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## Banana Republic's Dismissal of ADA Gift Card Lawsuit Is a Victory for Business, but Suggests Importance of Properly Responding to Accommodation and Accessibility Requests and Inquiries

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*Last week, a Southern District of New York judge held that retailers cannot be sued under Title III of the Americans with Disabilities Act ("ADA") for not offering Braille gift cards. The Court's thorough and well-reasoned decision is undoubtedly a positive development for retailers and merchants. However, as we have seen with ADA website litigation, the poorly pleaded (and ridiculed) complaint in this case leaves plenty of room for improvement. Merchants should therefore remain diligent about their efforts to protect against a better-pleaded complaint.*

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Blank Rome was the first to report on a new trend of lawsuits alleging violations of Title III of the ADA for merchants' failure to emboss gift cards with Braille ([October 2019 Business Litigation Alert](#)). Banana Republic now appears to be the first retailer to secure dismissal of one of these cases. In *Dominguez v. Banana Republic, LLC*, 1:19-cv-10171-GHW (S.D.N.Y. April 23, 2020), after acknowledging that the New York federal courts have been flooded with ADA gift card lawsuits, the Southern District granted Banana Republic's motion to dismiss on grounds that Plaintiff failed to establish an injury in fact, and because no read of the ADA supported the "meritless argument that the [ADA] requires retailers to create specialty goods for the visually impaired."

The Court dismissed the complaint under Rule 12(b)(1) because it was devoid of allegations that Plaintiff professed an interest in buying contemporary and affordable

workwear, or expand an already existing Banana Republic wardrobe. Plaintiff's vague, generic, and conclusory assertions about having previously been a Banana Republic customer, and that several stores were close to his house, were not enough to plausibly plead likelihood that he would be injured by Banana Republic's failure to sell Braille gift cards in the future.

The Court also addressed the merits and independently granted the motion on Rule 12(b)(6) grounds. The ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the **goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation** by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a)(West). Applying the text, the Court rejected all three of Plaintiff's ADA liability theories. First, the ADA regulates access to

places of public accommodation and nondiscriminatory enjoyment of whatever goods and services are ordinarily provided there. *It does not regulate the type of merchandise a place of public accommodation sells*, and thus does not require retailers to alter their mix of goods to include accessible goods—including provision of different goods or services, stocking specialty goods, or, in this case, creation of Braille gift cards for the visually impaired. Second, gift cards are neither public accommodations nor places. Gift cards do not fit within any of the twelve categories of accommodations enumerated in the ADA. Similarly, gift cards are not places, because “a consumer can make a purchase *with* a gift card, but not *on* or *in* a gift card. Finally, Banana Republic did not deny Plaintiff access to a *service* by failing to provide him with the opportunity to use a Banana Republic gift card to make a purchase at a Banana Republic store. The ADA prohibits the “failure to take steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals *because of the absence of auxiliary aids and services*....” The U.S. Department of Justice’s (“DOJ”) regulations clarify that “the ultimate decision as to what measures to take rests with the public accommodation, *provided that the method chosen results in effective communication*.” But here, Plaintiff did not allege that he ever asked Banana Republic’s customer service office what gift card-related accommodations Banana Republic offers legally blind patrons. The Court found the complaint’s solitary rote allegation that “[u]pon information and belief, [Banana Republic] does not offer auxiliary aids with respect to the gift cards” to be insufficient because “[a] litigant cannot merely plop ‘upon information and belief’ in front of a conclusory allegation and thereby render it non-conclusory.” For all of these reasons Plaintiff failed to state a claim under the ADA and corresponding city and state laws.

Reminiscent of Judge Loretta A. Preska’s memorable quote while dismissing an ADA website claim against Apple, Inc. last year (“*there is nothing inherently wrong with filing duplicative lawsuits against multiple defendants if the harms to be remedied do exist and are indeed identical. But those who live by the photocopier shall die by the photocopier*”), Judge Gregory H. Woods concluded his opinion with a quote sure to be cited by many defendants in the months to come:

*Computers have made a lot of things in life easier. Copy-and-paste litigation is one of them. The pitfalls of such an approach is evident here where, among other things, Plaintiff’s opposition responds to arguments never made by its opponent in its motion and failed to even correctly identify what Defendant sells. See, e.g., Opp’n at 3, 15, 16, 20 (referring to Banana Republic as a “food establishment”). Although it features the fruit in its name, Banana Republic does not sell bananas.*

While this decision is good for business—and merchants and retailers should celebrate this victory—the gift card litigation trend may not be dead. The Court left the door open (if only a crack) to a better-pleaded ADA gift card complaint by stating that “... *it is possible that only a fully accessible gift card could provide the effective communication necessary pursuant to Title III*. But Plaintiff never tried to discover whether that was the case here. Thus, as a matter of law, his claim fails.” That is, the reason behind Plaintiff’s failure to show he was denied access to an auxiliary aid or service was because Plaintiff admittedly never even asked for any auxiliary aid or service that would effectively communicate information about Banana Republic’s gift cards. The key takeaway is that, going forward, a few strategic phone calls to a merchant’s customer service department may form the basis for a plaintiff successfully pleading that the merchant denied him access to an auxiliary aid or service. Businesses should therefore discuss how to, among other things, handle potential accessibility inquiries with ADA-experienced legal counsel and 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 to reduce their risk and exposure to ADA claims.

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