SAN FRANCISCO
Daily Journal
— Since 1893 —

TUESDAY,
APRIL 8, 2008

COVER STORY

9th Circuit Agrees Litigant Is Vexatious

Wheelchair User, Lawyer Need OK To File More Suits

By John Roemer/ Daily Journal Staff Writer

Jarek Molski is a Woodland Hills paraplegic who uses a wheelchair and the courts. Molski's 400-plus lawsuits over disability access to California businesses led a senior District Court judge from Los Angeles to declare him a vexatious litigant and to sanction his lawyer.

On Monday, despite powerful dissents, the full 9th U.S. Circuit Court of Appeals affirmed the judge.

The vexatious-litigant designation means Molski must get permission from a judge before filing any further ADA claims in the Central District.

ADA Claims

The sanction on the lawyer, Thomas E. Frankovich of San Francisco, similarly requires him to win the Central District's OK before filing ADA claims for any client. Frankovich represents Disability Rights Enforcement Education Services, a nonprofit advocacy group that often sues over access issues.

In August, a three-judge panel of the 9th Circuit affirmed the decision of the judge, Edward Rafeedie, who died March 25.

On Monday, the full 27-judge circuit refused to reconsider the case en banc, allowing Rafeedie's vexatious-litigant decree, also known as a pre-filing order, to stand. Molski v. Evergreen Dynasty Corp., 05-56452 (9th Cir. April 7, 2008).

Rare Alliance

But a rare nine-judge alliance of circuit liberals plus Chief Judge Alex Kozinski, who styles himself a libertarian but who often votes with conservatives, penned two scorching dissents demanding restoration of Molski's unfettered right to sue.

Kozinski called Rafeedie's action tyranny, blasting the trial court's failure to hold an adequate evidentiary hearing before issuing the decree.

"Fortunately," Kozinski wrote, "there's a cure. The lawyers and judges of the Central District don't have to put up with this kind of tyranny by one judge acting entirely on his own."

Writing in his typical forceful and direct style, and with his authority as chief judge, Kozinski told the Central District what it "can and should" do: adopt a local rule requiring a judge to win agreement from colleagues before entering any pre-filing order.

And don't trust the judge who makes the order to implement it, Kozinski cautioned.

"Far wiser, and fairer, to have other judges, drawn at random, enforce the order in future cases," he wrote.

The suit that led to Molski's clash with Rafeedie started when Molski had a meal and tried to use the restroom at the Mandarin Touch Restaurant in Solvang in 2003.

Molski said there was not enough clear space for him to access the toilet. When he tried to leave the restroom, he caught his hand in the door, causing trauma, his complaint asserted.

The suit, filed under the ADA and California law, sought injunctive relief, attorney fees and costs, damages of $4,000 per day for each day the restaurant remained inaccessible, as well as punitive damages and pre-judgment interest.

Businesses strongly dislike such suits and often settle them rather than pay litigation costs.

But the Mandarin Touch's parent company, Evergreen Dynasty Corp., fought back. It retained attorney Robert H. Appert of San Gabriel not only to dispute Molski's claims but also to petition the judge for a vexatious-litigant order.

It worked. In 2005, Rafeedie issued the vexatious-litigant order and granted summary judgment in favor of the restaurant on Molski's ADA claims. A three-judge circuit panel comprising Jerome Ferris, Ronald M. Gould and Kevin Thomas Duffy, a New York senior district judge sitting by designation, held that Rafeedie acted "within his sound discretion."

But the dissenters Monday thought otherwise. Pre-filing orders implicate First Amendment and due process rights, pointed out Circuit Judge Marsha L. Berzon in a dissent she wrote separately from Kozinski's.

They can't be issued merely because a plaintiff is litigious and files numerous claims, but only if the claims "are patently without merit," Berzon wrote.

Rafeedie and the three-judge panel, she wrote, "may be uncomfortable with ADA litigation that it suspects is being brought to induce settlement."

"This concern with serial litigation is shared by many, rightly or wrongly," she wrote.

But Berzon questioned why the issue is so troubling.

"Judging by the dozens of settlement agreements in the record," she wrote, "the vast majority of these settlements include provisions for remedying barriers to access — precisely the goal sought by the ADA — as well as small amounts of monetary relief and payment of attorneys' fees."

Berzon and seven of the other dissenters - Harry Pregerson, Stephen Reinhardt, Michael Daly Hawkins, M. Margaret McKeown, Kim McLane Wardlaw and William A. Fletcher — were appointed to the circuit by Democratic presidents.

Kozinski is a President Reagan appointee whose vote remains unpredictable, as shown by his Monday vote in dissent to a conservative opinion.

In September, he allied with eight mostly conservative judges in protesting a denial of en banc review of a liberal opinion in an immigration case, Ramadan v. Keisler, 504 F.3d 973 (2007).

No other judge joined both dissents, noted Arthur Hellman, a scholar at the University of Pittsburgh School of Law who studies the 9th Circuit.

Frankovich, the attorney representing Molski, called the dissents "a major effort by the court to heat up the chilling effect of Rafeedie's order."

"It gives federal and state judges now a lot of guidance at how they ought to look at this, how they ought to redress the wrongs by the district court and the circuit panel," Frankovich said.

Concerned business groups including the California Restaurant Association and lobbyists representing state retailers, grocers and farmers retained Lizbeth V. West, of Sacramento's Weintraub Genshlea Chediak, to file amicus briefs in the case supporting Mandarin Touch Restaurant.

West criticized "a certain group of professional plaintiffs and their lawyers, motivated by attorney fees and statutory damages, who keep filing suits for hypertechnical violations" of the ADA.

"My clients call these drive-by lawsuits," she said. "Plaintiffs can go in almost in a private regulatory role and subject businesses to great economic hardship."

West predicted that the win for Mandarin Touch and the businesses, despite the dissents, will encourage others to try to use the vexatious-litigant statutes "against other serial filers."

Appert, who represents Mandarin Touch Restaurant, did not return a call seeking comment Monday.

Hellman thinks the circuit's Judicial Council has the authority under 28 U.S. Code Section 332 (d) (1) to impose a binding circuitwide rule that would force all district courts to adopt the procedure Kozinski suggested in his dissent.

Kozinski, as chief judge, is chairman of the council.

The code section empowers the council to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."

Hellman said, "So I think the district court is on notice that, if it does not adopt a local rule or general order on pre-filing orders, the circuit council might step in.

"But it probably won't be necessary. I think the Central District judges will take the hint."