

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 6 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SAMUEL LOVE,

Plaintiff-Appellant,

v.

BARCELINO CONTINENTAL CORP., a
California Corporation,

Defendant-Appellee.

No. 21-16503

D.C. No. 3:19-cv-06684-JSC

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, Magistrate Judge, Presiding

Submitted June 13, 2022**
San Francisco, California

Before: BYBEE, CALLAHAN, and COLLINS, Circuit Judges.

Plaintiff-Appellant Samuel Love, who uses a wheelchair for mobility, filed this suit alleging that Defendant-Appellee Barcelino Continental Corp.

(“Barcelino”) violated Title III of the Americans with Disabilities Act (the

“ADA”), as well as California’s Unruh Civil Rights Act (the “Unruh Act”), by

failing to provide an accessible sales counter at its store in San Mateo, California.

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

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2)(C).

The district court granted summary judgment to Barcelino, and Love timely appealed. We have jurisdiction under 28 U.S.C. § 1291. Reviewing the summary judgment order de novo, *see New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596, 600 (9th Cir. 2022), we affirm.

The district court properly rejected Love’s claim that Barcelino’s sales counters violated ADA Accessibility Guideline 904.4, which states that the “accessible portion of the counter top shall extend the same depth as the sales or service counter top.” 36 C.F.R. pt. 1191, app. D § 904.4.¹ Although Love presented evidence establishing the height and length of the two counters in question, he concededly failed to present any measurements as to their depth. Love contends that a reasonable inference of unequal depth can be drawn from the photographs of the counters that are in the record, but we disagree. Given the nature of the photographs, the suggested inference is too speculative. Love simply failed to present sufficient evidence to create a triable issue of fact as to whether the two counters were unequal in depth.²

¹ On appeal, Love has not challenged the district court’s rejection of his contention that Barcelino also violated Guideline 904.3.3.

² In his opening brief, Love alternatively contends that the proper comparison is not between the respective depths of each separate counter, but between (1) the depth of the lower counter and (2) the *combined* depth of the higher counter and the lower counter (which was in front of the higher counter). Love also argues that Barcelino’s counters create “inappropriate sight lines.” Love did not raise these points in his opposition to Barcelino’s summary judgment motion below, and we decline to consider them. *See Pacific Dawn LLC v. Pritzker*, 831 F.3d 1166, 1178 n.7 (9th Cir. 2016).

Love also argued below that, due to the lower counter's lack of a credit card machine or a cash register, it was not usable as a sales counter, and that therefore the only relevant sales counter was the non-ADA-compliant higher counter. To the extent that Love renews this argument on appeal (as opposed to improperly raising new arguments), we hold that the district court correctly rejected it. Because Love failed to present evidence that the higher counter had a credit card machine or cash register either, he did not present sufficient evidence to support the particular theory that he asserted in the district court.

Love does not contest the district court's conclusion that if his ADA claim failed, his derivative Unruh Act claim failed as well. Because the district court properly rejected Love's ADA claim, the court correctly entered judgment in favor of Barcelino on both claims.

AFFIRMED.