



U.S. Department
of Transportation
**Federal Transit
Administration**

400 Seventh St., S.W.
Rm 9100
Washington, D.C. 20590

March 23, 2007

Troy Wilkes



Re: FTA Complaint No. 06-0135

Dear Mr. Wilkes:

Enclosed please find a copy of the letter that was sent to the Bay Area Rapid Transit District (BART), of San Francisco. It concerns the complaint that you filed against BART, alleging violations of Title II of the Americans with Disabilities Act of 1990. The letter is a response from the Federal Transit Administration to the letter that we received from BART on July 10, 2006.

If you have any questions regarding this request, please contact me at 202-366-0809, or at my electronic mail address: jonathan.klein@dot.gov.

Sincerely,

Jonathan Klein, Esq.
Equal Opportunity Specialist
Office of Civil Rights

Enclosed: March 23, 2007 letter to BART; June 2, 2006 letter to BART from FTA



U.S. Department
of Transportation
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Administration**

400 Seventh St., S.W.
Rm 9100
Washington, D.C. 20590

March 23, 2007

Thomas E. Margro
General Manager
San Francisco Bay Area Rapid Transit District
300 Lakeside Dr., 23rd Floor
Oakland, CA 94612

Re: FTA Complaint No. 06-0135

Dear Mr. Margro:

This letter concerns the complaint filed by Mr. Troy Wilkes on February 16, 2006, against the San Francisco Bay Area Rapid Transit District (BART) alleging violations of Title II of the Americans with Disabilities Act of 1990 (ADA) and the Department of Transportation's (DOT) implementing regulations at 49 CFR Parts 27, 37, and 38. The Federal Transit Administration (FTA) Office of Civil Rights is responsible for civil rights compliance and monitoring, which includes ensuring that providers of public transportation properly implement the ADA, the DOT ADA regulations, and Section 504 of the Rehabilitation Act of 1973.

The FTA Office of Civil Rights is authorized under the DOT regulations to investigate discrimination complaints against public transit providers. 49 CFR §§ 27.121-123. In the complaint investigation process, we analyze the complainant's allegations for possible ADA deficiencies by the transit provider. If FTA identifies what may be a violation, we first attempt to provide technical assistance to assist the public transit provider in complying with the ADA. If FTA cannot resolve apparent violations of the ADA or the DOT ADA regulations by voluntary means, formal enforcement proceedings may be initiated against the public transit provider which may result in the termination of Federal funds. FTA also may refer the matter to the U.S. Department of Justice (DOJ) for enforcement.

FTA responds to each complaint that we receive based on the specific facts and circumstances at issue.

Mr. Wilkes' complaint alleges that BART unlawfully denied him access to BART facilities and vehicles as a result of his use of roller skates¹. He claims that his roller skates are necessary

¹ More specifically, Mr. Wilkes uses in-line skates, a type of skate. Our previous correspondence refers to them as "roller skates." For consistency, we will continue using "roller skates" in place of "in-line skates" or "rollerblades."

because he has a disability that prevents him from walking. The overarching question of whether BART failed to make a reasonable accommodation requires resolution of four issues:

1. Whether Mr. Wilkes is a person with a disability under the ADA
2. Whether roller skates constitute a mobility aid under DOT's ADA regulations
3. Whether use of roller skates in BART stations and on BART vehicles creates a direct threat
4. Whether use of roller skates in BART stations and on BART vehicles creates a fundamental alteration

Transit Providers' ADA Requirements

A transit provider must make reasonable accommodation in order to allow a person with a disability to use transit service.

Although the requirement for public entities to make "reasonable modifications" in their policies and practices is not explicitly addressed in the Department's ADA regulations, it is included in Department of Justice (DOJ) regulations, which are incorporated by reference at 49 CFR § 37.21(c). The relevant DOJ regulations state: "A public entity shall make reasonable modification in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability..." 28 CFR § 35.130(b)(7).²

If making the accommodation creates a direct threat to others, however, the accommodation does not need to be made by the transit provider. 28 CFR § 36.208. An accommodation is also not required where it fundamentally alters the nature of the service, program, or activity being provided. 28 CFR § 35.130(b)(7). In either case, a public entity must demonstrate the direct threat or fundamental alteration.

Discussion

FTA investigated Mr. Wilkes' allegations and sent an information request to BART in a letter on June 2, 2006. On July 10, 2006, we received a response from BART that did not sufficiently respond to the issues raised in our letter.

FTA asked BART to provide a detailed response with supporting documentation that explained why roller skates should not be considered mobility aids, whether a direct threat is created by use of roller skates, and whether there are other reasons why BART is not required to modify its policies and practices. BART provided only brief responses for all three questions and gave no supporting documentation.

We are unable to conclude from the record of correspondence in our possession that BART has fully considered all required factors, sufficiently deliberated, and made a clear fact-based decision regarding the need to make an accommodation in this circumstance. This letter does not constitute a determination of whether BART actually failed to make a reasonable

² Notably, DOT has proposed an amendment to Part 37, published as part of a Notice of Proposed Rulemaking on February 27, 2006, which, if adopted as proposed, would clarify that DOT has long believed this portion of DOJ's rule applied to parties also covered under the DOT's ADA regulations. 71 Fed. Reg. 9761.

accommodation required by law. To the contrary, based on limited facts known to FTA, BART appears to have grounds for a direct threat defense. It is, however, the responsibility of the transit agency to fully consider reasonable modifications to its policies.

BART must demonstrate that it made such full consideration by providing supporting documentation to its general assertions regarding the dangers posed by roller skates. Similar issues were considered in the Department's guidance on Use of "Segways" on Transportation Vehicles, which can be found at our website, <http://www.fta.dot.gov/ada>, under DOT Disability Law Guidance.. BART is advised to distinguish the use of roller skates from Segways in terms of the dangers they pose to other riders when used on transit vehicles.

BART must also show that it considered whether additional policy modifications or accommodations could eliminate the direct threat concerns. Notably, full consideration of possible modifications will likely require dialogue between Mr. Wilkes and BART.

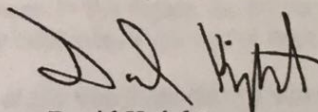
Conclusion and Next Steps

As indicated above, BART's assertions regarding direct threat may constitute a valid argument, if they are supported by evidence and more detailed analysis of alternatives. By contrast, BART's argument that reasonable accommodation is not required because it would be contrary to the California Penal Code's prohibition of roller skates in transit facilities is incorrect on its face. Similarly, BART's contention that it has no obligation to make reasonable modification "to accommodate the needs of one passenger" is incorrect.

Please reply to within 30 calendar days of the date of this letter, with a more complete response to the items from pages three and four of the June 2, 2006, letter (enclosed), in light of the discussion above. Please also indicate if there are certain requests for which no information is available.

If you have any questions regarding this request, please contact Jonathan Klein, Esq., at 202-366-0809, or at his e-mail address: jonathan.klein@dot.gov.

Sincerely,



David Knight
ADA Team Leader
Office of Civil Rights

Enclosed: June 2, 2006 letter to BART from FTA

cc: Troy Wilkes
Derrin Jourdan, FTA Region IX Civil Rights Officer



U.S. Department
of Transportation
**Federal Transit
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

June 2, 2006

Thomas E. Margro
General Manager
San Francisco Bay Area Rapid Transit District (BART)
300 Lakeside Dr., 23rd Floor
Oakland, CA 94612

Re: FTA Complaint No. 06-0135

Dear Mr. Margro:

This letter transmits a copy of a complaint received by the Federal Transit Administration (FTA) Office of Civil Rights alleging violations of Title II of the Americans with Disabilities Act of 1990 (ADA) by the Bay Area Rapid Transit District (BART), of San Francisco, California. The FTA Office of Civil Rights is responsible for civil rights compliance and monitoring, which includes ensuring that providers of public transportation properly implement the ADA, Section 504 of the Rehabilitation Act of 1973, and the U.S. Department of Transportation (DOT) ADA implementing regulations at 49 CFR Parts 27, 37, and 38. In the FTA complaint investigation process, we analyze the complainant's allegations for possible ADA deficiencies by the transit provider. If deficiencies are identified, they are presented to the transit provider and assistance is offered to correct them within a predetermined timeframe.

If FTA cannot resolve apparent violations of the ADA or the DOT ADA regulations by voluntary means, formal enforcement proceedings may be initiated against the public transportation provider, which may result in the termination of Federal funds. FTA also may refer the matter to the U.S. Department of Justice for enforcement.

The FTA Office of Civil Rights is authorized under the DOT regulation, 49 CFR Part 27, Subpart C, pertinent sections 27.121-123, to investigate discrimination complaints against providers of public transportation. The following is a summary of the complaint:

In 1983, the complainant was involved in a car crash which resulted in him sustaining multiple pelvic injuries. Since the accident, the vertical motions involved with walking cause the complainant pain and aggravate his injuries. The complainant claims that the horizontal motions involved with roller skating do not cause him pain or aggravate his injuries. Consequently, the complainant uses roller skates at all times instead of walking, including when using BART transportation services. BART has denied the complainant access to transportation

services because he will not remove his roller skates when riding. The complainant argues that he has a mobility-related disability and that his roller skates are a mobility device.

The complainant's allegation is:

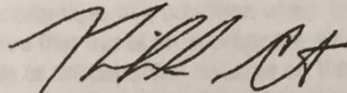
- (1) Complainant was denied access to BART transportation services while using his roller skates, which he claims is a mobility aide for his mobility-related disability; and
- (2) BART has not made reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of Complainant's disability. Specifically, BART has not made reasonable modification of their policies, practices, or procedures to allow the Complainant to use his roller skates on BART transportation services.

Please see the enclosed complaint for specific details.

By forwarding this complaint to you, we have initiated our investigative process. Please review the complaint and reply to our inquiry within 30 calendar days of the date of this letter. With your response, please provide the items from pages three and four of this letter. Please also indicate if there are certain requests for which no information is available.

I am the investigator assigned to this complaint file. Please contact me at (202) 366-0808 or Nicholas.Coates@dot.gov should you have any questions regarding this inquiry. Please include the FTA complaint number in any correspondence regarding this complaint. Thank you for your assistance.

Sincerely,



Nick Coates
Equal Opportunity Specialist
Office of Civil Rights

Enclosures

Please provide the following items/documentation:

- ☐ Detailed response with supporting documentation to the complainant's specific allegations.
- ☐ Copies of all correspondence between the complainant and the transit agency or its contractors, including complaints and any actions taken in response to the complaints.
- ☐ Incident, accident, investigative or police reports relevant to the allegations.
- ☐ Policies and/or procedures that support ADA activities as related to the allegations.
- ☐ Documentation that all employees are trained as appropriate under the DOT ADA regulations. This would include any policy to train as well as any documentation to show that the actual training occurred.
- ☐ Any other information that would assist us in the investigation of this complaint.

Enclosed is the DOT guidance regarding the use of segways on transportation vehicles. Below are three issues, two of which are discussed in the guidance, that are potentially a factor in this complaint. To facilitate review of this matter, please consider addressing them as part of your response.

1. Roller skates do not fall within the Department's ADA rule 49 CFR Part 37.3 definition of a "wheelchair." However, much like Segways, canes, walkers, etc., roller skates could be considered part of the broad class of mobility aids that Part 37 intends will be accommodated. See 49 CFR 37.5 and 37.165.

Please provide:

- ☐ A detailed response with supporting documentation explaining why roller skates should not be considered part of the broad class of mobility aids that Part 37 intends will be accommodated.
2. Transportation providers are not required to permit anyone, including a person with a disability, to bring a device onto a vehicle that is too big or that is determined to pose a direct threat to the safety of others.

Please provide:

- ☐ A detailed response with supporting documentation as to why roller skates may pose a direct threat to the safety of other passengers or BART employees. If applicable, please submit any guidance you have received from any DOT operating administration regarding denying roller skaters access on direct threat grounds.
3. Making reasonable modifications to policies and practices is a fundamental tenet of disability nondiscrimination law, reflected in a number of Department of Transportation

(DOT) and Department of Justice (DOJ) regulations (e.g., 49 CFR 27.11(c)(3), 14 CFR 382.7(c); 28 CFR 35.130(b)(7)). Although the DOT ADA regulations do not include language specifically requiring regulated parties to make reasonable modifications to policies and practices, FTA has always assumed that § 37.21(c) incorporates the DOJ provisions on this subject.

Please provide:

- ☐ A detailed response with supporting documentation as to why BART should not have an obligation to modify their policies and practices to reasonably accommodate the needs of the complainant. Also, please provide documentation of how a modification would result in an undue burden or a fundamental alteration of BART's program.