SCOTUS Leaves Businesses Hanging: Your 4-Step Plan to Avoid ADA Accommodation "Tester" Cases

Insights
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After waiting nearly a year for a decision that would have provided businesses with some much-needed clarity (and hopefully some relief), the Supreme Court tossed from its docket a case involving a legal "tester" who "surfed by" business to business and sued over alleged violations of the Americans with Disabilities Act. Today's decision (or lack thereof) in *Acheson Hotels v. Laufer* means that hospitality, retail, and just about any other business with a physical location (and possibly just a website) are still vulnerable to claims from so-called accessibility testers who often file hundreds of ADA lawsuits even though they never plan to patronize the businesses. What are the four steps your business can take to lessen the risk of facing one of these challenging cases?

Why Title III is Particularly Challenging for Businesses

The commendable goal of Title III of the ADA is to create a physical environment that is navigable by all. Thus, guests with disabilities who visit a hotel property – or any business with a physical space open to the public – must be provided the same access to the property and goods and services offered therein as non-disabled guests. Unfortunately, Title III has been subject to abuse – hence why a decision by SCOTUS in this case could have been helpful.

In addition, **the ADA doesn't require claimants to notify businesses of alleged Title III violations** that would give them a chance to fix the problem before a lawsuit is filed. (While repeated efforts have been made to introduce such notification requirements into the statute, they have not been successful.) That means many businesses are caught off guard when served with a lawsuit. Worse, they may spend thousands of dollars in attorneys' fees to resolve a case – even when the cost of actual compliance is very low.

Over time, the interpretation of Title III has also been **expanded to cover websites and mobile apps** so that individuals who rely on assistive technology to connect to the internet, such as screen readers or text magnification software, can have access to the goods and services made available through these digital tools. In other words, your business may not even need to have a brick-and-mortar presence in order to be subjected to a possible ADA Title III demand or claim. Unfortunately, these types of cases have also been subject to abuse as there is no clear standard as to what it means to have an "accessible" website.

Accommodation Tester Tested the System

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Deborah Laufer styled herself as an ADA accommodation tester, suing hundreds of hotels whose websites failed to state whether they have accessible rooms or sufficiently describe the accessible features of the hotel (at least in her opinion). But she had no intention of staying at these hotels, let alone booking a room. Instead, she would "surf by" on her computer and file lawsuits against what she deemed be non-compliant hotels.

- She would seek damages alleging she suffered "frustration and humiliation" when the reservation portals didn't give her adequate information in her view about whether she could be accommodated.
- She would also seek an agreement from the hotels that they would fix the problems (which she says wouldn't be done unless she filed suit).
- And finally, her attorney would seek attorneys' fees to cover the expense of filing the lawsuit, which often quickly accumulated into thousands of dollars.

Acheson Hotels runs a lodge in small-town Maine. Laufer sued the business saying it violated the ADA by failing to disclose adequate accessibility information on its website. The hotel argued that she had no standing to sue because she didn't plan to stay at the property – she lives in Florida, after all, and admitted she had no plans to visit New England – and therefore did not suffer any injury. The hotel further asserted that a five-minute phone call could have answered her questions.

Messy Situation Leads SCOTUS to Punt Decision

The Supreme Court originally accepted the case to resolve a disagreement between federal courts about whether such tester cases were permissible. Businesses hoped that SCOTUS would provide a clear standard that would be followed across the country, eliminating the confusing patchwork of standards that differed depending on where the case was filed, often creating issues for entities that operate multiple locations across the country.

But a curious thing happened between the time SCOTUS accepted the case in March and today: Laufer's lawyer (in a completely different case) was suspended from the practice of law for defrauding hotels by lying in fee petitions and during settlement negotiations. A court panel reported that he filed over 600 ADA lawsuits on behalf of Laufer and another client, submitting boilerplate lawsuits but immediately pushing for settlements that would award him high attorneys' fees. The report said he routinely exaggerated time spent drafting near-identical complaints, billing hours for work that took minutes.

Laufer dismissed her underlying claim in the wake of this controversy, but Acheson Hotels asked the Court to render a decision anyway. It pointed out that businesses would remain vulnerable to this type of set-up without a final decision. Most businesses would likely seek to quickly settle cases to stop the financial bleeding rather than fight all the way to Supreme Court, meaning this was a unique chance to get things right. Now is the time to resolve the issue once and for all, it argued.

But SCOTUS was unmoved. The unanimous December 5 decision dismissing the case was short and to the point. Justice Barrett wrote that the case was "moot" and therefore dismissed from the SCOTUS docket. "We emphasize, however, that we might exercise our discretion differently in a future case," she concluded, providing the slightest glimmer of hope for businesses that this issue might eventually be sorted. In a concurring opinion, Justice Thomas penned that he would have found Laufer to have lacked standing to bring her ADA claims because she disclaimed any intent to return to the hotel and dismissed the case on those grounds.

Where Does that Leave You?

Depending on where your business operates, you may continue to be vulnerable to a tester case like Laufer's.

- **Vulnerable:** Federal appeals courts in the First, Fourth, and Eleventh Circuits have said that testers have standing to sue businesses without showing concrete injury. That means you are vulnerable if you operate in Alabama, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, North Carolina, Puerto Rico, South Carolina, Rhode Island, Virginia, or West Virginia.
- **Protected:** Meanwhile, courts in the Second, Fifth, and Tenth Circuits have ruled in favor of businesses in similar cases. That means you have a level of protection if you operate in Colorado, Connecticut, Kansas, Louisiana, Mississippi, New Mexico, New York, Oklahoma, Texas, Utah, Vermont, and Wyoming.
- **Uncertain:** All other federal appeals courts have not issued definitive opinions on this issue. Which means you cannot definitively predict how a case will be determined should your business fall victim to a tester case in any other state.

What Should You Do? Your 4-Step Plan

While you may never be able to completely eliminate the risk that you will be hit by a tester case, there are steps you can take to minimize the chances:

1. **Review Your Premises.** This case can teach lessons for all employers beyond the hospitality industry. With some exceptions, Title III applies broadly to commercial facilities and private businesses that offer goods and services to the public, including restaurants, retail stores, theaters and stadiums, doctor's offices, private schools, daycare centers, and more. It's a good practice for all businesses to regularly review their physical locations and ensure their properties are compliant with accessibility standards. In addition, you can post signage in the facility advising that assistance is available and to train employees on how to assist guests with special needs.
2. **Check Digital Compliance.** In this digital era, you'll also want to ensure website compliance in addition to accessibility at your brick-and-mortar locations. For example, does your website have features that help facilitate easier navigation and are compatible with assistive

technologies? Does your website contain an accessibility statement and manner to communicate regarding accessibility related issues with the website? Does your website contain "dead" links? Does your website contain PDFs that cannot be read with a screen reader?

3. **Stay Up to Speed.** You should review your website on a regular basis and update your policies as needed. Notably, there are countless online tools that allow business owners to check whether their websites meet guidelines. There are also third-party providers and accessibility "widgets" that you may want to consider. If your website is being maintained internally, your designated employees should receive regular training on website accessibility and an accessibility coordinator should be appointed. And if your website or mobile app is maintained by a third party, you should regularly meet with them to make sure all aspects of the website are accessible to those with disabilities.
4. **Special Note for Hotels and Restaurants.** Hotels and restaurants should take this opportunity to ensure adequate information is listed on your websites and any third-party reservation portals about the accessibility features of your properties including service counters, common areas, swimming pools, guest rooms and their features (such as the presence of roll-in showers), and dining facilities.

Conclusion

We will continue to monitor developments related to this issue, so make sure you subscribe to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Leaves and Accommodations Practice Group or Hospitality Team.

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