

## **IS YOUR WEBSITE A TARGET WAITING FOR AN ADA LAWSUIT?**

The website for a business is often the first point of contact for potential customers. Many of the transactions that used to take place in brick and mortar storefronts now take place over the internet. Given the importance of establishing an online presence, many businesses have taken the time to upgrade their websites, making them more accessible and easier to use. However, recent court opinions and the Department of Justice's attention have recently focused on an area of uncertainty: compliance with the Americans with Disabilities Act ("**ADA**").

The purpose of this article is to briefly describe how the ADA applies to places of public accommodation, discuss the DOJ's current position on the ADA's applicability to websites, the increase in ADA Litigation against websites, and conclude by suggesting best practices for making a website more ADA compliant.

### **HOW THE ADA APPLIES TO PLACES OF PUBLIC ACCOMMODATION**

The Americans with Disabilities Act was enacted in 1990 and then revised in 2008. Title III of the ADA prohibits discrimination based on disability in places of public accommodation for most businesses that: (i) employ 15 or more persons in the preceding calendar year; (ii) are open to the public; and (iii) fall into one of the 12 broad categories listed in the ADA.

Under the ADA, most businesses fall under at least one of the broad categories, which include hotels, bars and restaurants, movie theaters, stores that sell goods and services, office buildings entertainment centers (halls and stadiums), museums, libraries and galleries, schools (including universities), parks and zoos, social service centers, and gyms and other exercise and recreational facilities.

When the ADA was enacted in 1990, the internet was still in its infancy. At the time, discrimination based on disability mostly occurred in person. The ADA recognized this factor as it articulated the standards required for businesses' physical locations to properly accommodate disabled individuals. Importantly, the ADA did not, however, provide the same regulatory guidance for websites. Yet, as the internet has become the primary way by which many businesses interacted with the public, online standards under the ADA have become necessary. Over time, the federal courts and the Department of Justice ("**DOJ**") have both taken notice and have increasingly acted.

### **THE DOJ'S CURRENT STANCE**

The DOJ is the primary federal government agency responsible for enforcing the ADA. In 2003, the DOJ first recognized the need to make websites accessible for disabled persons with the release of its Voluntary Action Plan for government agencies and private entities. The Voluntary Action Plan, which references the ADA, identifies a variety of suggestions to help make websites more accessible.

Additional recommendations followed, and in 2010 the DOJ issued an Advanced Notice of Proposed Rulemaking (“ANPRM”), entitled Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations. The notice stated that the DOJ was considering revising the ADA to establish rules that addressed accessibility for individuals with disabilities on public websites and requested comments from stakeholders. Formal guidelines were anticipated to be released by 2015. However, the release of the guidelines were delayed in December 2017, and the DOJ officially withdrew the ANPRM, leaving the question of how the ADA applies to websites unanswered.

Yet, even though the DOJ withdrew the ANPRM, the DOJ also reiterated that it had “long considered” websites to be covered by Title III of the ADA. So, even though the DOJ withdrew its formal rule on the ADA’s applicability to websites, the agency’s conduct overwhelmingly has supported, and continues to support, that websites are required to be accessible to disabled persons.

## **THE INCREASE IN ADA LITIGATION AGAINST WEBSITES**

It should come as no surprise the litigation alleging that businesses have violated the ADA by not making their website or mobile applications accessible to persons with disabilities has been steadily increasing nationwide. Without any statutory guidance, the federal courts have nevertheless increasingly found websites to violate the ADA. Two decisions by the federal courts on each coast of the country are demonstrative.

### **The Dennis Haynes v. Dunkin’ Donuts LLC Decision.**

On July 31, 2018, the United States Court of Appeals for the Eleventh Circuit ruled in Dennis Haynes v. Dunkin’ Donuts LLC that Dunkin’ Donuts violated the ADA because its website “facilitates the use of Dunkin’ Donuts shops, which are places of public accommodation,” but was not accessible to the blind. The Eleventh Circuit has jurisdiction over federal cases originating in the states of Alabama, Florida and Georgia.

Dennis Haynes argued that the Dunkin’ Donuts website should be accessible to the blind under the ADA because: (i) Dunkin’ Donuts stores are a place of a public accommodation; and (ii) the Dunkin’ Donuts website was a “service, facility, privilege, advantage, benefit and accommodation” of the Dunkin’ Donuts stores. In response, Dunkin’ Donuts argued that the ADA did not apply to its website because: (i) although its shops are a place of public accommodation, its website is not; and (ii) its website is not “a good, service, facility, privilege, or advantage of its shops.”

The Eleventh Circuit held in favor of Mr. Haynes. Finding that the ADA prohibits discrimination against the disabled by preventing their full enjoyment of goods, services, facilities, privileges, or accommodations at places of public accommodation, the court concluded that the prohibition under the ADA includes tangible and intangible barriers that disabled people face. Here, the website facilitates the use of Dunkin’ Donuts stores, which are places of public accommodation.

Moreover, the website denied Mr. Haynes access to the services of the Dunkin' Donuts stores that are available on the Dunkin' Donuts website, which includes information about the stores' products, store location information, and the ability to purchase gift cards online. As such, the failure to make those services available to the blind violated the ADA.

The Dunkin' Donuts decision effectively expanded the reach of the ADA to websites that primarily provide information about a business' physical location and the goods and services sold at a business' physical location. The implication of the ruling has seemingly opened the door to an increasing number of lawsuits over website accessibility under the ADA against businesses that are defined as places of public accommodation. Businesses should review their websites to ensure they comply with the ADA.

### **The Robles v. Domino's Pizza, LLC Decision.**

Recently, on January 15, 2019, the United States Court of Appeals for the Ninth Circuit ruled in Robles v. Domino's Pizza, LLC that Domino's Pizza's ("**Domino's**") website and mobile applications are subject to the ADA and Domino's is therefore required to make them fully accessible to the blind and visually impaired. The Ninth Circuit has jurisdiction over the federal cases originating in the states of Alaska, Arizona, California, and Hawaii.

Guillermo Robles, a blind man, unsuccessfully attempted to order a custom pizza from Domino's website. Mr. Robles argued that Domino's website and mobile applications were not designed to read Robles' screen-reading software that he used to access the internet. In response, Domino's argued that the ADA did not apply to Domino's online offerings through its website and mobile applications.

The Ninth Circuit held in favor of Mr. Robles, concluding that the ADA applied to Domino's website and mobile applications as there is a relationship between the online services and Domino's physical stores.

The Domino's Pizza, LLC decision expanded the reach of the ADA to websites (and mobile applications). Consequently, businesses, especially those with products or services in physical stores, should ensure that their website and mobile applications comply with the ADA even though the DOJ has not set standards.

### **BEST PRACTICES FOR MAKING A WEBSITE MORE ADA COMPLIANT**

Title III of the Americans with Disabilities Act of 1990 prohibits discrimination on the basis of disability in places of public accommodation. Importantly, Title III does not directly address whether places of public accommodation include websites, mobile applications, or other emerging web-based technologies. However, the Department of Justice, the primary federal government agency responsible for enforcing the ADA, has taken the position that Title III applies to all public-facing websites used by businesses that otherwise qualify as places of public accommodation. The

agency's adoption of WCAG 2.0 provides businesses a straightforward roadmap for ensuring their websites are properly accessible.

Given the rise in ADA litigation alleging that businesses do not make their websites accessible to the disabled population, businesses should take appropriate preemptive measures to make sure their websites are accessible by the disabled population by adopting practices that ensure their websites are accessible to disabled persons.

As both the DOJ and the federal courts are in agreement that WCAG 2.0 should be the accepted standard for website accessibility compliance, businesses should ensure that their websites are WCAG 2.0 compliant. WCAG 2.0 outlines four general principles of accessible website design. Websites must be: (i) perceivable; (ii) operable, (iii) understandable; and (iv) robust.

WCAG 2.0 defines each of those four principles of accessible website design as follows:

- ✓ Perceivable means that all website users must be able to perceive the information being presented. It cannot be invisible to all of their senses.
- ✓ Operable means that all website users must be able to operate the website interface. The interface cannot require interaction that a user cannot perform.
- ✓ Understandable means that all website users must be able to understand the information as well as the operation of the user interface. The content or operation cannot be beyond their understanding.
- ✓ Robust means that all website users must be able to access the content as technologies advance. Along that line, as technologies and user mechanisms evolve, the content should remain accessible.

Unless and until your business undertakes the procedures to ensure that your website is accessible to those whom the ADA is intended to protect, your business is squarely in the crosshair of plaintiffs' attorney looking to litigate.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of changes in the law or the means in which to comply with the law to reduce the risk of liability and claims. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are compliant with applicable state and federal law. Please feel free to reach out to the author at [jroth@TheRothLawFirm.com](mailto:jroth@TheRothLawFirm.com) with any questions or comments.