

California Ruling On Website Accessibility Under The ADA May Lead To More Litigation

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A recent decision out of a California superior court (*Davis v. BMI/BND Travelware*) ruled that a website operator was liable to a visually-impaired plaintiff for operating a website that was not accessible under the Americans with Disabilities Act (“ADA”). This suit, combined with a lack of binding guidance from regulators, may lead to an increase in litigation regarding website accessibility. In particular, any site associated with any retail or brick-and-mortar facility will be in the crosshairs.

Development of the Case Law of Websites and the ADA:

The purpose of Title III of the ADA is to prohibit “discrimination on the basis of disability by public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by the law.” The key determinant of the applicability of Title III of the ADA is whether the space or location being discussed is a place of public accommodation.

A place of public accommodation is a defined term under Title III of the ADA, and includes places such as a hotel, motel, inn, restaurant, bar, movie theater, concert hall, stadium, convention center, bakery, grocery store, clothing store, hardware store, shopping center, laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, terminal, depot, or other station used for specified public transportation, museum, library, gallery, park, zoo, amusement park, school, day care center, senior center, food bank, health spa, bowling alley, or golf course. Websites are not included in this definition.

However, while the statute itself does not contemplate websites as a place of public accommodation, several courts have considered the issue in the past with differing opinions on the matter.

Throughout the last fifteen years the prevailing opinion on the issue has evolved from a website simply not being a place of public opinion (see *Now, Inc. v. Southwest Airlines, Co*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002)) to the more recent holding that businesses are places of public accommodations if they are exclusively on the Internet doing what places of public accommodations listed in the ADA would be doing if they were in physical space (see *National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D Mass. 2012)).

A differing approach was brought by the Seventh Circuit in holding that an owner or operator of a website, or “other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do” (see *Doe v. Mutual of Omaha Insurance Company*, 179 F.3d 557 (Seventh Circuit 1999)). The holding in *Doe*

would then require all websites to make accommodations for the disabled, however subsequent case law had not agreed with the Seventh Circuit.

The Ninth Circuit created a more middle ground approach that relied on a two part test (see *Weyer v. Twentieth Century Fox Film Corporation*, 198 F.3d 1104 (9th Cir. 2000)). In *Weyer* the court stated that the first step is to determine if a place of public accommodation as defined by Title III of the ADA is somehow involved. If the answer is yes, then assess whether a nexus exists between the event or service complained of and the place of public accommodation. While *Weyer* did not contemplate the use of the Internet, this test was relied upon in a subsequent case brought by the National Federation of the Blind against Target, where the National Federation of Blind said Target's website was not accessible to the blind and in violation of Title III of the ADA (see *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006)). The holding in this case stated that Title III of the ADA will apply to the Internet whenever it could be shown that the challenged services (in the case at issue, Target's website) were heavily integrated with brick-and-mortar places of public accommodations and operated in many ways as a gateway to those places of public accommodations.

The new decision in the *Davis* matter, follows the path of inquiry in the existing Ninth Circuit cases, and the court found that "a [sufficient] nexus exists between defendant's retail store and its website that directly affects plaintiff's ability to access [goods] and services" and that the plaintiff was denied access due to his disability. This should put any retailers with an ecommerce website and a physical retail store on alert to ensure that their websites are ADA compliant.

Regulatory Guidance:

Complicating matters, the Department of Justice (DOJ), which administers the ADA, has been publicly considering (since 2010) the issuance of regulations regarding accessibility of websites under the ADA, but the DOJ has not yet issued any binding regulations. However, in enforcement actions, the DOJ has, in a 2014 [Consent Decree](#) with tax preparer H&R Block and in a 2015 [settlement](#) with online education provider EDX, used compliance with the [Web Content Accessibility Guidelines](#) (WCAG) as a measure of compliance. In each case, the DOJ ultimately required compliance with at least the level AA standard of the WCAG. Web developers and retailers will want to abide by this standard until firm guidance is provided by the DOJ in binding rules.

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