

Ninth Circuit Rejects Due Process and Primary Jurisdiction Arguments in ADA Website Accessibility Case

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In *Robles v. Domino's Pizza LLC*, No. 17-55504 (9th Cir. Jan. 15, 2019), the 9th U.S. Circuit Court of Appeals reversed a district court's dismissal of the plaintiff's ADA claim pursuant to the primary jurisdiction doctrine due to the lack of website accessibility regulations from the Department of Justice. In doing so, the Court issued three important rulings.

First, to the extent there was any doubt, the Court held that the ADA applies to websites of places of public accommodations if there is a sufficient nexus between the website and a physical brick and mortar location. Second, the Court held that applying the ADA to websites does not violate the Fourteenth Amendment right to due process merely because DOJ has not implemented specific regulations setting forth a technical standard for website accessibility. Third, the Court held that the district court erred in dismissing the case under the primary jurisdiction doctrine because DOJ has expressed no interest in promulgating regulations governing website accessibility and, therefore, deferring to the DOJ would delay the resolution of the plaintiff's claims.

Nexus between physical location and website app

The serial plaintiff filed suit in September 2016, alleging that he is visually impaired and was unable to order pizza from Domino's website because Domino's had failed to design its website and app so his screen reader software could read aloud non-text prompts. Among other things, plaintiff sought a permanent injunction requiring Domino's to bring its website and mobile app into compliance with the Web Content Accessibility Guidelines ("WCAG") 2.0.

The district court dismissed the case under the primary jurisdiction doctrine, holding that plaintiff's attempt to impose on businesses "a requirement that they 'compl[y] with the WCAG 2.0 Guidelines' without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic . . . flies in the face of due process." 2017 WL 1330216, at *5 (C.D. Cal. Mar. 20, 2017) (first alteration in original). In other words, the court agreed with what many businesses have repeatedly argued—that the WCAG 2.0 standards are not binding.

In reversing the district court's decision, the Ninth Circuit first held that the ADA applies to websites of places of public accommodations provided there is a sufficient nexus between the website and a physical brick and mortar location. Indeed, the Court expressly found that the "nexus between Domino's website and app and physical restaurants . . . is critical to our analysis." The Court avoided deciding "whether the ADA covers the websites or apps of a physical place of public accommodation where their inaccessibility does not impede access to goods and services of a physical location." This leaves undisturbed the pre-existing case law holding that the ADA does not apply to website businesses that are not connected to an actual, physical place. See, e.g., *Earll v. eBay*, 599 Fed. Appx. 695 (9th Cir. 2015).

The Court next rejected the district court's finding that requiring Domino's to comply with the vague strictures of the ADA would violate Domino's due process rights. Under this legal theory, an impermissibly vague statute violates due process when it does not "give fair notice of conduct that is forbidden or required." First, the Court

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reasoned that Domino's received fair notice that its website and app must comply with the ADA because DOJ has taken the position that the ADA applies to websites of public accommodations since 1996. Second, the Court rejected Domino's argument that imposing *liability* would violate due process because it had not received fair notice of its obligation to comply with WCAG 2.0, which are private unenforceable guidelines. In this regard, the Court reasoned there were no "fair notice concerns" because plaintiff was not seeking to impose liability on Domino's for failure to comply with WCAG 2.0. Rather, plaintiff's theory of liability is based on Domino's alleged violation of the ADA generally. That a court might order compliance with WCAG 2.0 as an equitable *remedy* for an ADA violation does not alter the due process analysis, according to the Court.

Third, the Court found that the lack of regulations establishing a specific technical standard for website accessibility does not eliminate the statutory obligation to comply with the ADA. The Court noted, "while 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." In fact, the Court posited that DOJ's failure to implement website accessibility standards might be motivated by DOJ's desire to afford businesses flexibility in determining how to comply with the ADA.

Finally, the Ninth Circuit found that the district court erred in invoking the primary jurisdiction doctrine, which allows courts to stay proceedings or dismiss a complaint pending the publication of regulatory guidelines. The Court held that the primary jurisdiction doctrine does not apply when (i) the agency is aware of the issue but has expressed no interest in the subject matter or (ii) referral to the agency would significantly postpone a ruling. The Court found that both factors were present here.

Takeaway

To be sure, the Ninth Circuit's decision facially comports with DOJ's September 26, 2018 letter to Congress—which the Court did not cite—confirming that "public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication" and that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA." But it glosses over what has become a real problem for businesses who desire to make their websites ADA compliant and avoid senseless litigation.

While most website accessibility plaintiffs sue to compel compliance with WCAG, these guidelines are in many respects subjective. Businesses are thus left to question whether websites must be "100% compliant" with WCAG standards—and whether that is even achievable—and what specific steps they must take in order to avoid nuisance lawsuits.

The practical take away from *Domino's* is that businesses subject to the ADA should continue to do everything practicable to ensure that their websites and apps are accessible to disabled users. And though compliance with WCAG standards is not strictly required for ADA compliance, it appears clear that lawsuits and demand letters seeking this relief are not going away any time soon.

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