



Episode 29: “ADA Accessibility: Is Your Website Compliant? With Rob Thorpe”

Speakers: Ari Kwiatowski and Rob Thorpe, Barclay Damon

[Ari Kwiatowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey, everyone. Welcome to “ADA Accessibility: Is Your Business and Its Website Compliant?” To our listeners, you probably noticed that I have been gone the past couple of weeks. I was on vacation. I was resting. I was relaxing in Buffalo. If you’re in upstate New York, you know, we have to enjoy this warm weather. So I have been gone. Rosemary Enright has filled it in for me. But I am back and I am ready to dig in. So let’s get to it. I am thrilled to announce that today I’m joined by my colleague Rob Thorpe. Rob is a partner in our Syracuse office. He is also in the Labor and Employment Group. And Rob has a vast amount of experience representing employers in many different capacities, counseling employers, representing them through administrative agencies and also throughout the course of litigation. So I am thrilled to welcome Rob to the podcast. Good morning, Rob.

[Rob Thorpe]: Morning, Ari. Happy to be here. Thanks for having me.

[Ari]: Yeah, thanks for joining. So with that introduction, I wanted to, and our listeners know this, I always subject our guests to sharing a fun or interesting fact about themselves. It can be personal. It can be professional. So, Rob, I’m going to turn the floor over to you to tell us a little bit more about yourself.

[Rob]: Sure. So the fun fact I always go with is that I was raised in the smallest city in New York State, City of Sherrill.

[Ari]: How have I not heard this?!

[Rob]: I guess I’ve never been put on the spot for a fun fact with you.

[Ari]: What is it, the smallest...?

[Rob]: Yeah. Sherrill, New York. It’s located kind of in between Syracuse and Utica, close to Turning Stone Casino, if that helps.

[Ari]: That helps me.

[Rob]: Yeah. So it’s about 3,000 people. I think last I checked Google and it still says small city on the sign as you enter the city. So I’m sticking to it.

[Ari]: I like it. That is pretty small!

[Rob]: Two stoplights, I think. Unless they’ve added one...

[Ari]: Now you’re in the big city, aka Syracuse.

[Rob]: Yeah.

[Ari]: All right, Rob. Well, thanks for sharing that. Definitely appreciate it. And I know our listeners kind of are always interested to hear our guests' fun facts because they are a wide range of interesting tidbits about everyone's lives. So but let's get into it, Rob. Here, we're here to talk about ADA accessibility to our listeners you know, Rob has really become a go-to at our firm for these types of issues because they are very specific. But, you know, let's back up a little bit, Rob. Can you just tell our listeners briefly, you know, what is the Americans with Disabilities Act or the ADA?

[Rob]: Sure. The ADA, as you mentioned, Americans with Disabilities Act of 1990, that year is important when it comes to these website accessibility cases. It prohibits discrimination against disabled individuals in all aspects, pretty much of life I mean there's different titles. There's Title I is the one we typically think of and that deals with employment. But the one we're going to talk about today is Title III, which is... governs public accommodations, which sounds like a state or public entity, but it really is most private businesses and that's a good segue into where we're headed.

[Ari]: Absolutely. So to our listeners, as Rob mentioned, you know, with the podcast before and if you're dealing with, if you're an employer and you're dealing with employee issues or discrimination issues in the workplace, you're really focused on Title I. This website accessibility issue, which we'll talk about in a moment is really, comes into play under Title III of the ADA. And as Rob mentioned, you know, Title III applies to public accommodations. So Rob, kind of just a threshold question: is a website or a company's website a public accommodation under Title III of the ADA?

[Rob]: Yeah. So the famous lawyer answer is "it depends."

[Ari]: Yes. And our listeners have heard that answer a lot.

[Rob]: Yeah. We never had a clear answer. Here, it depends on the jurisdiction; there is a split among the federal circuits, the federal appellate court circuits as to whether a website in and of itself can be a public accommodation. Again, the ADA was passed in 1990 and there aren't regulations issued by the Department of Justice to really govern this. They've issued guidance, and the Department of Justice has taken the position that websites are in fact a public accommodation, but there's no law on the books that says it. So courts, and again depending on the jurisdiction, have gone both ways. Sometimes they say this applies to brick and mortar, that's it. Websites alone are not public accommodations. And I think some of the more progressive jurisdictions have slowly started to say, you know, this is what the Department of Justice says, we're going to follow that even in the absence of the law or regulations. And so, including in the Second Circuit where we are, they've...they haven't come out and definitively said websites are public accommodations, but they're least leaning that way, as are some of the district courts within the Second Circuit.

[Ari]: Yeah, I think that makes sense. Rob, as you pointed out, you know, it's important to keep in mind that this statute was enacted in 1990 before businesses, any public, any entity really had websites. So I think that's important to keep in mind. But what I wanted to ask you, Rob, you know, this is a labor and employment podcast. We typically represent employers, businesses. If you're one of our listeners, what does ADA accessibility, website accessibility mean and why should you care?

[Rob]: Yeah, I think if you're, I mean you talk about employers, but if you're a business in general, you've probably been dealing with ADA accommodation issues in the employment context and also just in your business. Are your... do you have handicapped parking? Are the doorways to your at your entrance wide enough for wheelchairs, or is there a wheelchair ramp, things like that. And those are kind of the traditional claims that we all used...lawyers in this space used to defend, the traditional Title III ADA accommodation claims. Right. And so now we're shifting to a new era, not now, but in the last decade

or so, which are these website claims.

[Ari]: So, Rob, can you just explain to our listeners, you know, what you mean by “these website claims,” like what claims are we talking about? Because I think, you know, with a lot of federal statutes, there’s, you know, accessibility, there’s a lot of legal jargon. But can you just explain for our listeners you know, what we’re talking about? Because I think it as we’re going to discuss in a few moments, this is becoming a more wide-reaching issue.

[Rob]: Yeah. So most businesses maintain a website and or a mobile application. And the claims we’re talking about, at least in the last five to 10 years, are generally plaintiffs—and I refer to them often as serial plaintiffs because they file dozens, hundreds, sometimes thousands of these lawsuits—there’s kind of two categories of claims. The one category has targeted the hospitality industry, specifically hotels, motels, and other places of lodging. Those claims say...the plaintiffs in those cases say, I wanted to go visit your property. I went to your website and couldn’t determine based on reading the information on your website whether or not it could accommodate my disabilities. So that’s the “informational deficiency” type of claim. The second category—and the one you probably read about more often—are claims brought by visually impaired plaintiffs. And what they say is, I wanted to buy the widget that you make or take advantage of the services that you’re offer. I went to your website, my screen reader is not compatible with your website in that I couldn’t obtain the information that’s on your website because your website itself is not ADA compliant.

[Ari]: Very interesting.

[Rob]: So whether it’s the text or the font, the screen reader would dictate back the text that’s on the website. And visually impaired users, their claim is don’t have equal access to the information that are on those business’s websites.

[Ari]: Right. So, Rob, in your experience and you know, I know you mentioned serial filers, but in your more recent experience, is there one category that’s more common or is it mostly the latter category you discussed? Or what in your experience are we seeing for business owners? Who are these serial filers?

[Rob]: Yeah, so I don’t know if one is more prevalent than the other. I can tell you in the last two years, I think I’ve defended or at least been involved in close to 70 of these lawsuits, which is an insane amount.

[Ari]: Yeah. That’s a lot.

[Rob]: And they all look the same. I mean, within each category, it’s you can swap out the name of the plaintiff and the name of the defendant as well as the domain name. Beyond that, the allegations pretty much cut-and-paste jobs. And many courts have pointed that out.

[Ari]: Right.

[Rob]: So I don’t know that there’s—I’ve probably handled more in the hospitality industry, but there’s just as many, if not more of these lawsuits targeting businesses and all sorts of industries, [cut here] disabled people would, so I just want to make that clear.

[Ari]: Of course.

[Rob]: But, the type of plaintiff I have dealt with in the hospitality sector, there are a few in particular, they’re represented by the same law firm out of New York City. There’s one in particular, Deborah Laufer. I’ve written about her. She has filed hundreds, probably in the thousands at this point, of lawsuits not just in New York, all over the country. And in New York, fortunately, some of the district courts have taken the position, including the northern district where I am, that she lacked standing to pursue some of her

claims. The court simply didn't believe that there was a particularized harm that she intended to visit the motel in Auburn, New York and the hotel in Utica, New York, and then expand outside of central New York. It just...it became...there's a question as to the veracity of those allegations. And following a hearing, at least the court in the northern district had dismissed all of Deborah Laufer's remaining lawsuits based on lack of standing.

[Ari]: Wow.

[Rob]: Just one example.

[Ari]: Right, right. So, Rob, I think one of the things our listeners would definitely be interested in hearing is if you're a business owner, if you know, you're in the hospitality industry, you're in another industry, you maintain a website. Are there ways that businesses can defend against these types of lawsuits or are there things that businesses can do to make sure they're in compliance?

[Rob]: Yeah. So we'll start with the defense side. I will say 90% of these cases settle. And for good reason. Lawyers are expensive and it costs it to fight this battle. So, the 10% that haven't settled have been successful. They've wanted to fight it. It's a matter of principle for them. And I, I totally get it. I also understand the 90% that they weigh the business decision. Listen, I understand this plaintiff has targeted my business and a thousand others I'm not going to go to battle. I'd rather pay X amount of dollars, make it go away. I'll fix my website and we'll move on.

[Ari]: Right.

[Rob]: So those are kind of the two paths they tend to take. From my perspective, the more settlements that are paid, the more lawsuits that keep coming. So I love to have the fight and not because I'm litigious, just because I'd like to see in the absence of legislative action, some way to put an end to at least the volume of lawsuits that are being filed.

[Ari]: Right. And of course, we're advocates, right. So. Right. This is what we get paid to do. But what about in terms of coming into compliance, and how, if you're a business owner, how do you make sure that you are complying with Title III and hopefully you're able to avoid these types of lawsuits?

[Rob]: Sure. So I will say, I mentioned earlier the Department of Justice has not issued regulations. It's been X number of years—32 years...since the ADA was passed and we don't have regulations governing website accessibility.

[Ari]: Right.

[Rob]: Within the last few months, however, the Department of Justice did publish guidance for what that's worth. And within that guidance, it references kind of the gold standard of accessibility and those are the Web Content Accessibility Guidelines. Worth looking up if you're a business owner, I don't understand it, I'm not visually impaired. I don't have a screen reader. Right. So it's difficult for me to assess whether a website is or is not compliant.

[Ari]: Right.

[Rob]: But if you are a business owner, those are the standards that courts seem to accept that the Department of Justice is pushing. And so when you're working with your website developer, your website creator, that should be...it won't be news to them, but that should be the standard you're holding them to to avoid these lawsuits.

[Ari]: Right. And Rob, if you're one of our listeners, you can find that guidance on the Department of Justice

website. Is that right?

[Rob]: Yeah. I just did a Google search before this. It's the Department of Justice website accessibility, and it's the first link that pops up.

[Ari]: Great. So, Rob, thanks so much for taking us through these issues. I think this is a great primer on Title III and these accessibility claims. You know, before we sign off, I just wanted to ask you, I know you mentioned a case in the northern district. Are there any recent cases that you've come across within the northern district? So by the Second Circuit or any of the district courts that maybe you could share with our listeners that shed some light on these issues?

[Rob]: Sure. And I'll be quick. There's three of them that really came to mind. One was last year out of the Eastern District of New York. So down in the city, a case called Weingard versus Newsday. And I had mentioned that the Second Circuit hadn't really definitively said a website is or is not a public accommodation.

[Ari]: Right.

[Rob]: The court in that case, dismissed the lawsuit brought by Weingard. He had claimed that two of the videos on Newsday's website didn't have closed captioning and so he was denied equal access to the website. The Eastern District took the position that the website alone is not a public accommodation and because Newsday doesn't have a public-facing retail store, Weingard didn't have a claim.

[Ari]: OK.

[Rob]: So that was last year. Big decision out of the Eastern District more recently, the Second Circuit in, I think April dismissed a lawsuit brought by Owen Hardy. I mentioned Deborah Laufer previously. Owen Hardy is represented by the same law firm that represents Deborah Laufer. Owen Hardy has filed hundreds of lawsuits almost exclusively against hotels. This particular case that was...came before the Second Circuit was brought against a Holiday Inn franchisee. The court, the lower court, the district court had dismissed Owen Hardy's lawsuit based on lack of standing. And there really wasn't a harm or injury to Owen Hardy because they didn't think he—at least based on the allegations—that he intended to stay at this particular Holiday Inn.

[Ari]: So if I could interrupt you, Rob. So with respect to this particular plaintiffs, basically similar to the one you mentioned previously, who's basically just filing hundreds of lawsuits on the basis of Title III and basically what we would deem a serial filer; were those claims all over the country as well?

[Rob]: All over. All over the country. And I should point out, we talked about Title III and ADA and these lawsuits. There aren't damages that are being pursued in these cases. It's injunctive relief. And you could argue, more importantly, attorney's fees. And so that's what's driving the litigation. That's what's driving the settlements in addition to, I hope, for the right reasons, ADA accessibility.

[Ari]: Sure.

[Rob]: So. Owen Hardy filed this lawsuit against a Holiday Inn franchisee. It gets dismissed based on lack of standing and the Second Circuit affirmed just this year, which was a big decision that a lot of businesses in the hospitality industry were watching. Because we've all been impacted. They've all been impacted in one way or another by these claims, or at least the threat of these claims. So that was promising from a business owners' perspective. And then just earlier this month, there was a Second Circuit again came through for business owners. There was a...five lawsuits, five different plaintiffs against national retail stores. I think Jersey Mike's and I think Banana Republic and three others. And again, the issue with standing and those particular lawsuits, the plaintiffs were alleging that they were denied

equal access to the rights and privileges that others would get because those businesses didn't carry braille gift cards. So it was kind of a...it's not new to have complaints based on denied access for braille gift cards. It is interesting that they were sort of website cases and that the plaintiffs had gone to the website claiming that they intended to purchase a gift card and that the business doesn't sell braille gift cards.

[Ari]: Interesting.

[Rob]: Now, the court dismissed those five lawsuits; the lower courts and then the Second Circuit affirmed those decisions. And yet another victory for businesses and certainly a trend in the right direction from our perspective.

[Ari]: Yeah, I think that's really important to point out, Rob. And in those cases that you mentioned where the Second Circuit basically dismissed on the basis of standing, did they give any indication or comment at all on the issue of whether a website is a public accommodation under Title III? Or did that kind of just get sidestepped?

[Rob]: Sidestepped. They're still not really addressing I don't know if they're waiting for the district courts to figure it out or they want the Supreme Court to resolve the split that seems to exist among the circuits. It's unclear. It really was focused on the allegations in those five lawsuits, which, again, were all the same. Swap out the defendants and the plaintiffs, but same allegations. And the court found they are too speculative, they're conclusory, and there wasn't a particularized harm to warrant the continuance of the lawsuit.

[Ari]: Great. Definitely a step in the right direction, Rob, as you said. And I think we'll definitely hear more on this topic as these issues go through the court. So ...

[Rob]: You bet.

[Ari]: I did want to say thanks again so much for joining us. Rob, anything else that you want to share with our listeners before we sign off or today?

[Rob]: No, I think that's it. I'm here to help, as are you. And there's a lot of us in our firm that that unfortunately have been dealing with these lawsuits. But if you happen to get caught up in one or the threat of one, reach out. We're happy to help.

[Ari]: Absolutely. Thanks, Rob. Yeah. And of course, if you're listening we hope you don't come across these issues. But, you know, unfortunately, these ADA accessibility issues are as we're seeing and as Rob mentioned, becoming more prevalent. So we definitely wanted to keep you informed and keep you up to date. But Rob, thank you so much for joining. I really appreciate it. I think this has been a really great practical episode for our listeners who are employers and in large part business owners. So thank you so much again.

Rob: Thanks again for having me.

[Ari]: Absolutely. And to our listeners, tune in next week where we will discuss disability claims. And we're also going to talk and have an episode about a return-to-office policies. So definitely stay tuned for that. See you then.

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