

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

KIMBERLY PLETCHER,)
)
Plaintiff,)

and)

Case No. 2:20-cv-754 NBF

JUDITH MARCH, JOSIAH KOSTEK,)
GRAYDON GRAHAM, RONNIE)
STURCHIO, NICHOLAS CONLEY,)
SHARON BURTON, DEBBIE VIDOVICH,)
PAUL SHEPHERD, GERALD)
THOMCHICK, CONNIE WINNER, JOHN)
DURSO, TRACY O’CONNOR, DOUGLAS)
JANASZEK, OWEN BURK, BEN)
ZYTNIK, GREGORY MANDICH, JOHN)
BLACKSTONE, JAMES LEONARD,)
KATHLEEN CUNNINGHAM, JAMIE)
MARKS-BORICHEVSKY, POLLY)
QUINTILIANI, CAROLYN L. STEWART,)
TOMMY WYNKOOP, TAMMIE AIKEN,)
STEVEN PARSONS, JEFREY COULSON,)
KATHERINE DUCKSTEIN, NATHANAEL)
DOLLAR, THOMAS BENSOR, VICKI)
PARKER, STEPHEN MCRAE, KRISTIE)
HARNISH, MOLLY SHIRK, MICHAEL)
HAMMERS,)

Consolidated Plaintiffs)

v.)

GIANT EAGLE, INC. and C&J GROCERY)
CO., LLC,)

Defendants.)

**JOSIAH KOSTEK’S REPLY TO GIANT EAGLE’S BRIEF IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION**

AND NOW, COMES Plaintiff, Josiah Kostek, by and through his attorneys, Thomas B. Anderson, Esquire and Thomson, Rhodes & Cowie, P.C. and files this Reply to Defendant’s

Brief in Opposition to Amended Motion for Preliminary Injunction and in support thereof states as follows:

I. Giant Eagle has completely mischaracterized its obligations under the ADA and simply ignored the regulations implementing Title III.

Plaintiff's motion for preliminary injunction is full of references to the ADA regulations that Giant Eagle has violated. In its brief in opposition, Giant Eagle cites only one subsection of one ADA regulation and does not address in any way the remaining regulations. The reason Giant Eagle mentions only one section of the regulations is because it clearly violated others and the other regulations eviscerate its arguments in opposition to the requested preliminary injunction. Giant Eagle's policy and its treatment of Josiah Kostek cannot be reconciled with the Title III regulations (28 C.F.R. §§ 36.101 – 36.208) that provide "broad" and "expansive" coverage and protection for the disabled to the "maximum extent permitted" by the ADA. 28 C.F.R. § 36.101.

The ADA regulations allow public accommodations to make reasonable safety rules, but modifications must be made if they are reasonable and necessary, unless doing so would modify the nature of the business or the individual is a direct threat to the health and safety of others. 28 C.F.R. § 36.208 (Direct threat) (emphasis added). The ADA regulations only apply the term "direct threat" to an individual, not a generalized threat of any virus, and the regulations require an "individualized assessment" of whether the person is a direct threat, which Giant Eagle did not do. 28 C.F.R. § 36.208(a) and (b).

Giant Eagle makes a general statement that "COVID-19 is a direct threat to the health and safety of others." Doc. 22, p. 11-13. This argument misses the mark as it completely fails to address the requirements of 28 C.F.R. § 36.208(a) and (b). Giant Eagle makes this argument because it made no individualized assessment of Plaintiff, or any other individual, it merely adopted a policy and instructed its employees that no medical exceptions were allowed. "No

medical exceptions” necessarily means *no modifications for disabilities*. Furthermore, nowhere in its brief does Giant Eagle mention the central ADA regulation at issue, 28 C.F.R. § 36.302 (Modification in policies, practices, or procedures), that requires Giant Eagle to make reasonable and necessary modifications to its policies.¹

Giant Eagle also makes an argument that modifying its policy, such that it would have to do exactly what it has done for months in all its West Virginia, Ohio, and Indiana stores would impose an undue burden. However, Giant Eagle was admittedly going to change its policy months ago, in fact, it even posted signs on the doors of its GetGo locations suggesting that it had made the policy change. See Exhibit “M.” This argument is completely without merit or substance and cannot justify denial Plaintiff’s motion for preliminary injunction.

II. Giant Eagle cannot rely on the measures it put in place to deal with COVID-19 as an excuse to violate the ADA.

Giant Eagle spends much of its brief outlining the steps it took in response to COVID-19. Any measures put in place do not make it more or less likely that Giant Eagle violated the ADA and ignored the clear language of the Secretary of Health’s Orders. It matters not that Giant Eagle tried to implement or increase the availability of other options for customers who cannot wear masks inside its stores. Disabled individuals may not be told they must wait outside for someone else to select their groceries and bring the items outside, while nondisabled customers shop inside the store. Dominguez v. Banana Republic, LLC, 2020 U.S. Dist. LEXIS 72193, *14 (S.D.N.Y., April 23, 2020) (“To make this more concrete, a bookstore could not prohibit a visually impaired person from entering its store, but it need not ensure that the books it sells are

¹ “A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.” 28 C.F.R. § 302(a).

available in both Braille and standard print.”).² Contrary to Giant Eagle’s arguments, disabled individuals are not required to accept alternatives such as having others shop for them. 28 C.F.R. §§ 36.202 (Activities) – 36.203 (Integrated settings). These regulations are also not mentioned in Giant Eagle’s brief because they are irreconcilable with Giant Eagle’s policy and actions.

In J.D. v. Colonial Williamsburg Found., 925 F.3d 663, 666 (4th Cir. 2019), a child with a strict gluten-free diet sued Colonial Williamsburg for violation of Title III of the ADA when during a school fieldtrip a restaurant refused to allow him to bring his homemade gluten-free meal into the restaurant and instead offered to prepare him a gluten-free meal as an alternative. The Plaintiff declined the alternative because he did not trust the restaurant to safely prepare the meal to his specific needs. Id. Instead, the Plaintiff chose to eat his homemade meal outside and apart from the rest of his classmates. Id.

At issue was the restaurant’s policy against allowing outside food into its restaurant. Id. at 668. The district court granted summary judgment to the defendant concluding that the defendant did not deny the plaintiff a like experience because the restaurant would have prepared a gluten-free meal, or would have allowed him to stay inside, enjoy the atmosphere, and eat his meal later. Id. at 672. The district court concluded that the requested modification was not necessary for full enjoyment of the restaurant. Id. The Fourth Circuit Court of Appeals disagreed, vacated the district court’s judgment and remanded the case. Id. at 677.

The Colonial Williamsburg Court noted that the United States Supreme Court explained that the policy modification requirement set forth at 42 U.S.C. § 12182(b)(2)(A)(ii), “contemplates three inquiries: (1) whether the requested modification is ‘necessary’ for the

² “Practically speaking, how can an owner, etc., deny *the full and equal enjoyment* of the goods or services that he offers? By denying access to, or otherwise interfering with, the use of the goods or services that the business offers.” Id. at *14-15, quoting McNeil v. Times Ins. Co., 205 F.3d 179, 186-87 (5th Cir. 2000).

disabled individual; (2) whether it is ‘reasonable’; and (3) whether it would ‘fundamentally alter the nature’ of the public accommodation.” *Id.* at 671, quoting PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 n. 38, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001). “For each step, the ADA requires an ‘individualized inquiry’ based on the particular circumstances.” Colonial Williamsburg, 925 F.3d at 671, quoting Martin, 532 U.S. at 688.

In order to determine whether a requested policy modification is necessary, “public accommodations must start by considering how their facilities are used by nondisabled guests and then take necessary and reasonable steps to provide disabled guests with a like experience.” Colonial Williamsburg, 925 F.3d at 672, quoting A.L., ex rel. D.L. v. Walt Disney Parks & Resorts US, Inc., 900 F.3d 1270, 1296, (11th Cir. 2018); accord Argenyi v. Creighton Univ., 703 F.3d 441, 451 (8th Cir. 2013); Baughman v. Walt Disney World Co., 685 F.3d 1131, 1135 (9th Cir. 2012). “This approach is consistent with the ADA, which ‘guarantees the disabled more than mere access to public facilities; it guarantees them ‘full and equal enjoyment.’” Colonial Williamsburg, 925 F.3d at 672, quoting Baughman, 685 F.3d at 1135 (quoting 42 U.S.C. § 12182(a)).

The Colonial Williamsburg Court determined that there were genuine issues of fact concerning the plaintiff’s ability to eat out. 925 F.3d at 673. The Court of Appeals held that the district court erred in finding as a matter of law that the plaintiff’s “proposed modification was not necessary to have an experience equal to that of his classmates.” *Id.* at 674. The Court also held that the plaintiff had put forth sufficient evidence that his requested modification was reasonable. *Id.* at 675.

In Colonial Williamsburg, the defendant also claimed that the plaintiff's modification request was unreasonable because its policy was a legitimate safety requirement; the Appeals Court disagreed. Id. at 675.

And although "a public accommodation may impose legitimate safety requirements that are necessary for safe operation," 28 C.F.R. § 36.301(b), such requirements won't inevitably override a reasonable modification request. See Lamone, 813 F.3d at 508 ("**Requiring public entities to make changes to rules, policies, practices or services is exactly what the ADA does.**" (citation omitted)).

Id. at 675 (emphasis added).

Giant Eagle was legally required to analyze how its stores are used by nondisabled customers and make reasonable modifications to its policies to create a "like experience," as well as "full and equal enjoyment" for those disabled customers, such as Mr. Kostek, who cannot wear masks because of their disabilities. The emergence of COVID-19 did not suspend the ADA. Giant Eagle cannot legitimately argue that telling customers with disabilities that prevent them from wearing masks they must stand outside and allow employees to select their groceries for them, while nondisabled customers can select their own items inside the store, provides the disabled with full and equal enjoyment of the store, as well as a like experience.

Giant Eagle cannot use the virulence of the novel corona virus in and of itself as a basis to refuse to modify its zero-medical (disability) exception mask policy. The Pennsylvania Health Department has clearly and repeatedly recognized the need for disabled people and those with health conditions that prevent them from wearing a mask to be exempt from mask mandates. As the Covid-19 numbers increased in Pennsylvania, so did the exceptions set forth in the Secretary's Orders.³ Additionally, Giant Eagle had no mask policy in neighboring states.

³ The Secretary of Health's July 1, 2020 Order contains several exceptions to the mask mandate that clearly were intended to preserve the legal rights of the disabled. A copy of the Order is attached hereto as Exhibit "N." On July 1, 2020, Secretary Levine issued a new order regarding the wearing of masks. This time, she detailed more

III. Plaintiff has met his burden of proof entitling him to a preliminary injunction.

Plaintiff has produced medical evidence that proves he meets the definition of a person with a disability under Title III. See 28 C.F.R §§ 36.101(b) and 36.105. Plaintiff's medical evidence shows that due to his anxiety and PTSD, Plaintiff could not even tolerate wearing a soft cervical collar after neck surgery and he cannot wear a mask. Plaintiff has also provided a declaration in which he states that he cannot wear a mask due to his disabilities and his counselor's records, provided under seal, support his declaration. Plaintiff also provided video evidence that he was not permitted to select his own groceries inside the store or pay for the selected groceries, despite making a reasonable and necessary request for a modification. Plaintiff has provided evidence that his request was necessary to allow him to shop in the store like nondisabled customers and that the requested modification was reasonable and in accordance with state orders and guidelines. Also provided was the retaliatory letter banning him from the store. Plaintiff has satisfied all requirements to obtain preliminary injunctive relief that requires nothing more than compliance with the Health Secretary's Orders.

IV. Giant Eagle's exhibit proves it retaliated against Kostek in violation of the ADA.

In Exhibit 4 to its brief, Giant Eagle admits that it permanently banned Mr. Kostek from the store. The letter dated May 30, 2020, was written three days after the second time Mr.

exceptions to her order. The July 1, 2020 Order is to be read in conjunction with her prior order. According to the Order, the following are exceptions to the face covering requirement:

- i. **individuals who cannot wear a mask due to a medical condition, including those with respiratory issues that impede breathing, mental health condition, or disability;**
- ...
- iii. individuals who would be unable to wear a mask without assistance;
- iv. individuals who are under two years of age; and
- v. **individuals who are communicating or seeking to communicate with someone who is hearing-impaired or has another disability, where the ability to see the mouth is essential for communication. (emphasis added).**

The Order also states that individuals are not required to show documentation that an exception applies in his or her case.

Kostek was denied service at the store. The second encounter on May 27th, that was captured on video and shared with this Honorable Court, is not mentioned at all in the Declaration of Diana Mancini Liebmann or in Defendant's brief. During both encounters, Plaintiff attempted to shop for groceries without a mask. When he asserted his rights under the ADA, he was threatened with violence by one employee and called a "dumbass" by another. The police were called, and he was taken away in handcuffs after being denied service. Giant Eagle refused his request to modify its policy and allow him to shop without a mask. Giant Eagle then permanently banned him from the store because he asserted his rights under the ADA. The evidence is crystal clear, based on its own admission and exhibits, that Giant Eagle engaged in illegal retaliation in violation of 28 C.F.R. §36.206 (Retaliation or coercion), causing irreparable harm and warranting preliminary injunctive relief.⁴

V. Giant Eagle decided not to change its policy because of a labor union threat.

Giant Eagle's Exhibit 3B proves the company was going to comply with the Order of the Secretary of Health as of May 28, 2020. On May 27, 2020, Giant Eagle sent a memo to all "Team Members" advising them that as of May 28th, there would no longer be "**front door mask detail**" and like other businesses the sign on the front door would be the only "mask enforcement." Doc. 22 Exhibits "3A" and "3B." Why didn't Giant Eagle comply with the Secretary's Order or the guidelines that had been in place for nearly a month that clearly instructed Giant Eagle how to respond to customers who cannot wear masks? Plaintiff Exhibit "F." Did Giant Eagle decide not to change its policy and practices on May 28, 2020 because it

⁴ 28 C.F.R. §36.206 (a), (b) and (c)(2) have all been violated by Giant Eagle's actions. Plaintiff has set forth evidence of (a) protected activity, (b) knowledge by the retaliator of the activity, (c) adverse action by Giant Eagle, and (d) a causal connection between the protected activity and the adverse action. Defendant's own exhibit establishes causation and that Giant Eagle banned him from the store because of his protected activity. See Wilson v. Murillo, 162 Cal. App. 4th 1124, *1133-1137 (Cal. App. 2008) citing, Weixel v. Board of Educ. Of City of New York, 287 F.3d 138, 148 (2d Cir. 2002); Shotz v. City of Plantation, Fla., 344 F.3d 1161, 180 (11th Cir. 2003).

received new guidance from the Pennsylvania Department of Health or the CDC? No, Giant Eagle reversed course and continued to enforce its illegal policy in Pennsylvania for one reason; the union representing Pennsylvania employees threatened Giant Eagle.

VI. CONCLUSION

For the reasons set forth herein and in Plaintiff's original motion, this Honorable Court should grant Plaintiff's motion for preliminary injunction. Plaintiff has met his burden of establishing that the reasonable and necessary injunctive relief that he is requesting should be granted. Plaintiff has a reasonable possibility of succeeding on the merits after discovery has been conducted, but the requested preliminary injunctive relief is necessary now to right the wrong that has been done to him and to prevent ongoing disability discrimination, retaliation and irreparable harm.

Respectfully submitted,

THOMSON, RHODES & COWIE, P.C.

Dated July 27, 2020

/s Thomas B. Anderson
Thomas B. Anderson, Esquire
PA I.D. #79990

THOMSON, RHODES & COWIE, P.C.
Firm No. 720
Two Chatham Center, 10th Floor
Pittsburgh, PA 15219
(412) 232-3400

Attorneys for the Plaintiff



State Mandate

Face Coverings Required

If you are not wearing a mask, we respectfully assume it's due to a medical condition





Order of the Secretary of the Pennsylvania Department of Health Requiring Universal Face Coverings

COVID-19 is a contagious disease that is rapidly spreading from person to person. People infected are capable of exposing others to COVID-19 even if their symptoms are mild, such as a cough, or even if they are asymptomatic. Additionally, exposure is possible by touching a surface or object that has the virus on it and then touching one's mouth, nose, or eyes. Symptoms of COVID-19 may include fever, cough, shortness of breath, chills, repeated shaking with chills, muscle pain, headache, sore throat, and new loss of taste or smell. Early symptoms may also include chills, body aches, sore throat, headache, diarrhea, nausea or vomiting, and runny nose. Older adults and people who have serious chronic medical conditions are at a higher risk for serious illness.

The first cases of COVID-19 were reported in the United States in January 2020. Since then, multiple areas of the United States have experienced "community spread" of COVID-19, meaning that the illness is being transmitted through unknown contact, and not from contacts with known cases. On March 6, 2020, after the first cases of COVID-19 in the Commonwealth of Pennsylvania were confirmed, the Governor issued a Proclamation of Disaster Emergency. Since that date, the number of positive cases has continued to rise, and community spread has continued in the Commonwealth as well. Case counts rapidly increased throughout the Commonwealth in March and April, 2020. As of July 1, 2020, every county in the Commonwealth has been affected, the number of cases is 87,242, and 6,687 individuals have died from COVID-19.

In order to slow the spread and protect the people of the Commonwealth, the Governor and I issued Orders on March 19, 2020, closing all Commonwealth businesses that are not life sustaining. *See Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life Sustaining*, as amended; *Order of the Secretary of the Pennsylvania Department of Health Regarding the Closure of All Businesses That Are Not Life Sustaining*, as amended. On April 1, 2020, the Governor and I issued Orders directing all individuals in Pennsylvania to stay at home. *See Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home*, as amended; *Order of the Secretary of the Pennsylvania Department of Health to Stay at Home*, as amended.

In addition, I issued an Order on April 15, 2020, requiring mitigation measures to be applied at businesses that are permitted to engage in in-person operations, including a requirement that all customers wear masks while on premises of businesses that serve the public within a building or a defined area and directs businesses to deny entry to individuals not wearing masks, unless the business is providing medication, medical supplies, or food, in which case the business must provide alternative methods of pick-up or delivery of such goods. Individuals who cannot wear a mask due to a medical condition (including children under the age of 2 years per CDC guidance) are permitted to enter the premises and are not

required to provide documentation of such medical condition. *See Order of the Secretary of the Pennsylvania Department of Health Directing Public Health Safety Measures for Businesses Permitted to Maintain In-person Operations.*

Those mitigation efforts slowed the spread of the disease, protected our hospitals from being overwhelmed, and enabled our hospitals to care for our ill residents. Accordingly, in Orders on May 7, 2020, the Governor and I suspended restrictions for certain areas instituted in the orders on March 19, 2020, as amended, and April 1, 2020, as amended. *See Order of the Governor of the Commonwealth of Pennsylvania for Limited Opening of Business, Lifting of Stay at Home Requirements, and Continued Aggressive Mitigation Efforts, as amended; Order of the Secretary of the Pennsylvania Department of Health for a Limited Opening of Businesses, Lifting of Stay Home Requirements and Continued Aggressive Mitigation Efforts, as amended.*

These mitigation strategies, practiced by all persons in the Commonwealth, have been successful in slowing the spread of the virus, and have allowed the phased and considered reopening of the Commonwealth, *see Order of the Governor of the Commonwealth of Pennsylvania for the Continued Reopening of the Commonwealth* of May 27, 2020, as amended; *Order of the Secretary for the Continued Reopening of the Commonwealth* of May 27, 2020, as amended. Person-to-person spread does continue however, and with the reopening, the Commonwealth is beginning to see increases in new cases. Mindful of the need to slow this increase, in order to avoid the types of stringent Commonwealth-wide mitigation strategies that were discontinued a short time ago, and in order to avoid the resurgence that is overwhelming the health care systems and public health systems in other states, I am ordering that all persons in the Commonwealth wear face coverings in accordance with this Order. Face coverings can decrease the spread of respiratory droplets from people. *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html#recent-studies>. When used in public settings, face coverings will work to reduce the spread of COVID-19 in the Commonwealth.

COVID-19 is a threat to the public's health, for which the Secretary of Health may order general control measures, including, but not limited to, closure, isolation, and quarantine. This authority is granted to the Secretary of Health pursuant to Pennsylvania law. *See* section 5 of the Disease Prevention and Control Law, 35 P.S. § 521.5; sections 2102(a) and 2106 of the Administrative Code of 1929, 71 P.S. §§ 532(a), and 536; and the Department of Health's regulations at 28 Pa. Code §§ 27.60-27.68 (relating to disease control measures; isolation; quarantine; movement of persons subject to isolation or quarantine; and release from isolation and quarantine). Particularly, the Department of Health has the authority to take any disease control measure appropriate to protect the public from the spread of infectious disease. *See* 35 P.S. § 521.5; 71 P.S. § 532(a), and 1403(a); 28 Pa. Code § 27.60.

Accordingly, on this date, July 1, 2020, to protect the public from the spread of COVID-19, I hereby order:

Section 1: Face Coverings Defined

“Face covering” means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face. A “face covering” can be made of a variety of synthetic or natural fabrics, including cotton, silk, or linen. For purposes of this order, a face covering includes a plastic face shield that covers the nose and mouth. “Face coverings” may be factory-made, sewn by hand, or be improvised from household items, including but not limited to, scarfs, bandanas, t-shirts, sweatshirts, or towels. While procedural and surgical masks intended for healthcare providers and first responders meet these requirements, such as N95 respirators, these specialized masks should be reserved for appropriate occupational and health care settings.

Section 2: Face Coverings Required

Except as provided in Section 3, individuals are required to wear face coverings if they are:

- A. outdoors and unable to consistently maintain a distance of six feet from individuals who are not members of their household;
- B. in any indoor location where members of the public are generally permitted;
- C. waiting for, riding on, driving, or operating public transportation or paratransit or while in a taxi, private car service or ride-sharing vehicle;
- D. obtaining services from the healthcare sector in settings including, but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, veterinary clinic, or blood bank; or
- E. engaged in work, whether at the workplace or performing work off-site, when interacting in-person with any member of the public, working in any space visited by members of the public, working in any space where food is prepared or packaged for sale or distribution to others, working in or walking through common areas, or in any room or enclosed area where other people, except for members of the person’s own household or residence, are present when unable to physically distance.

Section 3: Exceptions to Face Covering Requirement

- A. The following are exceptions to the face covering requirement in Section 2:
 - i. Individuals who cannot wear a mask due to a medical condition, including those with respiratory issues that impede breathing, mental health condition, or disability;

- ii. Individuals for whom wearing a mask while working would create an unsafe condition in which to operate equipment or execute a task as determined by local, state, or federal regulators or workplace safety guidelines;
 - iii. Individuals who would be unable to remove a mask without assistance;
 - iv. Individuals who are under two years of age;
 - v. Individuals who are communicating or seeking to communicate with someone who is hearing-impaired or has another disability, where the ability to see the mouth is essential for communication;
- B. Individuals are not required to show documentation that an exception applies.

Section 4: Prior Orders

This Order is intended to be read in concert with my Order Relating to Public Health Safety Measures for Businesses Permitted to Maintain In-person Operations, dated April 15, 2020, and with the Governor's and my Orders for the Continued Reopening of the Commonwealth, dated May 27, 2020.

Section 5: Effective Date

This Order is effective immediately and will remain in effect until further notice.



Rachel Levine, MD
Secretary of Health