ADA Title III and Point of Sale Devices – technology, regulation and changing expectations

October 16, 2021
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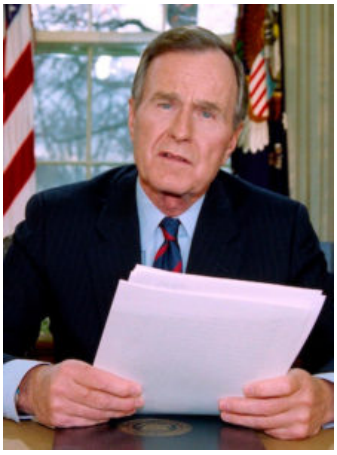
in ADA, ADA - SERIAL LITIGATION, ADA INTERNET, ADA POINT OF SALE, UNCATEGORIZED
Tags: ADA DEFENSE, DALTON V KWIK TRIP, NATIONAL FEDERATION OF THE BLIND V WALMART, POINT OF SALE, POS



*In just the last 10 days two different courts have taken completely different approaches to Point of Sale (POS) terminals commonly used for self checkout lines. In the more recent decision, *National Federation of the Blind, Inc. v. Wal-Mart Associates, Inc.* 2021 WL 4750521 (D. Md. Oct. 12, 2021) a carefully reasoned opinion rejects the notion that because these devices require assistance in selecting a cash back amount they violate Title III of the ADA. A much briefer opinion issued a week earlier reached the opposite conclusion. *Dalton v. Kwik Trip, Inc.* 2021 WL 4554362 (D. Minn. Oct. 5, 2021). The cases are the latest in a line of cases concerning touch-screen POS terminals that goes back at least as far as 2014's *New v. Lucky Brand Dungarees Stores, Inc.*, 51 F. Supp. 3d 1284 (S.D. Fla. 2014).[1] These cases raise, but do not resolve important issues concerning the ADA, technology, and regulation.

Both *National Federation for the Blind v Walmart* and *Dalton v Kwik Trip* concerned self checkout kiosks that included a cash back option. The similarity is not a coincidence. *Dalton*was filed after the *National Federation for the Blind* case as an obvious effort to leverage a public interest lawsuit filed by a well-regarded disability rights organization as a springboard for typical private ADA litigation.[2] Both cases claimed, truthfully, that a blind person could not take advantage of all the capabilities of the self-service kiosk, and in particular that a blind person had to rely on a person with vision to use the cash back feature. In *NFB* a store employee assisting the individual plaintiff selected cash back as an option without telling the plaintiff and tried to pocket the cash. The plaintiff was alerted to the deception by an audible reminder not to forget her cash and the employee was arrested on the spot. Dalton's concern was theoretical – she was afraid the same thing might happen to her although it had not. The cases reached opposite conclusions with the Court in *NFB* finding no violation of the ADA and the Court in *Dalton* finding that a violation had at least been pled.

The first issue these cases raise is simply what kind of equality is the ADA intended to provide; or put differently, what constitutes discrimination under the ADA. The view of the plaintiffs in these cases was expressed by the Court in *Dalton v. Kwik*

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I defend businesses nationwide in ADA and FHA accessibility lawsuits and consult with businesses and other attorneys concerning how to promptly and effectively deal with ADA and FHA demands, minimize litigation risk, and obtain meaningful compliance with the ADA and FHA. For more information about this feel free to email me at rhunt@hunthuey.com or visit our firm web site, hunthuey.com

ACCESSIBILITY DEFENSE

Quick Hits – fall color edition. September 20, 2022 Fall mushrooms are beautiful, but also potentially poisonous, which is a real stretch for an analogy to

Trip responding to the argument that the plaintiff could get her cash from an accessible ATM in the same store:

> Plaintiff has also set forth in her declaration that the availability of an ATM is not a sufficient alternative, as the use of an ATM charges a fee *and requires Plaintiff to go to a separate location in the store*. Defendant argues these facts are not relevant to the analysis, as a sighted person also incurs ATM fees. However, a sighted person is not forced to choose between an ATM and a POS terminal to get cash back *in a secure manner.*

2021 WL 4554362, at *4. I have highlighted the phrase "and requires Plaintiff to go to a separate location in the store" because we are talking here about a relatively small convenience store. The phrase "in a secure manner" is also important because at a Kwik Trip the customer does not take the cash directly from the POS device; instead it is handed to them by the cashier. The theoretical lack of security faced by the plaintiff was that she would ask the cashier to enter one cash back amount – say $20 – and the cashier would enter a larger amount and pocket the difference.[3]

Underlying the decision in *Dalton* is what can be called the "perfect equality" view of the ADA; that is, that the ADA requires that those with disabilities have an experience that is as close as possible to that of a non-disabled customer. If a non-disabled customer doesn't have to walk all the way from the cash register to the ATM to securely get cash then neither should a customer with a disability. If a non-disabled customer has a marginally smaller risk of being cheated than a blind customer the ADA requires elimination of that marginally smaller risk(4).

The problem with the perfect equality view of the ADA is that nothing in the ADA suggests it was intended to provide perfect equality of experience. The goal of the ADA was equal participation in the economic and social life of the nation,(5) and for Title III, equal opportunity to take advantage of the goods and services offered by public accommodations. Often that requires help from people instead of a perfectly autonomous existence. Blind diners are not entitled to braille menus if a server can read the menu to them. Wheelchair bound shoppers may have to rely on an employee to reach goods for them. It is true that technology increasingly allows us to exist in perfectly isolated bubbles, but the vision of the ADA was that those with disabilities would be brought out into the world, not hidden from it.(6) As a counter-point to the *Dalton* decision the Court in *NFB* says this:

> *Full and equal enjoyment means the right to participate and to have an equal opportunity to obtain the same results as others to the extent possible with such accommodations as may be required by the Act and these regulations. It does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability.*

NFB, 2021 WL 4750521, at *14 quoting 28 C.F.R. pt. 36 App. C. Thus, according to *NFB*, "Walmart is only required to provide visually-impaired patrons "equal opportunity …to the extent possible" during the self-checkout process."
Where to draw the line between equality of experience and equality of opportunity isn't always clear. For physical accessibility the ADA's design and construction standards represent a regulatory determination of that line. These standards make it easier for most individuals with disabilities to gain physical access to public places, but they do not guarantee that access will be identical.(7) Similar compromises exist throughout the regulations regarding accessibility. However, regulations do not always keep up with social and technological change. ATM machines were in common use for many years before standards for accessibility went into effect in 2012, partly because technology changed faster than the regulatory process could address them and partly because the cost – benefit analysis changed as technology improved and became cheaper. DOJ has argued since at least 1999 that Title III covered the internet but still has not managed to produce a set of regulations defining the accessibility needed for the internet to meet the requirements of the ADA. This is

the disability protection provisions of the ADA and FHA. Here's a roundup of the latest decisions. Website accessibility – let's review Roman v. Greenwich Village Dental Arts P.C., 2022 WL 4226026 (S.D.N.Y. Sept. 13, 2022) isn't an extraordinary […]
Richard Hunt

partly because of political impediments, but primarily because the regulatory process could not keep up with changing technology.

The *NFB* decision illustrates one way to approach this problem. In *NFB* the Court decided that because there are no regulations for POS devices other than ATM's public accommodations are not required to provide accessible POS devices. There is still an obligation to provide the auxiliary aids and services necessary for individuals with a disability to use the devices, but that can include human assistance because human assistance is a specifically recognized type of auxiliary aid and service.(8)

This decision requires, however, that the Court draw a line that is not arbitrary but also not inevitable concerning expectations of privacy. It rejects cases saying that human assistance is not a reasonable substitute for private access in voting cases because, it says, voting is expected to be in secret while there is no expectation of privacy in public retail transactions. There is a similar line between asking an employee to touch the cash back amount and having to give the employee a debit card PIN, the latter being secret by design. However, expectations change with technology. There are products I would rather buy at the self checkout counter of my local grocery store than with a cashier. When it wasn't an option I didn't expect my shopping choices would be somewhat private. Now that it is an option I expect this new level of privacy. More important for businesses, expectations of privacy may be evaluated differently by different courts. Regulation, which can in theory adjust to changing technology and expectations provides certainty, something that businesses and disabled consumers need so they know what their obligations and rights are.

Regulations can be helpful for Title III public accommodations, but even without problems caused by the pace of technological change DOJ sometimes finds the regulatory process too time consuming for it to implement policy in the shifting winds of political change. Its recently filed Statement of Interest supporting a requirement that hotels offer lower beds illustrates this.(9) DOJ could use the regulatory process to impose this requirement, but to do so would require far more time and energy than simply trying to get favorable court decisions or using the clout of the government to coerce compliance with its notion of what the ADA requires. Whether this is seen as appropriate or not depends on whose ox is being gored(10). The use of the power to litigate seems like a great idea as long as that power favors whatever group a person happens to be a member of.

Getting past theory to practice, retailers with POS devices can probably expect to see more cases filed by private plaintiffs like Dalton. *NFB* will inevitably be appealed and it may be some time before there is a more authoritative view of what the ADA requires for POS cash back transactions. In the meantime *Dalton* is likely to be followed by copy cat cases that try to extract quick settlements based on the uncertain status of the law. DOJ might even weigh in with a Statement of Interest as it did in *Vargas v Quest Diagnostics*, another case dealing with self service kiosks. (11). The basic problem that the pace of technological change simply outstrips the pace of legislation and regulation will not go away. When regulation and legislation cannot keep up with technology, Title III lawsuits that exploit the uncertainty are the inevitable result.

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* If you wonder what former President Bush has to do with POS devices you have forgotten story of his supposed amazement when he saw a grocery scanner in action. The story later turned out to be untrue, but the fiction is more interesting and has therefore outlived the truth.

[1] See my blog The next wave – ADA lawsuits against touchscreen POS devices

[2] The *Dalton* complaint includes among its allegations the facts that gave rise to the *NFB*, which are more compelling than the facts in *Dalton*.

[3] Various devices and a phone app are available to help blind individuals tell the denominations of the bills they are given, so the blind customer does not, in theory at least, have to rely on the cashier's honesty so long as she can enter the cash back amount herself.

(4) Remember that the premise of the case is that the cashier will steal from blind customers if given the opportunity. That cannot be regarded as a significant risk despite it having happened exactly once according the *NFB* case.
(5) “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals;” 42 U.S.C. §12101(a)(7).
(6) “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem” 42 U.S.C. §12101(a)(2).
(7) See my blog, The Tenth Circuit makes the ADA 2010 Standards a true safe harbor for business for a discussion of the issue.
(8) Cyberspace presents a different kind of theoretical challenge because there are no regulations to refer to, and that is why after years of litigation it is still impossible to say exactly what the obligation of a Title III entity is with respect to websites and mobile applications.
(9) See my blog, DOJ announces that there is no safe harbor for physical accessibility.
(10) This expression seems to be of uncertain origin, though I found a suggestion it comes from Exodus 9: “Then the LORD said to Moses, “Go to Pharaoh and say to him, `This is what the LORD, the God of the Hebrews, says: “Let my people go, so that they may worship me.”2If you refuse to let them go and continue to hold them back,3the hand of the LORD will bring a terrible plague on your livestock in the field–on your horses and donkeys and camels and on your cattle and sheep and goats.4But the LORD will make a distinction between the livestock of Israel and that of Egypt, so that no animal belonging to the Israelites will die.'” Anyone willing to go past the first page of Google answers may find something more persuasive.
(11) See my blog FHA and ADA Odds and Ends.

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ADA website demands – same old wine in the same old bottle again. . . »

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