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Recent Dismissal of ADA Lawsuit Reinforces the Value of a Strong and Prominently Displayed Accessibility Policy

A recent decision suggests that businesses should consider prominently displaying accessibility policies on their websites and inviting consumers to call or e-mail about specific accommodation inquiries. Such accessibility statements could later prove critical in defending accessibility lawsuits.

Judge Allyne R. Ross of the U.S. District Court of the Eastern District of New York recently dismissed a class action complaint filed by a Brooklyn, New York resident who alleged she had diabetes and was denied access to the Charles Playhouse theater in Boston, Massachusetts because of this disability. ***Castillo v. The John Gore Organization Inc.***, Case No. 1:19-cv-00388-ARR-PK.

The crux of Castillo's complaint was that she was deterred from booking a ticket to attend a show at the theater after seeing on the theater's website that the theater had a policy prohibiting patrons from bringing in outside food. Castillo alleged that because of her diabetes she needed to be able to immediately eat specific types of snacks to stabilize sudden drops in blood sugar. The theater's policy banning outside food thus deterred her from visiting. Castillo asserted claims under Title III of the Americans with Disabilities Act ("ADA"), as well as tagalong state and city statutory claims that typically accompany ADA claims asserted by plaintiffs in New York federal courts.

The problem for Castillo—and crucial to the theater's defense—was that the theater's website prominently displayed an accessibility policy, which stated that "[t]he Charles Playhouse is accessible to all patrons. Guests with accessibility questions or who require additional assistance may email the Playhouse directly . . . or call the House Manager . . . ." A phone number and e-mail address were provided for such inquiries. Castillo never called or e-mailed the theater to ask whether there were any exceptions to the policy that would allow her to bring in snacks.

The defendant moved under Fed. R. Civ. P. 12(b)(1) to dismiss for lack of constitutional standing. In particular, the defendant argued that the court lacked subject matter jurisdiction because Castillo failed to allege an injury in fact, ***i.e.***, a concrete and particularized invasion of a legally protected interest that was actual or imminent, not conjectural or hypothetical. Because the defendant's attack on subject matter jurisdiction

was factual (not facial), the defendant was able to go beyond the complaint and proffer affidavits and other evidence. The court recognized that Castillo needed to rebut the defendant's evidence with her own evidence to survive dismissal because the elements of constitutional standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case," and the plaintiff needed to support each element of standing with the manner and degree of evidence required at the successive stages of the litigation.

In support of its motion, the defendant submitted unrefuted evidence that at the time of Castillo's purported visit to the website, the website contained the aforementioned accessibility policy, which made it abundantly clear that there was a possibility of obtaining an accommodation. The policy's placement on the homepage of the website established that Castillo would have seen the accessibility policy before seeing the policy banning outside food. The court held that Castillo could not have had actual knowledge of a barrier to access the theater (as was required to show injury under her deterrence theory) because she made no claim, and proffered no evidence, that she contacted the theater as the website invited her to do and was denied permission to bring outside food. Additionally, the court rejected the plaintiff's broad allegation that she intended to take advantage of the facilities in the future if the alleged barriers were remedied and intended to attend a similar event as soon as the discriminatory policies were fixed. The court held that the fact that the plaintiff lived in Brooklyn and the theater was in Boston rendered it unreasonable to infer that she intended to return to the theater, or even intended to visit in the first place. Accordingly, the court dismissed Castillo's complaint for lack of standing and subject matter jurisdiction.

While the ***Castillo*** decision is fact specific, the key takeaway is that businesses should consider prominently displaying an accessibility policy on their websites declaring that the facility is accessible to all patrons, and inviting would-be visitors to call or e-mail with specific accommodation inquiries. Specific e-mail addresses and phone numbers should be provided for such accessibility questions and requests. Evidence of such accessibility statements may one day be critical to prevailing on a Rule 12(b)(1) motion to dismiss, the best-case scenario for a defendant facing an ADA lawsuit because at that point the legal fees are still relatively minimal. Businesses should also consider logging all calls and retaining all e-mails regarding accommodation requests and accessibility inquiries.

Blank Rome has assisted many clients with defending ADA lawsuits in different contexts. Blank Rome also regularly counsels clients on steps they can take to reduce their risk and exposure to ADA claims.

For additional information, please contact:

Martin S. Krezalek
212.885.5130 | mkrezalek@blankrome.com

Anthony A. Mingione
212.885.5246 | amingione@blankrome.com