

FEB 23 2015

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>SANDI RUSH,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>DENCO ENTERPRISES, INC., DBA Denny's #7156,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 12-56565

D.C. No. 5:11-cv-00030-DOC-
DTB

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted February 4, 2015
Pasadena California

Before: REINHARDT and GOULD, Circuit Judges, and MOTZ, Senior District
Judge.**

Based on our decision in *Kohler v. Bed Bath & Beyond of California, LLC*,
___ F.3d ___, No. 12-56727 (9th Cir. Feb. 19, 2015), we conclude that the district

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable J. Frederick Motz, Senior District Judge for the U.S.
District Court for the District of Maryland, sitting by designation.

court erred by granting summary judgment to Rush based on (1) Rush's argument that the Americans with Disabilities Act (ADA) and the ADA Accessibility Guidelines (ADAAG) require at least eighteen inches of strike-side wall space and (2) Denco's failure to rebut Rush's *prima facie* case of discrimination.

Rush did not present a *prima facie* case of discrimination under the ADA because, as a matter of law, the ADAAG do not require any length of wall space on the strike-side of a doorframe. *See Kohler v. Bed Bath & Beyond of California*, No. 12-56727, slip op. at 11–12 (9th Cir. Feb. 19, 2015). Also, summary judgment was not warranted by Denco's lack of response in opposition because Rule 56(e) of the Federal Rules of Civil Procedure should not "be misconstrued as condoning summary judgment by default." *Heinemann v. Satterberg*, 731 F.3d 914, 917 (9th Cir. 2013) (citing the 2010 Advisory Committee Notes accompanying Rule 56 of the Federal Rules of Civil Procedure).

We reverse and remand to the district court for further proceedings consistent with our opinion in *Kohler v. Bed Bath & Beyond of California, LLC* and our decision here.¹

¹ Because we reverse the district court on these grounds, we do not reach any of Denco's other issues.

Further, Appellee's Motion to Strike Appellant's Excerpts of Record is
DENIED.

REVERSED AND REMANDED.