

Judge Regina Cahan

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

THE WASHINGTON STATE )  
COMMUNICATION ACCESS )  
PROJECT, a Washington Non- )  
Profit Corporation, )

No. 09-2-06322-2-SEA

Plaintiff, )

vs. )

PLAINTIFF'S  
POST-HEARING BRIEF  
CONCERNING AGENCY  
RULEMAKING AND  
DUE PROCESS

REGAL CINEMAS, INC., )  
a subsidiary of Regal Entertainment )  
Group, a Delaware Corporation, )  
AMC ENTERTAINMENT, INC., )  
a/k/a AMERICAN )  
MULTI-CINEMA, INC., )  
a Delaware Corporation, )  
CINEMARK HOLDINGS, INC., )  
a Delaware Corporation, )  
SILVER CINEMAS ACQUISITION )  
CO., LLP., d/b/a Landmark Theatres, )  
a Delaware Limited Partnership, )  
LINCOLN SQUARE CINEMAS, LLC, )  
a Delaware limited liability company, )  
and KIRKLAND PARKPLACE )  
CINEMAS LLC, a Washington )  
limited liability company, )

Defendants )

As the Court acknowledged at the April 16 oral argument, this is an important case with potentially significant implications for substantial business interests and for

PLAINTIFF'S POST-HEARING BRIEF  
CONCERNING AGENCY RULEMAKING  
AND DUE PROCESS

1 tens of thousands of Washington residents with hearing loss. Believing it is more  
2 important to get it right than to get it fast, Plaintiff submits and asks the Court to consider  
3 this post-hearing brief on the question of whether a requirement that movie theaters show  
4 captioned movies may be imposed by the Court, as Plaintiff asks, or whether it must be  
5 imposed (if at all) by a regulatory agency through rulemaking, as Defendants assert.  
6

7 As we will show in this brief, the Washington State Law against Discrimination  
8 (LAD) guarantees Plaintiff a judicial forum, and denial of that forum would very  
9 seriously undermine the balancing of rights and interests incorporated into the LAD. We  
10 will also show that despite the superficial appeal of an agency rulemaking procedure, the  
11 questions presented in this case are very poorly suited to rulemaking. Finally, we will  
12 show that Defendants' vague "due-process" claims that they contend mandate referral to  
13 agency rulemaking are actually nothing more than attempts to engraft requirements into  
14 the LAD that simply do not exist.  
15

16 1. State Law Guarantees Plaintiff a Judicial Forum, and Denial of that Forum  
17 Would Seriously Alter the Balance of Rights and Interests in the LAD.

18 While Defendants earnestly asserted at oral argument that a movie-captioning  
19 requirement can only be imposed through agency rulemaking, they have not cited a single  
20 shred of authority to support that proposition. Nor will they find any such authority.  
21

22 The best Defendants can do is note that an agency rulemaking process *might* be  
23 available upon request. But although the LAD gives the state Human Rights Commission  
24 (HRC) the power to promulgate rules, RCW 49.60.120(3), the statute also says not once  
25 but twice that an aggrieved party has the unconditional right to go to court. RCW  
26 49.60.030(2) states:  
27

1 Any person deeming himself or herself injured by any act in violation of  
2 this chapter *shall* have a civil action in a court of competent jurisdiction to  
3 enjoin further violations, or to recover the actual damages sustained by the  
4 person, or both, together with the cost of suit including reasonable  
5 attorneys' fees ...

6 (emphasis supplied). The mandatory "shall" does not admit of qualifications or  
7 conditions – it states that anyone believing themselves to be injured by a violation of  
8 LAD, as Plaintiff clearly does, has the right to go to court.

9 To the same effect is the preceding provision. RCW 49.60.020 mandates liberal  
10 construction, states that the LAD does not repeal any other law (except a law that  
11 arguably requires or permits doing any act in derogation of LAD), then concludes:

12 Nor shall anything herein contained be construed to deny the right of any  
13 person to institute any action or pursue any civil or criminal remedy based  
14 upon an alleged violation of his or her civil rights.

15 Again, the right to go to court and seek redress for a civil-rights violation is regarded as  
16 inviolate. While the LAD created an agency that could make rules, and therefore could  
17 conceivably deal with certain violations, creation of that agency was plainly not meant to  
18 substitute for the right to go to court.

19 Requiring a civil-rights plaintiff to address the issue in rulemaking before the  
20 Human Rights Commission would change the balance of power in fundamental ways, all  
21 to the detriment of the plaintiffs. The reason is that unlike the courts, the HRC cannot  
22 award attorneys' fees in a rulemaking procedure.

23 Because civil-rights plaintiffs are generally private individuals seeking non-  
24 monetary relief against corporate defendants, the economic disparity between the two  
25 interests is frequently enormous, and the presence or absence of a fee-shifting provision  
26 can make a decisive difference. If rulemaking were required, the moneyed interests that  
27

28 **PLAINTIFF'S POST-HEARING BRIEF  
CONCERNING AGENCY RULEMAKING  
AND DUE PROCESS**

Page 3 of 12

Law Office of John F. Waldo  
151 Finch Pl. SW, #C  
Bainbridge Island, WA 98110  
(206) 842-4106  
(206) 842-4891 (fax)

1 are frequently civil-rights defendants could go into the rulemaking proceeding armed  
2 with well-paid attorneys, consultants, lobbyists and public-relations specialists, while  
3 plaintiffs would either have to find wealthy benefactors or rely on volunteers. Moreover,  
4 the plaintiffs would have to proceed without the benefit of any discovery into what is  
5 “reasonably possible in the circumstances” for Defendants to do.  
6

7 Washington courts have long recognized that the only possible “equalizer” is the  
8 availability of attorneys’ fees to a contingency-fee plaintiffs’ attorney. Liberal awards of  
9 fees and costs:

10 further the policies underlying these civil rights statutes: to make it financially  
11 feasible to litigate civil rights violations, to enable vigorous enforcement of  
12 modern civil rights legislation while at the same time limiting the growth of the  
13 enforcement bureaucracy, to compensate fully attorneys whose service has  
14 benefited the public interest, and to encourage them to accept these cases where  
15 the litigants are often poor and the judicial remedies are often nonmonetary.

16 *Martinez v. City of Tacoma*, 81 Wash.App. 228, 225, 914 P.2d 86 (1996), quoting *Blair v.*  
*Washington State Univ.*, 108 Wash.2d 558, 570, 740 P.2d 1379 (1987).

17 The Washington Supreme Court emphasized the fundamental importance of the  
18 LAD’s fee-shifting provision in *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 355, 103  
19 P.3d 773 (2004). At issue there was a compulsory arbitration clause in an employment  
20 agreement that required each party to bear its own costs of arbitration. The Court  
21 declared the fee-sharing provision substantively unconscionable because “this provision  
22 effectively undermines a plaintiff’s right to attorney fees under RCW 49.60.030(2), and  
23 ‘helps ... the party with a substantively stronger bargaining position and more resources,  
24 to the disadvantage of an employee needing to obtain legal assistance.’” (citation  
25  
26  
27  
28

1 omitted).<sup>1</sup> Although the *Adler* Court had to honor the agreement to arbitrate – a result  
2 compelled by the Federal Arbitration Act, which does pre-empt state law – the arbitrator  
3 would be required to award fees to a prevailing plaintiff. In this case, the applicable  
4 federal law – the Americans with Disabilities Act – is explicitly not pre-emptive, and  
5 there is no basis either in law or in fact for denying Plaintiff's our statutory entitlement to  
6 a judicial forum.  
7

8 2. Despite Defendants' Unsubstantiated Claims to the Contrary, This Case Is  
9 Not Well Suited to Agency Rulemaking.

10 While Defendants claimed at oral argument that this case can best be handled  
11 through rulemaking, that claim cannot withstand a close analysis.

12 The threshold issue confronting the Court is *whether* the LAD requires movie  
13 captioning. That involves determining whether Defendants' service is showing movies, or  
14 whether, as they contend, the service is showing non-captioned movies, and if the service  
15 is showing movies, whether LAD and its implementing regulations require Defendants to  
16 take those actions reasonably possible in the circumstances to make the movie  
17 soundtracks understandable. Those applications of undisputed facts to the language of the  
18 statute and regulations are pure issues of law for this Court, as the cases we cited in our  
19 pre-hearing briefs squarely hold.  
20  
21

22 Should the Court determine that LAD requires Defendants to show captioned  
23 movies to the extent doing so is "reasonably possible in the circumstances," then the next  
24 question is what, specifically, each individual Defendant must do to satisfy that  
25

---

26 <sup>1</sup> Defendants Regal, AMC and Cinemark are all public corporations that file annual  
27 reports. For their most recent year, they reported gross revenues of \$2.9 billion, \$2.3  
28 billion and \$1.6 billion respectively. Plaintiff's bank balance is \$1,016.87.

1 obligation. There is, admittedly, some superficial appeal to the suggestion that *at this*  
2 *point*, agency rulemaking would be an appropriate way to “bring everyone to the table,”  
3 start from ground zero, and work out a global set of principles to implement compliance  
4 with the general rule.

5  
6 In reality, though the state HRC is simply not set up to operate in that quasi-  
7 legislative fashion. We can see that from the HRC’s own regulation about rulemaking,  
8 WAC 162-26-840, which states:

9  
10 Petitions to the commission for the promulgation, amendment, or repeal of  
11 a rule under RCW 34.05.330 shall include a statement of the reasons for the  
12 requested action, and may be accompanied by a brief of any applicable law.  
13 Petitions for the promulgation of a rule shall set out the full text of the proposed  
14 rule.

15 So the way that would work is that Wash-CAP would petition for a rule, state why the  
16 rule should be adopted, state why the applicable law requires adoption of the rule, and  
17 specify what the rule should be. “Interested parties” such as Defendants would receive  
18 notice and the opportunity to respond. The procedure looks precisely like cross-motions  
19 for summary judgment, all without the benefit of discovery or meaningful access to  
20 counsel. It is little wonder that Defendants find it attractive.

21 Other HRC regulations indicate a general policy of deferring to ongoing litigation.  
22 HRC’s general “rule of abeyance” states:

23 A complaint of an unfair practice other than in real estate transactions will be held  
24 in abeyance during the pendency of a case in federal or state court litigating  
25 the same claim, whether under the law against discrimination or a similar law,  
26 unless the executive director or the commissioners direct that the complaint  
27 continue to be processed

28 WAC 162-08-062(2).

1           Moreover, agency promulgation of any "rule" would not actually get this  
2 particular case much closer to a final resolution. While the rule might enunciate broad  
3 principles, those principles would have to be applied individually to each Defendant. The  
4 differences in the individual circumstances of each Defendant are such that the general  
5 rule will be of very little use  
6

7           Regal shows open-captioned movies, and claims those visible captions are a  
8 distraction to hearing patrons. It uses that "distraction" claim as a basis for arguing that it  
9 cannot deploy the captions for every showing of a movie. That argument, if proved,  
10 might justify showing open-captioned movies on an intermittent schedule.  
11

12           AMC shows closed-captioned movies, and apparently does not contend that  
13 closed-captioned movies are a distraction to others, because when it does put a movie  
14 into the properly equipped auditorium, it activates the captions for every showing. Thus,  
15 a "rule" on frequency of showing captioned movies that applies to Regal won't apply to  
16 AMC.  
17

18           Cinemark currently hasn't installed the necessary equipment to show captioned  
19 first-run films. Should it be required to show some of its regular first-run movies in  
20 captioned form, which mode of captioning will it select, and what "rules" should apply to  
21 it?  
22

23           What about Landmark? With the exception of the ten-screen Metro multiplex, its  
24 other King County theaters have four or fewer screens, and tend to show niche "art-  
25 house" films. Will a rule that applies to the "big three" apply equally to Landmark? That  
26 will depend on the underlying economic realities.  
27

1           Lastly, Lincoln Square has gone to all-digital presentation. The modes of  
2 presenting captioned films may be different for it than for the other Defendants.  
3 Moreover, Lincoln Square is a relatively small family-owned operation, and its  
4 economics may be far different than the economics of the large nationwide Defendants.

5           Rulemaking is the development and enunciation of principles broad enough to  
6 cover a multiplicity of different individual situations. We question whether the HRC  
7 could develop a more workable formulation of a rule than what it has already done –  
8 direct that each Defendant must do what is “reasonably possible in the circumstances” to  
9 make its movies “understandable.” Determining precisely what it is reasonably possible  
10 in the circumstances for each of these Defendants to do is not rulemaking, but is  
11 adjudication. This Court is as able to undertake that function as HRC, and in light of the  
12 statutory guarantee of a judicial remedy, this Court must undertake that effort.

13           3.       In Their Vague ‘Due-Process’ Arguments, Defendants Attempt to Graft  
14                   Requirements Into the LAD That Do Not Exist.

15           Defendants claim that somehow, their “due process” rights would be violated if  
16 this Court were to declare that they must henceforth take actions to make their movie  
17 soundtracks understandable. That argument is inherently absurd. A proceeding before this  
18 Court with the opportunity for appellate review is the essence of due process.  
19

20           What Defendants can and do argue is that the LAD and its implementing  
21 regulations are void for vagueness, and hence not enforceable. While without merit, that  
22 argument is at least a recognizable, with developed case law. But by casting the void for  
23 vagueness argument in terms to due process, Defendants are also trying to graft non-  
24 existent requirements into the LAD.  
25

1 First, Defendants suggest that despite the LAD regulatory standard that services  
2 be made “understandable,” they should still not be required to do anything until and  
3 unless a rule is developed that specifically addresses the precise topic at issue. In essence,  
4 Defendants are trying to read a scienter requirement into LAD where none exists. The  
5 LAD could have simply prohibited “knowing” or “intentional” discrimination, but chose  
6 not to do so – instead, it prohibits “discrimination,” with no intent requirement. *Negron v.*  
7 *Snoqualmie Valley Hospital*, 86 Wash.App. 579, 586, 936 P.2d 55. (1996). While the  
8 void for vagueness doctrine entitles Defendants to fair notice of what is required, that  
9 can’t be stretched to a requirement that Defendants have not just fair notice but actual  
10 knowledge that their conduct is insufficient before liability can be imposed.  
11

12  
13 Second, Defendants are trying to impose a requirement that Plaintiff exhaust their  
14 administrative remedies – in this case, the supposed remedy of administrative rule-  
15 making. But as the courts observed in an LAD case, “[w]e see nothing in the statute that  
16 requires exhaustion of administrative remedies with the Human Rights Commission  
17 (HRC) prerequisite to filing a lawsuit under the statute,” *Galbraith v. TAPCO Credit*  
18 *Union*, 88 Wash.App. 939, 948, 946 P.2d 1242 & n. 6 (1997).  
19

20 Third, Defendants claim that judicial resolution of Wash-CAP’s complaint could  
21 subject them to new lawsuits from people who are not parties to this case. Parties are  
22 protected from the threat of multiple lawsuits with potentially inconsistent results by CR  
23 19, which requires the joinder of indispensable parties. However, that defense must be  
24 raised at the outset, in a CR 12(b)(7) motion brought prior to any other substantive  
25 proceedings. Having waived their right to bring such a motion, Defendants cannot now  
26  
27

1 try to achieve the same result through the back door by claiming that proceeding in the  
2 absence of other parties that might have differing views violates their due-process rights.

3 Finally, in claiming that a ruling would violate their due-process rights,  
4 Defendants overlook the fact that the regulations requiring services to be made  
5 “understandable” was promulgated in 1982. *Fell v. Spokane Transit*, 128 Wash.2d 618,  
6 627, 911 P.2d 1319 & n. 10 (1996). Should the Court reject the contention that the  
7 regulations are void for vagueness, as we believe the Court must, that would mean that  
8 for 28 years, these Defendants were on fair notice that they had an obligation to make  
9 their services understandable. It would also mean that for 28 years, Plaintiff’s members  
10 and thousands of similarly situated individuals in King County have been denied  
11 accommodations to which they are legally entitled. Defendants’ claim that an award of  
12 prospective relief plus attorneys’ fees violates their due-process rights is difficult to take  
13 seriously. The time-value of money retained for 28 years likely far exceeds any amount  
14 Defendants could be required to pay in fees.

#### 18 SUMMARY AND CONCLUSION

19 Defendants’ argument that any movie-captioning requirement must come from  
20 administrative rulemaking is erroneous. The Washington Law against Discrimination  
21 give Plaintiff an unqualified right to a judicial forum. A critical part of the LAD’s  
22 enforcement mechanism is the awarding of attorneys’ fees to a successful plaintiff, and  
23 referral to a proceeding that cannot make such an award would erroneously strip Plaintiff  
24 of that important right.

25  
26 Contrary to Defendants’ argument, this question is not well-suited to rulemaking.  
27 Once this Court decides the threshold question of whether the LAD requires Defendants

28 PLAINTIFF’S POST-HEARING BRIEF  
CONCERNING AGENCY RULEMAKING  
AND DUE PROCESS

Page 10 of 12

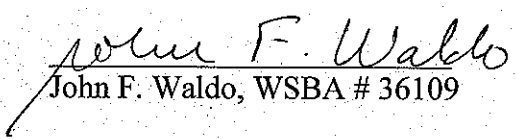
Law Office of John F. Waldo  
151 Finch Pl. SW, #C  
Bainbridge Island, WA 98110  
(206) 842-4106  
(206) 842-4891 (fax)

1 to do those things reasonably possible to make its movie soundtracks understandable, any  
2 general rule an agency might promulgate would need to be applied individually to  
3 differently situated Defendants. Adjudication would predominate over rulemaking.

4 Finally, by couching the referral argument in terms of "due process," Defendants  
5 are trying to engraft into the LAD inapplicable requirements of scienter and exhaustion of  
6 administrative remedies. They are also trying to maintain a belated and back-door claim  
7 of failure to join indispensable parties

8  
9 For the foregoing reasons, Defendants' argument that this case belongs in an  
10 administrative forum must be rejected. Plaintiff asks this Court to enter the proposed  
11 interlocutory order declaring that the LAD and its regulations require each Defendant to  
12 do what is reasonably possible in their individual circumstances to make their movie  
13 soundtracks understandable to Plaintiff's members. The specific steps will be ascertained  
14 either through negotiation or, failing that, at trial.<sup>2</sup>

15  
16 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April, 2010.

17  
18  
19   
20 John F. Waldo, WSBA # 36109

21 151 Finch Pl. SW Ste. C  
22 Bainbridge Island, WA 98110  
23 (206) 842-4106 (desk)  
24 (206) 842-4891 (fax)  
25 [john@wash-cap.com](mailto:john@wash-cap.com)  
26 Attorney for Plaintiff Washington State  
27 Communication Access Project

28  

---

<sup>2</sup> Because Plaintiff seeks only injunctive relief, this case will be tried to the Court without a jury, minimizing any potential problem of fragmented and piecemeal litigation.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

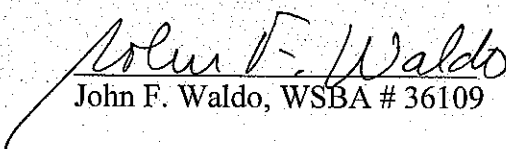
I hereby certify that on this 20<sup>th</sup> day of April, 2010, I caused to be served on the person(s) listed below in the manner shown the foregoing PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT:

**By email attachment (as agreed by the parties):**

M. Brett Burns  
Hunton & Williams LLP  
575 Market Street, Suite 3700  
San Francisco, CA 94105  
Phone: (415) 975-7000  
Fax: (415) 975-3701

Laura M. Franze  
Hunton & Williams LLP  
1445 Ross Avenue, Suite 3700  
Dallas, TX 75202  
Phone: (214) 979-3000  
Fax: (214) 979-3950

Thomas A. Lemley, WSBA #5433  
Davis Wright Tremaine LLP  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101  
Phone: (206) 757-8085  
Fax: (206) 757-7085

  
John F. Waldo, WSBA # 36109