Use of Website Not Necessary to Sue for Discrimination

A plaintiff does not need to transact with the business to establish standing

By Onika K. Williams

A state supreme court has held that a person does not have to use a website’s services to have standing to sue the website for its alleged discriminatory terms and conditions. The court held that the plaintiff merely had to show an intent to use the website’s service, not actually use it. Accordingly, the decision opens the door to discrimination claims by potential customers. The case has divided experts, some who see the decision as significantly opening the door to more discrimination claims, while others believe it modestly extends current law.

Bar Against Bankruptcy Attorneys Leads to Discrimination Suit

The conflict in *White v. Square, Inc.* began when a bankruptcy attorney visited a website for Square, Inc., an internet service that allows individuals and merchants to process electronic payments. Square does not charge its users a registration fee; rather, the company collects a percentage of every transaction and a flat fee for each transaction. The attorney visited Square’s website to
register for its services. However, Square’s user agreement asks users to confirm that they “will not accept payments in connection with the following businesses or business activities: ... bankruptcy attorneys or collection agencies engaged in the collection of debt.”

The attorney sued Square in the U.S. District Court for the Northern District of California, alleging that Square’s user agreement discriminated against bankruptcy attorneys in violation of the Unruh Civil Rights Act. The purpose of the Act is to create and preserve “a nondiscriminatory environment in California business establishments by banishing or eradicating arbitrary, invidious discrimination by such establishments.” The attorney alleged that he had intended on using Square’s services for his bankruptcy practice but believed he could not sign the agreement without committing fraud.

The district court dismissed the attorney’s complaint with prejudice, holding that he lacked standing under the Unruh Civil Rights Act to sue Square. The court reasoned that the attorney had not attempted to use Square’s services and only had awareness of its discriminatory terms of service. The attorney appealed to the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit certified questions to the Supreme Court of California about standing under the Unruh Civil Rights Act. Specifically, the Ninth Circuit asked whether a plaintiff suffers discriminatory conduct when the plaintiff visits a business’s website with the intent of using its services, encounters terms or conditions that deny the plaintiff full and equal access to the business’s services, and then exits the website without entering into an agreement for services? Or, alternatively, does the plaintiff have to engage in additional interaction with the business or its website before the plaintiff will be able to claim that he or she has been denied full and equal treatment by the business?

Intent to Use Business’s Services Sufficient for Standing

The Supreme Court of California concluded that a person who visits a business’s website with the intent to use its services and encounters discriminatory terms or conditions has standing to sue under the Unruh Civil Rights Act, with no additional requirement that the person enter into an agreement or transact with the business. In explaining its conclusion, the high court discussed cases that were brought under the Unruh Civil Rights Act involving brick-and-mortar establishments. The court reasoned that mere awareness of a business’s discriminatory practices was not enough for standing; however, standing does extend to people who have been subjected to discrimination. For example, the court explained that the Unruh Civil Rights Act does not require a black plaintiff to make use of a blacks-only facility, or use a whites-only facility in violation of a segregation policy, in order to have standing.

In light of the Supreme Court of California’s answers to the certified questions, the Ninth Circuit ruled that the bankruptcy attorney had standing under the Unruh Civil Rights Act and reversed and remanded the matter to the district court.

Leaders Divided About White’s Impact on Discrimination Cases

ABA leaders are split about how influential the White decision will be about web accessibility. One leader views the decision as an extension of public accommodation cases under Title III of the Americans With Disabilities Act and the Fair Housing Act. “I do not see the White decision as having a significant impact as I believe the law was previously decided,” states H. Rowan Leathers III, Nashville, TN, member of the Tort Trial & Insurance Practice Section. While “the standing ‘door’ is now a little wider, an actual intent to use the business’s services must exist for there to be standing. Simple awareness of a discriminatory policy or practice is not enough,” explains Leathers.

Other leaders believe that White will be influential in future litigation because website accessibility, specifically for people with disabilities, is a growing concern for the courts. “I suspect that this decision will be nationally influential,” predicts Professor Cassandra B. Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section of Litigation’s Civil Rights Litigation
“A very large proportion of commerce (and even employment) now occurs online. Ensuring that people with disabilities are fully able to engage in commercial activities requires ensuring that websites are accessible, and courts have been increasingly likely to apply the Americans with Disabilities Act to online merchants and service providers,” Robertson states.

ABA leaders advise practitioners to stay abreast of technological advancements. This case “shows how important it is for lawyers to keep up with technological change. Technology has become a huge part of modern life, and law is not immune to those changes,” says Robertson.

Onika K. Williams is an associate editor for Litigation News.

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- Jason Tashea, For Law Firms on the Web, Online Accessibility for the Disabled is Good Business, ABA J. (May 21, 2019).