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Landmark ADA Case Leaves More Questions Than Answers on Website Obligations

March 9, 2022

Businesses hoping for clarification on their obligations to ensure their websites comply with Title III of the Americans with Disabilities Act (ADA) will still have to wait, following a recent federal appellate court decision. That decision by the Eleventh Circuit Court of Appeals (covering Florida, Georgia, and Alabama) vacates an earlier ruling by the same court that held that a website is not a place of "public accommodation." At the same time, the ruling leaves open the question of what steps businesses must take to ensure access by persons with disabilities.

The ADA is a federal statute that prohibits discrimination against disabled individuals. Title III of the ADA addresses "public accommodations," which include a wide range of enumerated entities and places such as restaurants, hotels, theaters, retail stores, libraries, and parks. Unless it would fundamentally alter the nature of services provided by the public accommodation, Title III generally requires a business to make reasonable modifications that would allow individuals with a disability to partake in the full and equal enjoyment of the goods or services that are offered.

If a website is classified as a place of public accommodation, it means that businesses will be required to remove barriers that prevent individuals

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with a disability from accessing and using their websites. This is accomplished by ensuring that websites are designed so that individuals with disabilities can access and use the website to the same extent as those without a disability, including: (1) ensuring that any videos include closed captions for individuals with hearing impairments; (2) ensuring that the website is compatible with screen reading software so that individuals with visual impairments can navigate and use the website; or (3) ensuring that the website can be navigated and used with only a keyboard to accommodate individuals with dexterity issues who are unable to use a mouse.

So, are websites a place of public accommodation? Currently, the answer depends on where in the country you are. The recent federal appellate court decision, *Gil v. Winn-Dixie Stores, Inc.,* was brought by a visually impaired plaintiff who alleged that he was unable to take full advantage of discounts, pharmacy services and a store locator feature available on Winn-Dixie's website. Like many grocery stores, Winn-Dixie does not conduct sales directly from its website, but the website does allow customers to access digital coupons and link those coupons directly to a customer's account. The value of a coupon is then automatically applied when an item is purchased in the store. Winn-Dixie's website also allows pharmacy customers to refill existing prescriptions online so that the prescriptions can be picked up in the store. Gil is able to use a computer and access websites through the use of access technology and screen reader software. When Gil accessed the Winn-Dixie website, he alleged that approximately 90 percent of the website would not work with accessibility and screen reader software.

The Eleventh Circuit Court of Appeals initially joined the Third, Sixth, and Ninth Circuit courts, holding that a "public accommodation" under Title III means a physical place, unless certain specific expectations are met. In contrast, the First and Seventh Circuits have come to the opposite conclusion and held that the phrase "public accommodation" "is not limited to

actual physical structures." However, in December, 2021, the Eleventh Circuit vacated its own earlier ruling. Then, on March 2, 2022, the Eleventh Circuit denied a request to rehear the matter, effectively shutting the door on the case and punting the issue until it is addressed at a later time or the Supreme Court weighs in.

Even though the Eleventh Circuit vacated its ruling that held a website was not a place of public accommodation, businesses are not necessarily off the hook when it comes to accessibility. That is because even if a website or mobile application are not a public accommodation in and of themselves, they may still fall under the purview of the ADA if the website is "heavily integrated" into physical locations that are normally subject to Title III, such as the Ninth Circuit found in the *Robles v. Domino's Pizza* case. If such a website doesn't function for disabled individuals, it could be an "intangible barrier" for enjoyment of that public accommodation. For example, a business that sets up a website allowing customers to design a cake that they can then order and pick up in its store may have a website that is heavily integrated into the physical location. Under such circumstances, the website may need to comply with the ADA, even if the website itself is not a place of public accommodation.

Savvy companies may want to bypass the fact-intensive analysis altogether in favor of a simpler and safer approach, and take a hard look at their websites now to ensure they are ADA- compliant. This approach has several benefits. First, websites don't stop at the state border. Even employers in a jurisdiction that has held that websites are <u>not</u> places of public accommodation under Title III may have customers elsewhere that use their website. Second, even though the relevant statutes or caselaw may not specifically state that websites are places of public accommodation under Title III, the Department of Justice has taken the position that Title III applies to all public-facing websites used by companies that

otherwise qualify as places of public accommodation. Third, creating an ADA compliant website, even if you are in a jurisdiction that holds Title III does not apply to websites, may help deter frivolous drive-by lawsuits filed by serial plaintiffs.

Takeaways

Now, more than ever before, the ability to connect with customers and conduct business online is paramount to a company's success. Creating and maintaining a high quality website is a significant investment. The internet has become an essential tool for many, but a website also carries with it the potential for legal risk if it does not comply with the ADA. For any questions about how the ADA applies to the operation of your business, including your website, contact your Akerman labor and employment attorney for additional information and guidance.
