HOTELS: NEWS

How latest ADA decision impacts US hotel industry

By Guest Contributor on 4/21/2021

Over the last few years, website accessibility actions have exploded, with individual and class actions filed by the dozen under the Americans with Disabilities Act (ADA) as well as state law analogues. The hotel industry has been a focal point of these cases. The central driver of these cases is the uncertainty surrounding whether, and to what extent, the ADA and state law analogues apply to websites. This uncertainty has led to hundreds of filings and demand letters.

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This article discusses the recent decision in *Gil v. Winn-Dixie*, issued on April 9, 2021, impacting whether and to what extent the ADA applies to websites. Note, however, this is different than the extent to which accessible room information must be provided via online reservation sites, which this article does not address.

The ADA itself does not, on its face, apply to websites. The Department of Justice has not promulgated standards for website accessibility. Nonetheless, plaintiffs have been largely successful in convincing courts both that the ADA does apply to websites *and* that private, non-binding website accessibility standards should fill the gap the Department of Justice has left.

This has left companies – including many in the hotel industry – in a bind. Website accessibility seems simple enough in concept, but without a definitive regulatory standard, it is very difficult in practice. Unlike physical ADA cases, which generally derive from clear standards and physical measurements, online accessibility is more mercurial. As a result, proving up accessibility can be very difficult. The lawsuits in this space seize on that difficulty. The case law thus far has been trending in favor of plaintiffs, creating a very low barrier to filing website accessibility cases. Specific allegations – that is, allegations of *exactly* what the plaintiff encountered and on what page of the website – have generally not been required, allowing for broad accusations of inaccessible websites and barriers.

That is until the Eleventh Circuit issued its decision in *Gil v. Winn-Dixie*, providing defendants their first glimpse of good law. The *Gil* case stemmed from the contention that Winn-Dixie's website was inaccessible to the visually impaired and the plaintiff could not adequately access the site through his screen reader technology. The trial court entered judgment against Winn-Dixie in a bench trial, finding that Winn-Dixie's website violated the plaintiff's rights under Title III of the ADA. The court also entered an onerous injunction requiring website remediation, a web accessibility policy, accessibility training and quarterly website testing.

On appeal, the Eleventh Circuit first addressed the critical threshold issue: Is a website a place of public accommodation under the ADA? Taking a strict statutory construction approach, the court held that a website *is not* a place of public accommodation, for the simple reason that the ADA describes only tangible, physical spaces as places of public accommodation.

The court next turned to the question of whether the ADA also applies to intangible barriers that prevent an individual from fully accessing and enjoying a physical place of public accommodation – here, a website allegedly preventing full enjoyment of a grocery store. In addressing this issue, the court made two critical observations. First, the Winn-Dixie website was *not* a point of sale; the purchases must occur at the store and all web-initiated interactions (like coupons and prescription refills) must be completed in the store. And, second, the website had no impact on the plaintiff's ability to actually shop at the store. Accordingly, the court held, the website was not an intangible barrier to access the store.

The Eleventh Circuit thus vacated and remanded the case. In so doing, the court set forth a test for website accessibility cases in the Circuit. Specifically, the court stated that a claim may exist where "the inaccessibility of the website . . . [is] an 'intangible barrier' to [the] ability to communicate with [the] physical stores, which results in [an individual] being excluded, denied services, segregated, or otherwise treated differently from other individuals in the physical stores."

This test is an exceedingly high bar. The court made clear it was not embracing a mere "nexus" test where the website had some connection to a physical location. The court specifically distinguished a recent Ninth Circuit website accessibility case, *Robles v. Domino's Pizza*, in which the Ninth Circuit adopted a nexus test and found that the ADA did apply in the context of online ordering. The Eleventh Circuit's decision thus indicates that, in its view, even online ordering may not necessarily satisfy the bar it imposed.

The *Gil v. Winn-Dixie* opinion provides much-needed guidance, particularly for the myriad hotel defendants facing claims that their sites are inaccessible. There have been, to date, dozens and dozens of lawsuits that hotel websites are not compatible with screen reader technology, and on that basis alone violate the ADA. Under the *Gil* analysis, these claims will face an uphill battle in states like Florida, Alabama and Georgia, encompassed by the Eleventh Circuit. And this is critical because Florida has been one of the centers of ADA website litigation.

This does not necessarily mean, however, that hotels should forego incurring the expense of updating their websites to ensure accessibility. With the *Gil* decision comes the reality that it is only one circuit's opinion; the Ninth Circuit, for example, where many of these cases are filed, takes a decidedly different view. Nevertheless,