Litigation Under the ADA: Protect Your Company From Lawsuits

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Title III of the ADA

• Federal **civil rights law** that requires all public accommodations be accessible to individuals with disabilities.

• Since January 16, 1992, all places of public accommodations are required to comply with the ADA.

• Applies to owners/operators, landlord/tenants, franchisors/franchisees.

Understanding Title III of the ADA

• **Coverage**
  – Places of public accommodation – Hotels, resorts, spas, restaurants.
  – Prohibits hotels from denying services and accommodations to individuals with disabilities.
  – Protects individuals with disabilities and individuals associated with disabled individuals.
Title III Obligations

• Must remove barriers to access

• Must modify policies, practices, and procedures – unless doing so fundamentally alters goods and services

• Requires auxiliary aids and services for effective communications

Website Accessibility
ADA and Website Accessibility

1. Does your website need to be accessible for users with visual, hearing and physical impairments?
   - Slightly more complicated, but yes

2. Does your website need to provide information regarding various accessibility features at your hotel?
   - Yes

Website Accessibility Issues For Users With Visual And Hearing Impairments
Must my website be accessible for those hard of hearing and seeing?

- Most Likely, Yes! Tension exists in courts and DOJ whether Title III applies to websites
  - Courts have ruled on both sides of the issue
  - No universally recognized standard for achieving website accessibility
  - Trend is for courts to find that websites are places of public accommodation
  - This, even in the absence of guidelines for private companies’ websites, the trend is to comply with the gold standard -- WCAG 2.1.

Recent Court Decisions
Gil v. Winn Dixie (S.D. Fla 2017)

- Customer alleged that Winn-Dixie’s website was incompatible with technology software that assists the visually impaired, in violation of Title III of the ADA.
- Court held that a website that is heavily integrated with physical store locations and operates as “a gateway to the physical store locations” constitutes a service of a public accommodation covered by the ADA.
- The judge declined to rule that a website is always a public accommodation because the facts of this particular case did not require him to rule so broadly.
Recent Court Decisions
Andrew v. Blick Art Materials (E.D. NY 2017)

- Ruled that websites are places of public accommodation, which people with disabilities have a substantive right to access.
- The judge rejected the approach used in Winn-Dixie, and specifically wrote that “rigid adherence to a physical nexus requirement leaves potholes of discrimination in what would otherwise be a smooth road to integration.”
- Finds that any website which offers direct sale of goods or services is on its own a public accommodation.

Recent Court Decisions
Haynes v. Hooters of America (11th Cir. 2018)

- A blind plaintiff attempted to read and navigate Hooters’ website but was unable to do so because the website was not compatible with Screen Reader Software.
- District court ruled plaintiff’s lawsuit was moot since Hooters already agreed to fix their website to WCAG 2.0 in prior settlement.
- The 11th Circuit reversed, holding that plaintiff’s claims were NOT moot even though Hooters had already agreed to update its website. There was still a live controversy about whether the plaintiff could receive an injunction to force Hooters to make its website ADA compliant.
Diaz v. The Kroger Company (SDNY June 4, 2019)

• A blind man sued Kroger claiming that its website was not compatible with screen reader software and thus denied equal access to visually impaired customers.

• Kroger filed a motion to dismiss, claiming that
  – (i) it had undertaken to make its website comply with WCAG 2.0 before the lawsuit was even filed;
  – (ii) its website was now fully compliant with WCAG 2.0;
  – (iii) that each barrier to access identified by the plaintiff had been fixed and/or no longer existed; and
  – (iv) it was committed to keeping the website in compliance with WCAG 2.0 in the future.

• By taking those actions, the court found that the plaintiff’s ADA claim was moot and thus granted Kroger’s motion to dismiss.

Mendez v. Apple (SDNY March 28, 2019)

• A blind woman sued Apple claiming that barriers to the website kept her from getting full and equal access.

• Apple filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the plaintiff had failed to allege that she sustained any concrete or particularized injuries.

• Court granted Apple’s motion to dismiss, noting that she failed to identify which sections of the website she tried to access, or the goods or services she was unable to purchase.

- A man who entered a website with the intent of purchasing services has standing to maintain an action under the Unruh Civil Rights Act.

- Court: A person suffers discrimination under the Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services.

- Concludes that this rule applies to online businesses and that visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store.

- This is in addition to “tester” standing.

Robles v. Domino’s Pizza

- Case centered on the inability of individuals who had limited vision to use Domino’s website to order pizzas online with the use of screen-reading software.

- In March 2017, a California district court dismissed the lawsuit, holding that while Title III applied to the internet, allowing the case to proceed in the absence of clear web accessibility regulations from the DOJ would violate Domino’s due process rights.

- The Ninth Circuit reversed. It held that Title III applies to websites and that the lack of official web accessibility regulations does not raise due process concerns. It also suggested that lower courts could reference WCAG 2.0 guidelines when structuring remedies.

- Domino’s petitioned the Supreme Court to hear this case, where it could prove to be a landmark battle over the rights of disabled people on the internet.

- On Oct. 7, 2019, the Supreme Court denied Cert.
Common Website Accessibility Issues

• Users with visual impairments:
  – Menus in PDF Format
  – Pictures, symbols, maps, diagrams, etc. with no written descriptions
  – “Click here” links
  – Text as an image file (as opposed to html)

• Users with hearing impairments:
  – Video and audio files with no captioning

• Users with physical impairments:
  – Navigating website without a mouse or a keyboard

Common Threads in WCAG 2.1

• Provide text alternatives for non-text content (e.g., pictures, maps)
• Provide text captions for audio content
• Avoid using color as the only means of conveying information (e.g., green means go)
• Make all functionality available from a keyboard interface (as opposed to requiring mouse “clicks” to activate links)
• Provide a way to pause or slow down “time out” features
Policy and Remediation Plans

• Given the recent case law, hotels should proactively test your website’s accessibility.
  ❖ WAVE (WebAIM.org) – provides visual feedback containing errors preventing or interfering with content accessibility and areas that can be improved
  ❖ Functional Accessibility Evaluator and Ainspectr Sidebar

Policy and Remediation

• If not accessible, implement a remediation plan:
  1) A timeline for remediating accessibility issues
  2) Executive and senior management participation
  3) Identify an accessibility project leader
  4) Make third party providers aware of accessibility requirements and expectations
Policy and Remediation

• Create a web accessibility policy consistent with WCAG 2.1
• Ensure training and compliance with policies

• If you do not implement certain accessibility features because they are unduly burdensome or would fundamentally alter your website, make sure to have plenty of documentation to back up that claim.
  – Heavy burden to prove this defense

Policy and Remediation

• Retain an Accessibility Consultant
  – They can help you build safeguards into your contracts to protect against client liability for inaccessible deliverables
Website Accessibility Issues
For Users With
Mobility Impairments

Hotel Accessibility Information on Website

• Hotel websites are subject to the ADA because it provides information about their goods and services to the public
  – ADA regulations - 28 CFR 36.302(e)(1)

• A public accommodation that owns, leases, or operates a place of lodging shall:
  
  i. Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms;
Accessibility Information on Website

ii. Ensure that accessible guest rooms are held for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type;

iii. Reserve, upon request, accessible guest rooms or specific types of guest rooms and ensure that the guest room requested are blocked and removed from all reservations systems;

iv. Guarantee that the specific accessible guest room reserved through its reservations service is held for the reserving customer, regardless of whether a specific room is held in response to reservations made by others;
Accessibility Information on Website

v. Identify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs.

• This final prong of the regulation is crucial and has been the subject of hundreds of lawsuits.
• Much easier logistically to bring this type of claim as opposed to more “traditional” brick and mortar claims.
Accessibility Information on Website

• So, what is enough information?

• Due to the lack of case law, there is no bright line rule as to the amount of information that is deemed to be “sufficient.”

1. At a minimum, provide information regarding whether common areas of your hotel are accessible

2. Where should that information be provided?
   - Popular common areas

3. Are there accessible routes to get to these areas?

4. If so, describe those as well.
   - Do not provide inaccurate information!
Accessibility Information on Website

1. You also need to provide sufficient information regarding the accessibility of your rooms.

2. What does that mean?
   - Bed type, number of beds, type of bathroom (roll-in shower, tub with accessible seats), non-slip grab bars, etc.

3. How should this information be provided?

Service Animals
Service Animals

- Definition -- Dogs (or miniature horse) trained to perform work for the benefit of a person with disability

- Cannot impose surcharge or cleaning fee for use of service animals

- Only two permissible inquiries can be made:
  - Is the animal required because of a disability?
  - What work or task has the animal been trained to perform?
  * No other inquiries about an individual's disability or the dog are permitted

- Cannot require proof of certification or medical documentation as condition of entry

- May require the dog to be harnessed, leashed or tethered

- May only exclude service animals if:
  - The dog is out of control and the owner cannot gain control
  - The dog is not housebroken

- "Comfort," or "emotional support" animals do not meet the ADA's definition of service animal
Effective Communication Issues

- Disability access lawsuits have been filed for denial of “assistive listening devices” when attending meetings or workshops at hotels
  - Plaintiffs attend seminar at hotel and requests auxiliary (headphones) due to trouble hearing.
  - Plaintiffs do not ask for auxiliary aids in advance and they often are not readily available.
  - In one case in which we defended, the plaintiff could not recall a single instance in the past two years where he attended a seminar, meeting or conference and did not later sue the business.
Effective Communication Issues

• This claim is based on the ADA’s implementing regulation, 28 C.F.R. § 36.303
  ➢ “a public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”
  ➢ “Auxiliary aids and services” by definition include assistive listing devices and systems

• The type of auxiliary aid or service provided will vary based on:
  ➢ The method of communication used by the individual;
  ➢ The nature, length, and complexity of the communication involved; and
  ➢ The context in which the communication is taking place.
Examples of Auxiliary Aids and Services

- Open and closed captioning
- Transcription services
- Written materials (large print, braille, etc.)
- Telephone handset amplifiers
- Assistive listening devices
- Telephone compatible with hearing aids
- Closed caption decoders
- Note takers
- Telecommunication devices for the Deaf
- Videotext displays
- Qualified interpreters
- Other effective methods of making orally delivered materials available to the Deaf and people who are hard of hearing.

Action Steps

- If requested - Engage the guest to determine what type of auxiliary aid might be needed.
- Prior to a request - Plan ahead to accommodate the communication needs of persons with disabilities.
  - Have a policy and procedure for providing listening devices upon request.
  - Identify local resources for auxiliary aids and services.
  - Find out how you can produce documents in Braille or acquire other aids or services.
  - Consider whether it makes sense to procure equipment or obtain services through vendors (consider having an interpreter on call).
  - Train employees about effective communication and how to obtain and use auxiliary aids and services. All employees who interact with the public over the telephone or in person need to know their role in ensuring effective communication.
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Questions?

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