

Battling Blind POS Suits May Be Lost Cause For Retailers

By **Juan Carlos Rodriguez**

Law360, New York (May 23, 2014, 2:28 PM ET) -- Retailers including Apple Inc. and Office Depot Inc. are facing a flurry of lawsuits accusing them of discriminating against blind people by not providing card payment machines that accommodate the sight-impaired, and experts say companies may be better off just changing the devices than taking up arms in court.

The lawsuits are the latest example of how the disabled community is making clear its determination not to be left behind by technological advances. And the U.S. Department of Justice has lent the disabled advocates' cause considerable support with court filings holding that companies that don't offer blind-friendly point-of-sale devices are violating the Americans with Disabilities Act.

Past tech-oriented battles have included whether retail websites must be compatible with screen-reading software used by the sight-impaired to browse the Internet and whether ATMs must be furnished with braille buttons and audio interfaces. Courts have held that the ADA must be construed in the plaintiffs' favor in those cases.

William G. Miozzi, partner in charge of Winston & Strawn LLP's Washington, D.C., labor and employment relations practice group, said Title III of the ADA covers public accommodations, commercial facilities and some private entities, and is frequently interpreted as covering new areas, such as websites, that weren't included in the 1990 law's original language.

He said companies have been routinely stymied in suits over disabled accommodations.

"There's no defense to it," Miozzi said. "The defense, if there is one, is going to be undue burden, and that's only plausible if the retailer is a small, mom and pop place."

Miozzi said the advocates and the DOJ's strategy has been similar for each iteration of ADA suits: Start at the top, with big companies like Wal-Mart Stores Inc. and Target Corp., and work down, so that over time, the message will be delivered, and the only kind of devices available, even to small retailers, will be the disabled-friendly ones.

With a strong record of success in court, businesses might be well advised to carefully weigh the cost of a court battle versus an equipment swap, and the publicity a fight might generate.

"I see most of this stuff being resolved," Miozzi said. "Retailers are just going to have to incur the capital costs to make these equipment changes. ... Smart lawyers are helping companies understand that this

isn't a battle they can win. So put the time and effort and money into compliance."

Chris Danielsen, director of public relations for the National Federation of the Blind, said businesses often aren't aware of disability issues with new technology until they're brought to their attention.

For instance, with touch-screen POS devices, blind people have no frame of reference like they would with a tactile keypad that has a number five in the center. Without the ability to enter PINs, they must recite the numbers to clerks, which obviously raises a host of privacy and safety concerns.

"The primary reason for the concern is not having the level of independence and privacy that everybody else has," Danielsen said.

R. Bruce Carlson of Carlson Lynch Ltd., who has filed a multitude of POS suits against retailers, said the disabled community realizes new technology has the potential to benefit them.

"From the perspective of the disability rights community, we have all this new technology, which, if it's incorporated in the proper way, can really facilitate accessibility, whether it's for somebody who's blind or has a mobility impairment, if the technology is made accessible," he said.

Carlson said another priority for the disabled community is that their online bills are delivered in a format that is compatible with screen-reading software. Because so many people are getting bills through email rather than paper mail, sight-impaired individuals want to be able to review them the same way someone with no impairment would, which means using special software that reads the bills aloud.

Along those lines, two H&R Block Inc. subsidiaries in March said they would make their online tax services more accessible to blind taxpayers after reaching a deal with the U.S. Department of Justice to resolve claims in a proposed anti-discrimination class action.

William C. Martucci, a partner at Shook Hardy & Bacon LLP who practices business and employment litigation, said the advice his firm has shared with national retailers is to be mindful of changing technology and make it as accessible as reasonably possible.

"Frankly, that builds a customer base and a potential employee base that's favorable," Martucci said. "This enlightened approach that really embraces trying to make it work often results in a very strong business practice that leads to financial gains and an attractive workplace."

And Kevin Knestruck, an attorney with Disability Rights Advocates, said while he's seen businesses react differently when approached about possible equipment changes, there is a way to avoid conflict in the first place.

"Before they adopt the latest, greatest, newest technology, they should think through how it's going to affect people with disabilities. And usually there's a solution, if they take that step," he said.

But Joseph D. Guarino, a partner at DLA Piper who does counseling and litigation work for retail clients, said businesses do have ground to stand on if they decide to fight.

He said the only published guidelines pertaining to tactile keypads relates to ATMs, and a DOJ statement of interest filed in one POS case in Florida federal court doesn't offer any options or alternatives to

defendant Lucky Brand Dungarees Stores Inc.

"Companies have flexibility. They can stand firm with the argument that they're not required to have tactile inputs under Title III ... or they can consider implementing POS systems that feature these upgrades," Guarino said.

Even still, he said most companies are inclined to do what is necessary to ensure effective communication with individuals with disabilities.

"Whether or not the law requires them to incur the extra expense, with respect to POS systems, is up for debate," he said.

--Editing by Katherine Rautenberg and Richard McVay.

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