

**UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MICHIGAN**

<p>SUSAN MCKAY, individually and on behalf of all others similarly situated,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>BORDER FOODS, INC., and BORDER FOODS OF WISCONSIN, LLC,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No.</p> <p>NATIONWIDE</p> <p>CLASS ACTION COMPLAINT</p>
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NATIONWIDE CLASS ACTION COMPLAINT

COMES NOW, Plaintiff SUSAN MCKAY (“Plaintiff”), on behalf of herself and all others similarly situated, and asserts as follows:

INTRODUCTION

1. Plaintiff, a person with a mobility disability who uses a wheelchair for mobility, brings this action individually and on behalf of all others similarly situated against Defendants, asserting violations of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the “ADA”), and its implementing regulations. Defendants BORDER FOODS, INC., and BORDER FOODS OF WISCONSIN, LLC (collectively, “Defendants”) collectively own, lease, and/or operate at least one hundred eighty-nine (189) Taco Bell restaurants in the states of Iowa, Illinois, Michigan, Minnesota, South Dakota, Wisconsin, and Wyoming. Plaintiff’s claims arise from own her experience with excessive sloping conditions in purportedly accessible parking spaces, access aisles, and curb ramps (“Parking Area” or “Parking Areas”) at places of public accommodation owned, operated, controlled, and/or leased by Defendants (“Defendants’

facilities”), and from site investigations at seventeen (17) of Defendants’ facilities also finding excessive sloping conditions.

2. Plaintiff asserts that these excessive sloping conditions persist in part as a result of Defendants’ existing but inadequate internal maintenance procedure, which fails to ensure compliance with the sloping requirements of the ADA’s implementing regulations. *See* 28 C.F.R. §§ 36.101 *et seq.*

3. The ADA expressly authorizes the injunctive relief aimed at modification of *existing* policies, practices, or procedures that Plaintiff seeks in this action. In relevant part, the ADA states:

In the case of violations of . . . this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities. . . . Where appropriate, injunctive relief shall also include requiring the . . . modification of a policy...

42 U.S.C. § 12188(a)(2).

4. Based on the extensive factual investigation performed by Plaintiff’s investigators, Plaintiff believes and therefore asserts that numerous additional facilities owned, controlled, and/or operated by Defendants have Parking Areas that are, or have become, inaccessible to individuals who rely on wheelchairs for mobility due to excessive sloping, demonstrating that the Defendants’ existing internal maintenance procedure (discussed at ¶¶ 18-21 below) is inadequate and must be modified. 42 U.S.C. § 12188(a)(2).

5. Plaintiff brings this action individually and on behalf of all other similarly situated wheelchair users to compel Defendants to (i) remediate all access barriers within the Parking Areas of their facilities, and (ii) modify its existing policies to ensure that its facilities comply with the ADA implementing regulations’ excessive sloping requirements. 28 C.F.R. §§ 36.101 *et seq.*

6. Consistent with 42 U.S.C. § 12188(a)(2), Plaintiff seeks a permanent injunction requiring that:

- a. Defendants remediate excessive sloping within the Parking Areas at Defendants' facilities, consistent with the ADA's implementing regulations;
- b. Defendants modify its existing maintenance policy to ensure that the excessive sloping conditions within the Parking Areas at Defendants' facilities do not reoccur; and
- c. Plaintiff's representatives shall monitor Defendants' facilities to ensure that the injunctive relief ordered pursuant to Paragraph 6.a. and 6.b. has been implemented and will remain in place.

7. Plaintiff's claims for permanent injunctive relief are asserted as class claims pursuant to Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) was specifically intended to be utilized in civil rights cases where the Plaintiff seeks injunctive relief for his or her own benefit and the benefit of a class of similarly situated individuals. To that end, the note to the 1996 amendment to Rule 23 states:

Subdivision(b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

PARTIES

8. Plaintiff Susan McKay is, and at all times relevant hereto was, a resident of Jackson, Michigan. Plaintiff is a person with a mobility disability stemming from a T11/T12 injury resulting from a car accident in 1979. As a result of her disability, Plaintiff uses a wheelchair for mobility. Plaintiff is therefore a member of a protected class under the ADA, 42 U.S.C. § 12102(2), and the regulations implementing the ADA set forth at 28 C.F.R. §§ 36.101 *et seq.*

9. Defendant BORDER FOODS, INC., is, and at all relevant times was a Minnesota Corporation, doing business in the State of Michigan as the owner, lessee, and/or operator of dozens of Taco Bell restaurants in the state.

10. Defendant BORDER FOODS OF WISCONSIN, LLC, is, and at all relevant times was a Wisconsin Corporation, doing business in the State of Michigan as the owner, lessee, and/or operator of dozens of Taco Bell restaurants in the state.

11. Plaintiff is further informed and believes, and based thereon alleges that Defendants collectively own, lease, and/or operate one hundred eighty-nine (189) Taco Bell restaurants in the states of Iowa, Illinois, Michigan, Minnesota, South Dakota, Wisconsin, and Wyoming, as described herein.

12. Defendants' facilities are places of public accommodation as defined in 42 U.S.C. §12181(7) and are therefore subject to the requirements of the ADA.

FACTUAL ASSERTIONS

Plaintiff Has Been Denied Full and Equal Access to Defendants' Facilities

13. Plaintiff visited Defendants' facilities located at 821 Capital Avenue, Battle Creek, Michigan, on September 13, 2021, where she experienced unnecessary difficulty and risk of physical harm exiting and entering her vehicle, and navigating the facilities, such that extra care was needed to avoid falling and to safely traverse the area, due to excessive slopes in a purportedly accessible Parking Area and other ADA accessibility violations as set forth in more detail below.

14. Despite this difficulty and risk, Plaintiff plans to return to Defendants' facilities. She regularly travels to the area to shop and for leisure. On September 13, 2021, Ms. McKay was traveling to Saugatuck for a vacation with her husband and stopped in Battle Creek for food. She travels through Battle Creek to Saugatuck multiple times per year, and plans those trips around

stopping in Battle Creek to eat. Plaintiff often stops for Taco Bell on road trips due to her preference for their crunchwrap supreme and an iced tea. Plaintiff is familiar with Battle Creek because she also travels there several times a year to shop at the store “Ollie’s Bargain Outlet.” Plaintiff will be visiting Battle Creek within the next few months to shop and will be passing through the area to the beach again next Spring, and during those visits, intends to dine at Defendants’ Battle Creek facility. Furthermore, Plaintiff intends to return to Defendants’ facility in Battle Creek facility to ascertain whether it remains in violation of the ADA.

15. As a result of Defendants’ non-compliance with the ADA, Plaintiff’s ability to access and safely use Defendants’ facilities has been significantly impeded and Plaintiff will be deterred from returning to and fully and safely accessing Defendants’ facilities due to the discrimination she has previously encountered there.

**Defendants Repeatedly Deny Individuals with Disabilities Full and Equal Access to
Defendants’ Facilities**

16. As the owner and/or operator of its facilities, Plaintiff is informed and believes, and based thereon alleges that, as a Taco Bell franchisee pursuant to franchise agreements, Defendants utilize an Operations Manual or “Answer System” (the “Manual”) which sets forth the standards issued by the franchisor, and is required to follow all of the manual’s instructions, requirements, standards, specifications, and procedures at each of their locations, including those setting further management, administration, and maintenance policies, practices, and procedures related to “Daily Outside Maintenance.” Plaintiff is further informed and believes, that pursuant to the franchise agreements, Defendants are required to maintain the Restaurant buildings, drivethrus, parking lots, and landscaped areas at each individual location in conformance with the specifications set forth in the Manual.

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