UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SCOTT MAGEE, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
	)	Case No. 16 C 5652
v.	)	
	)	Judge Joan B. Gottschall
McDONALD'S CORPORATION,	)	
Defendant.	)	

ORDER

Before the court is defendant McDonald Corporation's motion to dismiss plaintiff Scott Magee's first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) [Dkt. 19]. For the reasons set for the below, McDonald's motion is granted in part and denied in part.

I. BACKGROUND

Plaintiff Scott Magee, individually and on behalf of a class, has filed a verified amended complaint (hereinafter, "complaint") against McDonald's, alleging that by offering its products late at night only through "drive-thru" windows that serve only persons in cars and not pedestrians, McDonald's is precluding blind persons[1] from accessing its products late at night. McDonald's conduct, Magee alleges, violates 42 U.S.C. §§ 12181 and 12182 of the Americans with Disabilities Act (the "ADA"), as well as California's Unruh Civil Rights Act, Cal. Civ. Code §§ 51 and 52 (the "Unruh Act"). Magee seeks a declaratory judgment that McDonald's is in violation of these laws, as well as the certification of two classes, including a nationwide class of "all legally blind individuals who have been and/or are being denied access to McDonald's

[1] Magee suffers from macular degeneration and is legally blind.

restaurants in the United States where McDonald's restaurants' products and services are only offered via drive thru."

McDonald's has moved to dismiss, contending, among other things addressed below, that Magee lacks standing to complain of the conduct of any McDonald's restaurants other than "possibly" the one near his home in Metairie, Louisiana. The court finds that Magee has ADA standing only to complain of the Metairie McDonald's, but concludes that he has Unruh Act standing to seek damages, but not an injunction, with respect to the San Francisco and Oakland restaurants he sues. The court further concludes that the question of Magee's standing to represent a nationwide class against McDonald's restaurants nationwide is more appropriately addressed as a question of class certification, not standing. Finally, the court concludes that Magee has adequately stated a cause of action.

II. LEGAL STANDARDS

McDonald's seeks dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure, which states that a court must dismiss a claim if it lacks subject-matter jurisdiction over it. *Illinois v. City of Chicago,* 137 F.3d 474, 478 (7th Cir.1998) ("Subject-matter jurisdiction is the first question in every case, and if the court concludes that it lacks jurisdiction it must proceed no further."). When deciding a motion to dismiss pursuant to Rule 12(b)(1), the court accepts "as true all facts alleged in the well-pleaded complaint and draw[s] all reasonable inferences in favor of the plaintiff." *Scanlan v. Eisenberg*, 669 F.3d 838, 841 (7th Cir. 2012). The court, however, "may look beyond the pleadings if necessary to determine whether subject-matter jurisdiction exists." *Revelis v. Napolitano,* 844 F.Supp.2d 915, 919 (N.D. Ill. 2012) (citing *Hay v. Ind. State Bd. of Tax Commis.,* 312 F.3d 876, 879 (7th Cir. 2002)).

McDonald's also seeks dismissal of Magee's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Rule 12(b)(6) allows a defendant to move for dismissal of a complaint if it "fail[s] to state a claim for which relief can be granted." As with Rule 12(b)(1), the court must accept all facts pleaded in the complaint as true, and must draw all reasonable inferences in the plaintiff's favor. *INEOS Polymers, Inc. v. BASF Catalysts*, 553 F.3d 491, 497 (7th Cir. 2009). In general, "the complaint need only contain a 'short and plain statement of the claim showing that the pleader is entitled to relief,'" *E.E.O.C v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting Rule 8(a)), with sufficient facts to put the defendant on notice "of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (internal quotation mark omitted) (alterations in original). To survive a motion to dismiss under Rule 12(b)(6), the complaint need not present particularized facts, but "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic*, 550 U.S. at 555).

III. STANDING

Magee seeks injunctive relief for McDonald's alleged violation of 42 U.S.C. § 12182. To establish Article III jurisdiction, a plaintiff must demonstrate that he has standing to sue. Specifically, he must meet three requirements: "(1) injury in fact, which must be concrete and particularized, and actual and imminent; (2) a causal connection between the injury and the defendant's conduct; and (3) redressability." *Scherr v. Marriott Intern., Inc.*, 703 F.3d 1069, 1074 (7th Cir. 2013). In this case, as in *Scherr*, only the first element is at issue. And as in *Scherr*, Magee seeks injunctive relief. "[T]o establish injury in fact when seeking prospective

injunctive relief, a plaintiff must allege a 'real and immediate' threat of future violations of their [sic] rights . . . ." *Id.*

While speculative statements about a plaintiff's future intentions are not enough to establish standing, a plaintiff's statement that he would visit a place but for ongoing violations is sufficient. *Id.* Thus, standing requires, besides a showing of past injury, allegations that establish the likelihood that the plaintiff would visit the defendant's place of public accommodation in the future (based on such factors as geographic proximity and a history of past visits), plus some basis for believing that the alleged violation will, if not enjoined, continue and an allegation that plaintiff would use the facility but for the alleged ADA violation. *Id.*

Magee's allegations are sufficient to establish his standing as to the Metairie, Louisiana McDonald's. Magee lives in Metairie. He alleges that he has visited this particular restaurant "multiple times" and expects to visit again in the future. (Compl. ¶ 34). He further alleges that because "of his familiarity with McDonald's late night policy [which provides service only to people in cars, excluding those who are on foot], he "sometimes avoids going to McDonald's during its late-night hours." (*Id*., ¶ 42). Magee has made clear that he frequents the Metairie McDonald's but at times avoids going there in the evening because of its policy. This allegation is sufficiently concrete and actual to create a justiciable case or controversy.

As for the San Francisco and Oakland restaurants Magee identifies in his complaint, he alleges nothing other than that he was refused service at each restaurant on one occasion. He says nothing to establish any likelihood that he will seek to patronize these restaurants in the future. The Seventh Circuit has made clear that to establish standing, a plaintiff must claim that he would visit a specific facility in the future but for its alleged ADA violations, or at the very least, the plaintiff must allege facts indicating an intent to return to the facility were it made

accessible. *Scherr, supra,* at 1074-75. Accordingly, Magee does not have standing to sue the California restaurants under the ADA for injunctive relief.

However, the result is different with respect to Magee's standing to sue the two California restaurants under the Unruh Act. First, Magee makes plain that he does not seek injunctive relief under the Unruh Act, but only actual and/or statutory damages. The Act appears to provide for such remedies, and McDonald's has not argued that if Magee was actually injured by the conduct of these restaurants, he lacks standing to seek damages. As long as Magee is seeking only damages on the basis of his actual past encounters with these restaurants, the court does not see any standing bar.

McDonald's further argues, however, that Magee visited the two California restaurants *after* he had filed suit, and he cannot base standing on "any acts occurring after the lawsuit was filed . . . ." (Def.'s Mot. Dismiss, p. 6). For this principle, McDonald's cites many cases including *Brother v. Tiger Partner, LLC,* 331 F.Supp.2d 1368, 1373-74 (M.D. Fla. 2004). This case, as well as the others defendant cites, stands for the unexceptional proposition that standing must be determined at the time the case is filed. It says nothing about the issue here, which is whether, when acts occur after the filing of a complaint, Magee can allege those acts in an amended complaint, the allegations of which determine standing. With one exception, the other cases relied on by McDonald's are unhelpful on this point. The court notes, however, that one of the cases cited by McDonald's in its reply brief, *Focus on the Family v. Pinellas Suncoast Transit Authority,* 344 F.3d 1263 (11th Cir. 2003), is on point. After reiterating the rule that standing must be determined as of the time of the filing of the complaint, the court states explicitly that where there is an amended complaint, "it is necessary that appellant possessed Article III standing *on this later date*." *Id.* at 1275 (citing *County of Riverside v. McLaughlin*,

500 U.S. 44, 51 (1991)) (assessing standing at the time the second amended complaint was filed). Clearly, it is impermissible to file a complaint and try to bolster standing by performing acts *after* the complaint is filed. *See, e.g., Moyer v. Walt Disney World*, 146 F.Supp.2d 1249, 1253 (M.D. Fla. 2000). It is another thing entirely to file an amended pleading containing formal allegations of incidents occurring *before* the filing of that pleading. McDonald's theory would upend the liberal policy in favor of amendments for no good reason. The only complaint before the court is the amended complaint, and it is the allegations of that pleading that determine whether Magee has standing. *See Smith v. Bond County Jail*, Case no. 17-cv-006-JPG, 2017 WL 446967, at *5 (S.D. Ill. Feb. 2, 2017) ("An amended complaint supersedes and replaces the original complaint, rendering the original complaint void.").

IV. CLASS ALLEGATIONS

Magee has sued on behalf of two classes, a nationwide class of "all legally blind individuals who have been and/or are being denied access to McDonald's restaurants in the United States where McDonald's restaurants' products and services are only offered via drive-thru," and a California class of "all legally blind individuals who have been and/or are being denied access to McDonald's restaurants in California where McDonald's restaurants' products and services are only offered via drive-thru." (Compl., ¶ 44). Defendant argues that Magee lacks standing to sue any McDonalds restaurant other than the one in Metairie and that his class allegations do not give him standing to sue the 14,000 restaurants he has never visited and where he has never been injured. (Def.'s Reply Brief, p. 4).

Defendant argues that Magee must have standing in order to represent a class. This is true. But Magee has standing as to one McDonald's restaurant—the one in Metairie—and the

question therefore becomes whether his standing as to one restaurant allows him to bring a class action as to restaurants where he does not have standing.

Equal Rights Center v. Kohl's Corp., Case No. 14 C 8259, 2015 WL 3505179 (N.D. Ill. June 3, 2015) (Guzman, J.), addressed this issue. The Equal Rights Center and six individual plaintiffs sued Kohl's Corporation for ADA violations, alleging barriers at various stores which interfered with the access of mobility-impaired individuals. Citing *Scherr,* Kohl's argued that the standing of the individual plaintiffs must be limited to the Kohl's stores they visited, and that those plaintiffs lacked standing as to the Kohl's stores they had not visited. *Id*. at *3. Judge Guzman concluded that *Scherr* was distinguishable because the *Scherr* plaintiff did not seek classwide relief. While each plaintiff's standing is limited to the stores he or she visited (or could show that he or she intended to visit), the issue of whether such plaintiffs could obtain nationwide prospective relief against all Kohl's stores should be decided at the class certification stage. *Id*. In so ruling, Judge Guzman relied on the decision of the Tenth Circuit in *Colo. Cross Disability Colo. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1213 (10th Cir. 2014), which held that because the named plaintiff had standing with respect to one Abercrombie & Fitch store, "[t]he question whether an injunction may properly extend to Hollister stores nationwide is answered by asking whether [the named plaintiff] may serve as a representative of a class that seeks such relief. All that is necessary to answer this question is an application of Rule 23." *Id*. (citing *Colo. Cross*, 765 F.3d at 1213). This does indeed appear to be the better rule. As *Newberg on Class Actions* § 2.1 (5th ed.) states, "Whether a plaintiff with standing will be permitted to present not only her own individual claims but also those of a class is not properly a question of standing doctrine but of class action law." *See generally Payton v. County of Kane,* 308 F.3d 673 (7th Cir. 2002) (exploring the conditions under which a group of defendants can be

sued by a class, even though not all members of the class suffered injury from a particular defendant).

Accordingly, having found that Magee has standing as to the McDonald's restaurant near his home in Metairie, Louisiana, the court defers until the class certification stage the question of whether Magee can represent a nationwide class regarding restaurants as to which he lacks individual standing.

V. WHETHER PLAINTIFF HAS STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Defendant argues that Magee fails to state a claim for discrimination under the ADA or the Unruh Act. The court first turns to the ADA.

Defendant argues that the applicable test for an ADA violation is whether Magee would have been treated differently if he did not have a disability and everything else had remained the same, citing *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994). Magee was not treated any differently from other McDonald's patrons, defendant argues. Rather, (according to defendant), Magee alleges that *everyone* trying to access McDonald's late at night could do so only by driving to the drive-up window. But *Gehring* is an age discrimination case, and accordingly is based on an entirely different statute, a statute which prohibits treating people differently from one another based on a protected characteristic. In contrast, the relevant portion of the ADA, 42 U.S.C. §12182(a), prohibits a place of public accommodation (which includes a restaurant, *see* 42 U.S.C. §12181(7)(B)) from treating people in the same way if doing so deprives the disabled person of the opportunity to enjoy what the public accommodation offers: " the full and equal enjoyment of [its] goods, services, facilities . . . ." It is not surprising that McDonald's cites no ADA case in support of the principle it seeks to apply. The ADA, far from requiring disabled patrons to be treated the same as abled patrons, is violated when a public

accommodation fails "to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated different than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility . . . or accommodation being offered or would result in an undue burden." 42 U.S.C. §12182(b)(2)(A)(iii). Magee's allegation that as a blind person unable to drive he was refused a service available to sighted persons who can drive states a cause of action.

McDonald's attempts to distinguish *Anderson v. The Franklin Institute*, 185 F.Supp.3d 628 (E.D. Pa. 2016), a suit brought under the ADA, on two grounds: first, that it involved a specific regulation; and second, that it requested a modification that was cheap and easy. But the existence of an explicit regulation is of no moment; the absence of a regulation means only that the court will have to construe the applicable statute to decide this case. *See Kalani v. Starbucks Corp.*, 117 F.Supp. 3d 1078, 1085 (N.D.Cal. 2015) (appeal pending) ("Contrary to Defendant's position, mere compliance with applicable ADAAG regulations does not preclude the possibility that a place of public accommodation may deny an individual the 'full and equal enjoyment' of the goods or services the public accommodation provides."). And with respect to the nature of the accommodation required, deciding whether an accommodation to help Magee access late night food would fundamentally alter the nature of the good desired or impose an undue burden is not an issue for a motion to dismiss, but an issue for summary judgment or trial. Still, *Anderson* is very much on point in another regard, saying specifically that "[d]efendant's theory that no violation exists because Anderson receives the same treatment as all other patrons *reflects a misreading of the case law and a lack of appreciation for one of the chief purposes of the ADA.*" 185 F.Supp.3d at 645 (emphasis added). That is precisely McDonald's theory here, and

it is wrong for the same reason that defendant's theory in *Anderson* was wrong. As the court there said, the whole point of the ADA is that "'preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal.'" *Id.* (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002)). Defendant's attempt to rely on *Kalani, supra,* and *Betancourt v. Ingram Park Mall*, 735 F.Supp.2d 587 (W.D. Tex. 2010), fares no better. The ADA is not necessarily complied with when disabled and abled people are treated the same. Rather, the ADA stands for the principle that sometimes differently situated people must be treated differently if equality is to be achieved.

With respect to the Unruh Act, the result is the same. Section 51(f) of the Unruh Act, Cal. Civ. Code § 51(f), states that a violation of the right of an individual under the ADA shall also constitute a violation of the Unruh Act. Indeed, the California Supreme Court has held that all remedies available under § 52 of the Unruh Act (including actual and treble damages, penalties, injunctive relief and attorneys' fees) are available where an ADA violation has been proven. *See Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 665 (Cal. 2009). Although the parties to the case at bar have not spent much time or energy briefing the standards applicable to a violation of the Unruh Act, it appears to reach the same conduct that is prohibited by the ADA.

VI. CONCLUSION

Plaintiff has standing to sue the Metairie, Louisiana McDonald's, but not the other California McDonald's restaurants he names, for injunctive relief under the ADA. He has standing under the Unruh Act to sue the two California restaurants for damages since he visited those restaurants prior to filing his amended complaint. The issue of whether he can represent a class as to McDonald's restaurants to which he lacks individual standing will be deferred until the class certification stage. Finally, Magee has adequately stated a cause of action under both

the ADA and the Unruh Act. Accordingly, McDonald's motion to dismiss is granted in part and denied in part. A status conference is set for March 1, 2017, at 9:30 a.m.

Date: February 15, 2017

/s/
Joan B. Gottschall
United States District Judge