

Does Internet Discrimination Occur If a User Doesn't Click "I Agree"?

(June 7, 2018) On the internet, does discrimination happen when a user encounters discriminatory language in the terms of service and does not click to agree to the terms, or does it happen only after the user agrees to the discriminatory policies and is injured by the website's policy?

The Ninth Circuit, when confronted with the question, in effect, answered, "Ask the California Supreme Court." The federal appellate court certified the issue to the California Supreme Court for resolution, noting, "Questions such as these are likely to arise frequently in the future, as internet-based services become more prevalent."

The question arises in a case involving a bankruptcy attorney who sought to use Square, Inc.'s internet-based services to accept electronic payments without opening a merchant account with a credit card company. Square's seller's agreement prohibits accepting payments in connection with certain businesses including "bankruptcy attorneys or collection agencies engaged in the collection of debt."

Robert White, a bankruptcy attorney, refused to click the "continue" button on Square's website, which would have subjected him to the terms of the agreement. Instead, he sued Square alleging discrimination against bankruptcy attorneys under California's Unruh Act, which prohibits discriminatory conduct that includes "occupational discrimination." The trial court dismissed the case, finding no discrimination because he did not agree to the terms.

The federal appellate court found there was a split in authority in California whether discrimination may occur when a person merely becomes aware of the discriminatory practice or whether the discrimination occurs only after the individual presents himself for discrimination. In addition, the federal appellate court said it was "not clear how the cases apply in the absence of brick and mortar to internet-based services."

"But it is not clear what steps are necessary for plaintiffs to 'present themselves' to an internet-based business or to be denied equal access. For instance, White argues that he presented himself to Square merely by visiting the website, and was denied equal access merely by reviewing the exclusionary seller agreement. Surrey suggests that this would not be enough: plaintiffs who merely visit a website and discover a discriminatory fee do not have standing. Yet it is not clear Surrey applies in this context, because, as White argues, Square does not impose a discriminatory fee. Additionally, Square's seller agreement presents, on its face, an exclusionary policy that precludes a bankruptcy attorney from full and equal access to Square's services."

The appellate court notes that, if White had to accept the terms to be subject to the discriminatory practices, then the case would be dismissed for lack of standing. If encountering the discriminatory terms and stopping were enough, then the case would continue.

White v. Square, Inc., Ninth Cir. No. 16-17137, issued June 7, 2018.

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