S.D. N.Y. 1994). See also *Ortega v. Fedcap Rehab. Servs., Inc.*, 2003 WL 21383383, *1 (S.D. N.Y. 2003) (defendant ordered to produce documents relating to other complaints of discrimination, as they "may lead to the discovery of admissible similar act evidence")

Similar acts evidence is also admissible to show actual or constructive knowledge of management, so as to impute liability to the corporation; there comes a time when so many similar acts exist that a corporation cannot deny institutional knowledge of the events. *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 801-02 (8th Cir. 2009); *Johnson v. Washington Times Corp.*, 208 F.R.D. 16, 19 (D. D.C. 2002).

Where a concern exists about potential prejudicial impact of similar act evidence, the concern is commonly addressed with a proper limiting instruction. *Tomczyk v. Rollins*, 2009 WL 1044868, *7 (N.D. Ga. 2009); *Finley v. Cowles Bus. Media*, 1994 WL 665019, *3 (S.D. N.Y. 1994). See also *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 526 (3d Cir. 2003) (discrimination plaintiff who failed to request limiting instruction waived argument that admission of other acts evidence created undue prejudice). Here, even less cause for concern about uncontrollable prejudice exists, because the Court has already ruled that this case will be tried non-jury. See Order Granting Clarification [Doc. 197].

Even if actual knowledge of discrimination is not an element of Plaintiff's claim under ADA, see *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994), it does not logically follow that evidence of actual knowledge is necessarily irrelevant to proof of any other element of the case. Here, the evidence of similar acts sheds light upon a number of issues which have no relation to propensity or bad character.

b. Evidence of Other Victims is Relevant to the Allegation that the DAS and its Implementation are Systemically Violative of ADA's Individual Assessment and Reasonable Accommodation Requirement

Defendant's principal defense is that Disney is incapable of individually accommodating its disabled guests. That is, Disney asserts that it is incapable of adopting anything other than a no-exceptions one-size-fits-all accommodations policy, because "abusers" of an ADA-compliant policy will bankrupt the system. (Disney offers no supportive historic headcount or cost data to support this premise.)

In essence, Disney intends to offer proof that any discrimination flowing from the DAS is a necessary collateral risk in comparison to the extensive number of abusers who would inevitably take advantage of an ADA-compliant accessibility policy. This theory should be incompatible with the ADA's requirement that Disney show that the cost of individually accommodating A.L., rather than the cost of avoiding a universe of abusers, will fundamentally alter Disney's products and services. But assuming Disney's phobia about an epidemic of abusers is otherwise relevant, it is proper to evaluate that risk by comparing the number of abusers to the number of victims. While Disney offers no proof as to the number of abusers, Plaintiffs are prepared to offer substantial proof that the number of victims – consisting of families in which a disabled person has a developmental disorder manifesting in a cognitive impairment – is substantial.

Also, again assuming the speculative cost of "abusers" is relevant to Disney's duties to A.L. under the ADA, Plaintiffs are also prepared to offer proof that even though Disney's disabled guests suffer from a wide array of cognitive impairments which manifest in different ways, Disney's treatment of all of these disabled guests is rote and uniform. That is, by showing that many disparate victims exist, all of whom are treated identically, Plaintiffs will offer proof that the DAS and Disney's implementation of the DAS are indeed "blanket" and "one-size-fits-

all" policies, with no room for individual assessments and reasonable modifications as required under ADA. In order to best show that the DAS is systemically violative of ADA's individual assessment requirement, A.L. proposes to offer proof that the system results in the same across-the-board treatment for everyone regardless of any individual special needs and regardless of any particular nuances of a guest's disability.[2]

c. Evidence of Other Victims is Relevant to the Show that Requested Injunctive Relief would not Result in a Fundamental Alteration

Plaintiffs' complaint includes requests for a wide array of injunctive relief, including:

- Enjoining Defendant to reasonably modify its policies, practices, and procedures to afford Plaintiff with an opportunity to experience Disney's goods, services, facilities, privileges, advantages, and accommodations; and
- Establishing Court-approved remedial measures that Disney must implement, to prevent Disney from further discriminating against Plaintiff when they visit the Disney Parks; and
- Establishing Court-approved requirements for information dissemination about Disney's remedial measures and modified policies, to prevent Disney from further deterring Plaintiff from visiting Disney Parks as a result of anticipated discrimination.

Should the Court wish to take up for consideration any of these requested forms of injunctive relief, the magnitude of any particular form of injunctive relief may become material. For example, if the injunctive relief includes an order requiring Disney to train its employees in the basic fundamentals of dealing with guests with autism, the breadth of such training might become part of the analysis. See *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994) (in action for injunctive relief under ADA, where state failed to show that undue hardship would flow from

[2] For authorities relating to ADA's individualized assessment requirement in the context of reasonable modifications, see Plaintiffs motion for summary judgment and cases cited therein. See also, for example, *Forbes v. St. Thomas Univ., Inc.*, 768 F. Supp. 2d 1222, 1227-28 (S.D. Fla. 2010) ("[ADA] creates an affirmative duty in some circumstances to provide special, preferred treatment, or 'reasonable accommodation'"), *quoting Henrietta D. v. Bloomberg*, 331 F.3d 261, 275–276 (2nd Cir.2003) and *Dunlap v. Ass'n of Bay Area Gov'ts*, 996 F.Supp. 962, 965 (N.D. Cal.1998.

providing to deaf persons mental health counselors who had understanding of and experience within the deaf community, injunction would not result in fundamental alteration).

d. The Potential Similar Acts Evidence is Not Hearsay; Motion is Premature

As for Disney's argument that any similar acts evidence which might be offered is necessarily hearsay, the argument is premature. Plaintiff can produce evidence of similar acts and similarly-situated victims in any number of ways, such as through live testimony from any of scores of potential victim witnesses, or through substantiated summaries of common data, or through Disney's own business records relating to complaints by disabled guests. This aspect of the motion must simply be tabled until the manner and context in which the evidence is offered at trial becomes more clear.

IV. Disney's Motion to Exclude Evidence of Third Party Surveys and Studies

Essentially, Disney argues for exclusion of this evidence on the same basis as the above-discussed similar acts evidence. For this reason, the above discussion in opposition to that aspect of Disney's motion applies here.

V. Disney's Motion to Exclude Evidence Relating to FCHR Determinations of Discrimination

Disney's concerns that this evidence is untrustworthy, that it is not sufficiently probative, and that it may become unduly prejudicial, are undermined by the fact that this trial will be a bench trial before the Court. Also, there exists no reason at this early stage to address evidentiary rulings at trial which may not materialize, and for which the context of presentation at trial is not yet known. Otherwise, Disney argues for exclusion of this evidence on the same basis as the above-discussed evidence relating to similar acts and third party surveys and studies. For this reason, the above discussions in opposition to those aspects of Disney's motion apply here.

VI. Disney's Motion to Exclude Evidence or Argument that Disney, Through its DAS, Intentionally Discriminates Against Disabled Guests and Knowingly Deters them from Attending the Parks

It is true that Plaintiffs have not uncovered any document in the nature of an internal communication expressly stating: "Let's get rid of those autistic guests who sometimes ruin the Magic for our non-disabled guests." At least no such express admission is contained within the documents which Disney has produced.[3] But there can be no doubt that Disney knowingly and intentionally discriminates against persons with A.L.'s particular category of disability. See Ex. 8 to Plaintiff's Motion for Summary Judgment [Doc. 181-8], which contains more than 30 documents establishing that: 1) Disney's own disabilities personnel repeatedly internally warned Disney's industrial engineers that the DAS would not accommodate the needs of Disney's guests with cognitive impairments; 2) Disney deliberately ignored those warnings and released the DAS in the form its own disabilities personnel knew would be discriminatory; and 3) Disney's own disabilities personnel continued to so warn Disney even after the DAS was released, all to no avail.

Just as Disney cannot or will not say how many families with autism have visited the Disney parks at any time, Disney cannot or will not say whether the number of such guests visiting the Disney parks is diminishing. It takes no imagination at all to reach the inference that the number is plummeting. Because the experience has proven a miserable one, locally-based families with season passes know not to renew their passes, at least not until Disney recognizes reasonable modifications to its flawed accessibility policy. Similarly, distant families have learned enough from public outcry to know not to invest thousands of dollars in a vacation which is certain to create a horrible experience. Again, given Disney's knowledge that the DAS would

[3] Plaintiffs cannot speculate as to what admission may be contained in the 3,095 documents Disney has NOT produced but has identified on its privilege log.

not accommodate these families, and given the necessary result that families would be deterred from returning and/or attending in the future, it takes no imagination at all to infer that Disney intended the obvious result; the DAS would dramatically reduce park attendance by families in which someone has moderate to severe autism.

VII. Conclusion

For the reasons outlined above, Defendant Disney's Amended Consolidated Motion in Limine must be denied in its entirety, on its merits. Alternatively, the motion should be denied without prejudice to renewal at the time of trial, for the reason that it is premature.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Electronic Mail this 25th day of November, 2015 to:

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