

# Activists Raise Concern To 9th Circ. Over Lengthy ADA Cases

By **Donald Morrison**

Law360 (March 10, 2023, 7:02 PM EST) -- A group of disability activists urged the Ninth Circuit to keep intact its reversal of a decision involving accessible parking at a lobster shop, saying the panel correctly ruled that the lower court wrongly relied on litigation history when determining that the suit wasn't credible.

The activists, who identify as "busy professional women who use wheelchairs," together with a group of nonprofits, told the appeals court on Thursday that protecting the rights of serial litigants in Americans with Disabilities Act suits is crucial, because "without private litigants, the ADA's promise of equality and inclusion would be nothing more than a lofty dream."

"Yet, despite congressional intent to facilitate private enforcement and create 'clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,' ADA access cases are becoming riskier and more difficult for the private bar to bring," the activists' amicus **brief** states.

In January, a split Ninth Circuit **found that** Chris Langer's status as a "serial litigator" was improperly used against him in his ADA suit accusing the owners of a building renting space to Gour Maine Lobster and the 1 Stop Smoke Shop of failing to provide parking with wheelchair access.

U.S. Circuit Judge Daniel P. Collins said in his dissent that the court correctly ruled that Langer wasn't a credible witness, saying that he made implausible claims and that there were inconsistencies in his testimony.

The owners of the property, Milan and Diana Kiser, filed a petition Feb. 6 to rehear the suit, arguing that it is invalid because Langer, who's a paraplegic and disability advocate, wasn't intending to use the restaurant and was just there as an independent "tester" to check for ADA compliance.

"If the notion of 'tester' standing is taken to its limits, it begs the question of how or even why having a disability is necessary to pursue a claim so long as one can imagine a qualifying beneficiary of the litigation," the Kiser's petition stated.

Briefs supporting the Kiser's attempt at rehearing were then filed by the Automotive Business Coalition, the American Hotel & Lodging Association and The Restaurant Law Center, among other hospitality groups.

Michelle Uzeta of the Disability Rights Education & Defense Fund, representing the amici, told Law360 that "testers" play an important role in making sure businesses are complying with ADA standards.

"The government cannot take on that burden of enforcement, they simply don't have the resources or staffing," Uzeta said. "Without enforcement the law has no impact and people will continue to be discriminated against and excluded from community life."

Julie Reiskin, who uses a power wheelchair for mobility due to multiple sclerosis and who is one of the amici, told Law360 that independent "testers" like Langer are the only way ADA laws are being enforced.

"Testing is how civil rights happen," Reiskin said. "It shouldn't be looked at as a nefarious thing. This

is how our system works."

The Ninth Circuit **criticized** what the panel referred to as "abusive" ADA suits in October, upholding its decision to slash attorney fees in a similar ADA suit over accessible parking.

Thursday's brief also argues that Title III standing has never relied on an intent to buy goods or services and that the fact this suit has lasted five years is another example of the "arduous path to basic barrier removal."

"People who do not use wheelchairs are able to go in and out of places of public accommodation without demonstrating a 'desire to buy a good or service,' the brief stated. "Rather than complying with the applicable accessibility standards, petitioners have contentiously fought jurisdiction and liability for more than five years."

The amici are led by Katherine Corbett, Ann Cupolo-Freeman, Ruthee Goldkorn and Reiskin, as well as the Civil Rights Education and Enforcement Center and The Disability Rights Education & Defense Fund.

Counsel for Langer and the Kisers did not immediately respond to request for comment Friday.

The amici are represented by Amy Farr Robertson of Fox & Robertson PC and Michelle Uzeta of the Disability Rights Education & Defense Fund.

Langer is represented by Dennis Price of Seabock Price APC and Russell Clive Handy of Potter Handy LLP.

The Kisers are represented by Samy S. Henein of Suppa Trucchi & Henein LLP.

The case is Chris Langer v. Milan Kiser et al., case number 21-55183, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Rich Mills.