Published on *The National Law Review* https://www.natlawreview.com

Website Accessibility – Americans with Disabilities Act Impact

Article By:

Jonathan M. Turner

Susan Kohn Ross

Background

Title III of the Americans with Disabilities Act ("ADA") mandates that public accommodation must be provided to disabled persons to allow for the "full and equal enjoyment" of the related privileges, goods, services, advantages and accommodations as those provided to able-bodied persons. The owner of any business is responsible for making sure those accommodations are made with "reasonable modification." The ADA makes it very clear that a business that does not provide for that accommodation is engaging in unlawful discrimination 42 U.S.C. section 12182(b)(2)(A)(iii).

The statute provides for various examples of where public accommodations must be provided, including locations such as an inn, a restaurant, a theater, an auditorium, a bakery, a laundromat, a depot, a museum, a zoo, a nursery, a day care center, and a gymnasium. Noticeably absent from that list are websites. That's because websites did not exist at the time the statute was passed, and Congress has not expressly addressed the issue in the interim.

Over the last twenty years, the Courts have weighed in, with conflicting perspectives, on the topic of website accommodation and how the statute can or should be interpreted for this purpose:

- The Ninth Circuit of the Court of Appeals (the court with jurisdiction over California and other parts of the Western states) takes the position, based on examples provided by the statute, that public accommodations refer to a "physical space." See *Weyer v Twentieth Century Fox Film Corp.*, 198 F3.d 1104, 2000 WL 1643 (9th Cir. 2000). Under that interpretation, websites per se **would not** qualify as subject to public accommodation.

- A leading case discussing this issue is *National Federal for the Blind v Target*, 582 F.Supp.2nd 1185 (N.D. CA 2007). There the court held that website non-accessibility for disabled persons may give rise to a claim if there is a **sufficient "nexus"** between the website and the goods and services of public accommodation.

There have been a number of cases since then that address this topic, mostly in a manner adverse to website owners. Some of these cases adjudicated in other parts of the country have decided websites are public accommodations. *See, for example, Castillo v Jo- Ann Stores, 2018 U.S. Dist. LEXIS 23020, 2018 WL 838771 (ND Ohio 2018).*

What Has Changed

The most recent case from the Ninth Circuit Court addressing this subject is *Robles v. Domino's Pizza, Inc.*, 2019 WL 190134, decided on January 15, 2019. There, the court reaffirmed the rule adopted by "the many district courts that have confronted this issue[;]" i.e., that **the ADA applies to websites and mobile apps that connect customers to the goods and services of restaurants and other places of public accommodations**.

The Department of Justice (DOJ), which is charged with enforcement of Title III of the ADA, was moving toward incorporating the website accessibility guidelines established in WCAG 2.0 AA (which can be found here: http://www.w3.org/WAI/standards-guidelines/wcag/) during the Obama administration. However, the Trump administration has put this on hold. So, for now, we are left in a sea of uncertainty to be guided by court decided law, of which there is little. However, one should not assume the absence of DOJ promulgated regulations or other guidelines will provide a "due process" defense to claims that a website connected to a place of public accommodations fails to comply with accessibility requirements under the ADA. See *Roble v. Domino's Pizza, Inc.*, *supra* (due process argument based on DOJ's withdrawal of regulations regarding website accessibility to disabled individuals rejected by court – "[w]hile we understand why Domino's wants DOJ to issue specific guidelines for website and app accessibility, the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations.")

A court could look to WCAG 2.0 AA for guidance to decide website accessibility issues, but there still must be sufficient nexus between the website and a physical place of public accommodation for the ADA to apply. Assuming a sufficient nexus is established, the question of website accessibility is an easier one to address where the disability in question is sight. There is software that can read text and translate it into audio, provided the visual content on the website has embedded code permitting the software to perform the audio translation. With the use of a braille keyboard, a blind person could navigate through the website with this type of software. Whether this is a "reasonable modification" of "policies, practices, and procedures" will probably turn on the expense, the resources of the defendant, the intended users/audience, and any other relevant facts which are typically case specific.

In contrast to Title III, to this point, there do not appear to be any cases discussing website accessibility in connection with employer obligations under Title I which deals with employment discrimination against individuals with disabilities. Unlike Title III, Title I is enforced by the EEOC or Equal Employment Opportunity Commission.

Employment Related Issues

Title I prohibits employers from discriminating against "qualified individuals with a disability" in connection with hiring, firing, promotions, compensation, training, job application procedures and other terms and conditions of employment. Title I defines a "qualified individual with a disability" as someone who, with or without a reasonable accommodation, is able to perform the essential functions of the job he/she is seeking or performing.

Employers under Title I must engage in the interactive process to explore whether “reasonable accommodations” exist to address the work limitations presented by the individual’s disability. The employer must take these reasonable affirmative steps to accommodate a disabled person only if asked, or if the person has a known disability that affects the individual’s ability to perform essential job functions. The employer need not provide the most reasonable accommodation, nor the one requested or preferred by the individual. The obligation only is to provide or offer a “reasonable accommodation.”

In the last Congress, the House passed a bill, the ADA Education and Reform Act of 2017 (H.R. 620), which sought to curb lawsuits brought by “serial plaintiffs” alleging barriers to access to public accommodations, and the burden they place on business. Although not specifically aimed at a particular type of ADA lawsuit, it was hoped the reforms contained in this bill would provide relief from the explosion of website accessibility lawsuits filed over the past few years.

How Do You Prepare?

The Act would impose certain preconditions before a lawsuit could be filed. For example, a potential plaintiff would have to provide written notice to a business owner of an alleged accessibility barrier and permit the opportunity to respond in writing about how the barrier may be addressed. The businesses would then have four months to demonstrate a willingness to correct a purported ADA violation. Only if the business owner does not remove the barrier, or does not demonstrate substantial progress in removing the barrier, would the individual be permitted to sue. No comparable bill has so far been introduced in this session of Congress, but it is still early in the legislative calendar. In the meantime, those owning and operating physical locations which provide public accommodations will have to decide for themselves how best to deal with the large number of lawsuits regarding website accessibility facing those providing goods and services to the public.

National Law Review, Volumess IX, Number 39