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"Tester" Results Are In! Supreme Court Ruling on ADA Accessibility Testers Proves Disappointing, But Not Useless

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Nearly a year ago, we reported that the United States Supreme Court was planning to hear a case—*Acheson Hotels v. Laufer*—on whether "tester" plaintiffs in ADA accessibility cases have standing to sue, including in the increasingly popular website accessibility cases. Last month, the Supreme Court issued its opinion. While the opinion does not address the "tester" standing issue head-on, all is not lost. There are some good, foreshadowing tidbits within the opinion and its concurrence, so let's dive in.

Background on ADA Accessibility and Testers

Website accessibility claims and other ADA accessibility claims are on the rise. Generally, these suits allege that a person living with a disability was unable to visit a business's location or website to purchase goods or learn about products, services, or other information. For more information on website accessibility claims specifically, see our previous post here.

What if the person bringing an accessibility claim never really intended to visit the business's location or website? A plaintiff bringing a lawsuit must have "standing," meaning they must allege some concrete injury that is traceable to the alleged wrongdoer's actions. Stated differently, simply alleging that they *could have* been harmed is generally not enough. They must allege a specific harm they suffered.

Unfortunately, in the ever-increasing website and other ADA accessibility claims, "tester" plaintiffs have entered the scene. These are individuals who (sometimes admittedly) never attempted or intended to visit the business or website—*i.e.*, they were not harmed—but they noticed that a location or website wasn't fully accessible. The Supreme Court agreed to hear the *Acheson Hotels v. Laufer* case, which focused on the issue of whether these "testers" have standing.

The Supreme Court's Opinion

Ms. Laufer, who has both visual impairments and mobility impairments, is a self-proclaimed "tester" plaintiff, meaning she seeks out potential violations and then files lawsuits in hopes of bringing

websites into ADA compliance. She filed suit against Acheson Hotels, alleging that its website did not include ADA-required information regarding the accessibility of one of their properties. Ms. Laufer's complaint, however, did not allege that she intended to visit the hotel.

Prior to the Supreme Court hearing the parties' oral arguments, a key event occurred: Ms. Laufer's attorney was suspended from practicing law for allegedly lying in fee petitions and during settlement negotiations. As a result, Ms. Laufer voluntarily dismissed her lawsuit against Acheson Hotels and requested that the Supreme Court dismiss her case as moot. Acheson Hotels objected, contending that Ms. Laufer was "abandoning her case to pave the way for Laufer and similar plaintiffs to resume their campaign of extortionate ADA suits against unwitting small businesses without the hindrance of an adverse ruling from this Court." The Supreme Court did not dismiss the case but asked the parties to discuss this mootness issue at oral argument.

Ultimately, on December 5, 2023, the Court issued its opinion, holding that the case was moot. The Court noted that it did not appear Ms. Laufer was dismissing her case to evade an unfavorable ruling and instead was doing so due to the complications with her attorney.

Helpful Takeaways

Despite the disappointment in not receiving a ruling on the "tester" standing issue, the Court's opinion has some good takeaways. First, the Court noted that a Circuit Court split on the issue was still "very much alive," leaving open the possibility of the Court ruling on this in the future. So the Court may address the tester issue again. Second, in his concurring opinion, Justice Thomas offered some insight as to his opinion should the "tester" standing issue come back around. He started by noting that there was no requirement that the Court address mootness before standing, as both are Article III jurisdiction issues. So, Justice Thomas concluded that Laufer did not have standing. He noted Laufer's "lack of intent to visit the hotel or even book a hotel room elsewhere in Maine" and went so far as to point out the reality of these "tester" lawsuits:

An official could have informed Acheson Hotels that its website failed to comply with the [ADA], and Acheson Hotels could have updated its website . . . . Laufer, however, chose to "enforce" each technical violation of the ADA she could uncover with a lawsuit. Because she is a private plaintiff, no discretion was required or exercised. And, of course, Laufer has been willing to forgo her suits if a hotel pays up, even though the ADA provides for no damages for private litigants.

So, testers beware. There is at least one Supreme Court Justice who clearly is not on your side.

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