



ADA Title III Lawsuits Find a New Target: Gift Cards

Insights

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Title III of the Americans with Disabilities Act, requiring equal access to places of public accommodation, has often been abused by plaintiffs and attorneys looking to turn any conceived minor violation of building standards – such as a doorway being one inch narrower than the code requires – into a lawsuit. In 2020, plaintiffs filed over 8,000 ADA Title III lawsuits, many of which were centered on alleged technical violations of the law. The proliferation of lawsuits has been particularly high in places like California where similar state laws provide for the recovery of compensatory damages, something the ADA does not. The endemic was so prevalent that 60 Minutes recently aired a segment detailing the abuse.

A new flurry of ADA Title III lawsuits, primarily filed in New York, is attempting to have courts hold that retailers must provide braille gift cards for visually impaired customers. Nearly 40% of all Title III ADA lawsuits filed last year involved allegations that retailer websites were inaccessible to the visually impaired, and a large portion of those involved allegations regarding gift cards. Seven visually impaired plaintiffs, in fact, filed more than 200 of those complaints in New York federal courts against restaurants, retailers, and entertainment venues. They alleged the retailers' failure to provide gift cards in braille denied equal access.

What Are These Lawsuits Alleging?

The plaintiffs in these types of cases all are legally blind and use braille to read written materials. They note that gift cards are generally the same size and texture as credit cards making them indistinguishable from credit cards to the visually impaired. There is also no way for a visually impaired individual to themselves distinguish among the various gift cards that might be offered.

The ADA does not require that a retailer make accommodations in the goods it sells, only that retailer's premises must be *accessible* to the visually impaired. To overcome this hurdle, the plaintiffs in these cases argue that store gift cards are not "goods" because they have no intrinsic value. Rather, the plaintiffs are making the claim that the gift cards are a "service" because they provide a means to purchase a seller's goods. Therefore, not providing braille gift cards, they allege, is a violation of the ADA to not provide equal access to the company's services. In their filings, plaintiffs further allege that during the COVID-19 pandemic, store closures and other restrictions made obtaining help regarding gift card questions from in-store employees more difficult.

Could These Lawsuits Gain Traction?

Many of the lawsuits have been dismissed on various procedural grounds. But last year, a federal district judge for the first time substantively addressed the argument that gift cards must be offered in braille. While the judge rejected this claim, it is worth examining the arguments to put yourself in the best position to avoid similar lawsuits.

In 2019, Yovanny Dominguez called Banana Republic's customer service line asking if they sold gift cards containing braille. When the customer service representative responded "No" and allegedly did not offer any alternative auxiliary aids or services, the ADA Title III lawsuit followed.

In rejecting Dominguez's claims, the court identified several flaws. First, the judge rejected the argument that gift cards are services that Title III requires to be accessible. The district court reasoned "a bookstore could not prohibit a visually impaired person from entering its store, but it need not ensure that the books it sells are available in both braille and standard print."

Second, the judge determined that gift cards, unlike websites where goods and services can be purchased, are not "places of public accommodation" because they are not places where goods can be purchased. A "small slab of plastic" is not within the definition of places of public accommodation.

Third, because Dominguez never affirmatively requested an "auxiliary aid" during his call, the court rejected his claim he was denied access to Banana Republic's goods and services. Places of public accommodations must assist disabled individuals by offering auxiliary aids when necessary to provide access to their goods and services, but a customer has a duty to ask for such assistance. Moreover, retailers do not have to offer the specific accommodation requested if an accommodation made is effective. The court noted "a restaurant would not be required to provide menus in braille...if the waiters in the restaurant are made available to read the menu."

The final nail in the coffin was the "copy and paste" nature of the lawsuit. Specifically, one of Dominguez's attorney's legal filings responded to arguments that were never made by Banana Republic and in fact failed to even correctly identify what the company sold. The court commented: "Although it features the fruit in its name, Banana Republic does not sell bananas."

The district court dismissed the other copycat lawsuits relying on the same analysis. Since the *Banana Republic* case, 12 district judges in the Southern District of New York have reached the same conclusion that Title III of the ADA does not require retail stores, restaurants, and other businesses provide braille gift cards for the visually impaired.

What to Expect in the Future

It is unlikely the failure of the New York cases will deter other attorneys from bringing the same claims in other areas of the country where courts might be more sympathetic to the argument. The New York opinions will probably assist plaintiffs and their attorneys to adjust their allegations to overcome the shortcomings. Critically, the plaintiffs may well seek assistance with gift cards from

store employees and, if they do not receive it, be much better positioned to argue for the need of braille gift cards.

Because of this, retailers should take steps to remind and train their employees in how to assist visually impaired customers. While the claim that not offering braille gift cards violates the ADA seems without merit at this point, there is no question that the difficulties the plaintiffs alleged the visually impaired have in distinguishing among and purchasing gift cards are real. Given that the National Federation for the Blind reports that only approximately 10% of the visually impaired population reads braille, good customer service is likely a better accommodation than braille gift cards. If an employee did refuse to assist a visually impaired customer in selecting gift cards, regardless of the law, at best the retailer could lose a customer and at worst, could suffer reputational damage in the visually impaired community.

Conclusion

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Retail Industry Practice Group](#).

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