

Visually Impaired Website (ADA) Litigation, Continued...

By Cory Morris

My April, 2018 Suffolk Lawyer article discussed two lawsuits and predicted, with unfortunate success, the floodgate of Americans with Disabilities Act commercial website litigation opening in New York State. “New York’s federal courts saw 1,471 lawsuits filed in 2018 aimed at websites that plaintiffs claim are not American with Disabilities Act accessible, accounting for 64 percent of the 2,285 ADA website accessibility lawsuits launched in seven major states tracked by the company UsableNet Inc.”¹ The lack of, among other things, judicial decisions in the area is responsible for the proliferation and, in some instances, resolve of these cases.

“New York’s and Florida’s federal courts see a total of 96 percent of” this new subject of ADA litigation. Corporate attorneys and in-house counsel must advise their clients about checking for ADA compliance as well as the several tools available to commercial websites. It is reported that “New York state is home to companies that have been sued in 25 percent of all such law-

suits.” Without federal guidance, the overture for defense attorneys must be more than silent settlement and a suggestion that perhaps a decision on the merits will reduce the amount of nuisance lawsuits that are developing.

Plaintiffs have the right to sue under the ADA for website compliance, “the term ‘public accommodation’ in Title III extend[ing] to private commercial websites that affect interstate commerce.”² Congress intended that the application of the ADA “should keep pace with the rapidly changing technology of the times...”³ from finding lawyers, Razor Scooters,

higher education, hailing cabs or even hosting a bed-and-breakfast stay. The ADA “as a whole is intended ‘to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’”⁴ Title III of the ADA provides that, as a general rule, “[n]o individual shall be discriminated against on the basis of disability in the full and equal en-



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joyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”⁵

In some instances, brick and mortar business “website[s] act[] as an asset or channel to the physical stores by allowing customers to find store locations... and access digital coupons via the website.”⁶ To state a claim under Title III of the ADA, a plaintiff must allege that plaintiff is disabled within the meaning of the ADA; defendants own, lease, or operate a place of public accommodation; and defendants discriminated against the plaintiff by denying a full and equal opportunity to enjoy the services defendants provide. The statute expressly states that the denial of equal “participation” or the provision of “separate benefit[s]” are actionable under Title III. Section 12181 of the ADA defines a “place of public accommodation” as an entity whose operations affect commerce and falls within one of 12 enumerated categories. Still,

substantial businesses operate wholly on the internet without the slightest concern about ADA compliance. By doing so, blind, deaf or otherwise disabled (within the meaning of the ADA) persons are denied a full and equal opportunity to enjoy services provided through commercial websites.

“The statute applies to the services of a place of public accommodation, not services in a place of public accommodation.” Indeed, “[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute.”⁷ “Disabled plaintiffs, many of them represented by the same handful of firms, filed 240 suits in 2015 and 2016, according to a Wall Street Journal report on the trend last November.”⁸ That number has exponentially increased.

Title III of the ADA, in a section entitled “specific prohibitions,” defines discrimination to include:

a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied

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Reynolds, Caronia, Gianelli & La Pinta, P.C. is proud to announce that the Honorable Peter H. Mayer, III, has joined the firm. Mr. Mayer is recently retired from the bench where he served as a Justice of the Supreme Court. Prior to ascending the bench Mr. Mayer specialized in defending cases on the federal and state level in Suffolk County and throughout the country. He served in the Suffolk County District Attorney’s Office for over 10 years as a trial assistant, as Bureau Chief of the Major Crime Bureau as well as serving as an Assistant in the Suffolk County Attorney’s Office defending civil rights cases. He is also a member of the Colorado State Bar. While on the bench, Mr. Mayer presided over numerous tort, contract and commercial civil cases to verdict. He was selected to supervise the very first medical malpractice conference part after developing a level of expertise as a trial judge and his knowledge of medical malpractice civil litigation.

He will assist the firm in complex state and federal criminal and civil litigation



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services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the goods, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.⁹

There is simply utility in web accessibility tools and resources. Businesses and entrepreneurs are addressing the need for creating such aids and services. Some will not cost the consumer anything. Website design companies are cognizant of this blossoming opportunity to create and design ADA compliant websites or adapt pre-existing websites for those who are considered disabled within the meaning of the ADA. Some of these website conversions consist of a simple plugin or update where other designers are charging thousands of dollars to obtain ADA compliance.

Some plaintiffs' attorneys engaging in the mass filing of ADA lawsuits (usually on behalf of the same individual(s)) have been cited for fraud, some plaintiffs not even obtaining a portion of the settlement.¹⁰ "[T]he Lawsuit Reform Alliance of New York ["LRANY"] maintains that the law meant to protect individuals with disabilities is being exploited by lawyers on the search for settlements."¹¹ Indeed,

the report created by LRANY claims that "problems exist with the current law since it attracts attorneys to collect fees and lawsuits to be brought with no notice of alleged violations ... [and] ... Department of Justice not clarifying the law and attorneys who seek settlements and not accessibility for their clients." Sharon Stern Gerstman, then president of the New York State Bar Association added to the NBC article that "if a person or entity believes that a frivolous action has been brought, he or she may move for sanctions under New York State Civil Procedure Laws and Regulations." Attorneys, however, should be aware that, in addition to sanctions for frivolous lawsuits, there appears to be a remedy in the way of attorney's fees for ADA defendants as prevailing parties.¹²

The Supreme Court held in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (in the Title VII context) that district courts may award attorney's fees if the plaintiff's "claim was frivolous, unreasonable, or groundless," or if "the plaintiff continued to litigate after it clearly became so." Why not then, if a website merely fixes the error of its ways upon reasonable notice, can a defendant not exercise the same premise of law recognized over 40 years ago. Additionally, unless the website is internally created and maintained, one

who contracts with a website provider can presume that the website designer is aware of the law and should be held liable for providing an ADA deficient website whether directly or by indemnification. In other words, defend and perhaps you can save not only the integrity of the company but also the litigation costs to the corporate.

The issue presents a major concern to the legal community as to the validity of some of these lawsuits¹³ and the breadth of the ADA and its amendments. Without an authority to the contrary, these lawsuits are sure to permeate the federal courts. Going forward, attorneys must ask the question: Is your website ADA compliant?

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

¹ Jason Grant, *ADA Website Accessibility Suits Flood New York's Federal Courts, Report Says*, New York Law Journal (January 17, 2019), <https://www.law.com/newyorklawjournal/2019/01/17/ada-website-accessibility-suits-flood-new-yorks-federal-courts-report-says/?kw=ADA%20Website%20Accessibility%20Suits%20Flood%20New%20York%27s%20>

² Federal%20Courts%2C%20Report%20Says&et=editorial&bu=NewYorkLawJournal&cn=20190118&src=EMC-Email&pt=DailyNews.

³ *Del-Orden v. Bonobos, Inc.*, No. 17 CIV. 2744 (PAE), 2017 WL 6547902, at *10 (S.D.N.Y. Dec. 20, 2017); see also *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017) (J. Weinstein).

⁴ H.R. Rep. 101-485 (II), at 108 (1990), reprinted in 1990 U.S.C.A.N. 303, 391.

⁵ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999) (citing 42 U.S.C. § 12101(b)(1)).

⁶ 42 U.S.C. § 12182(a).

⁷ Elisa Edelberg, *What the Winn-Dixie Case Means for the Future of Web Accessibility*, 3 Play Media (January 4, 2018), <https://www.3playmedia.com/2017/09/27/what-the-winn-dixie-case-means-for-the-future-of-web-accessibility/>.

⁸ *Nat'l Fed'n of the Blind v. Target Corp.* ("Target"), 452 F. Supp. 2d 1148, 953 (N.D. Cal. 2006) (citations omitted); *Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017).

⁹ Alison Frankel, *Will Trump DOJ side with disabled plaintiffs in ADA website suits*, Reuters (October 19, 2017), <https://www.reuters.com/article/legal-us-otc-ada/will-trump-doj-side-with-disabled-plaintiffs-in-ada-website-suits-idUSKBN1CO2WJ>.

¹⁰ 42 U.S.C. § 12182(a)(2)(A)(iii) (external quotation marks omitted).

¹¹ Ken Barnes, *The ADA Lawsuit Contagion Sweeping U.S. States*, Forbes (Dec. 22, 2016) <https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-s-states/#77674de034ee> (the head of California Citizens Against Lawsuit Abuse calling for legal reform in the area).

¹² NBC 4, *New York Sees Spike in Frivolous American With Disabilities Act Lawsuits, Report Claims*, NBC (March 27, 2018), <https://www.nbcnewyork.com/news/local/New-York-Spike-Frivolous-American-Disabilities-Act-Lawsuits-Report-ADA-Title-III-478082393.html>.

¹³ *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642 (2016) (a four million dollar award to CRST on appeal as a prevailing party, the Supreme Court held, among other things that, a favorable ruling on the merits is not a necessary predicate to find that a defendant is a prevailing party) (*id.* at p. 1651-1654).

¹⁴ See, e.g., Dave Biscobing, *Judge tosses ADA serial suer's case out of federal court, sanctions attorneys*, ABC 15 (October 14, 2016), <https://www.abc15.com/news/local-news/investigations/judge-tosses-ada-serial-suers-case-out-of-federal-court-sanctions-attorneys>.

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to enrich the gang. He has been arrested two times for this activity. He will do anything the gang asks of him; they have become his alter-family. He is not rational in his behavior, and clings to the gang association because there is no other social group available that has reached out to treat or assist him.

These cases in Criminal Court, and cases similar to them in Family Court, require dedicated counsel who can provided the necessary time and expense for there efforts on behalf of their clients. Arrange for investigations, obtain records from medical facilities or other court records relative to the defendant and thoroughly research the law to be able to give professional legal advice. However, there is a conundrum. The conundrum is the following: In the

case of *Gideon v. Wainwright*, 372 U.S. 335, a landmark case in United States Supreme Court history, the court unanimously ruled that states are required under the Sixth Amendment of the U.S. Constitution to provide counsel ("effective counsel") to defendants in criminal cases who are unable to afford their own attorneys and in derivative cases to provide counsel to families members who cannot afford counsel. The most obvious problem is that the aforementioned mandate by the highest court in our land, the Supreme Court of the United States, is not funded. It was left to the states to provide for a fair payment structure for counsel to fulfill the obligations of the mandate of the court. But, as we all know or should be aware of, there is not a legislator in New York State who has not

promised their constituents they will provide laws against crime to protect their constituency. The conundrum here is the legislators, and the governor who controls the budget, do not want to reveal to their constituents they are willing to provide funds to support criminal defense. No one in Albany is willing to pick up the gauntlet in this regard; that's the bottom line. On the last rate increase for 18-b counsel, the law increasing rates was bootstrapped on to a law that was passed for other reasons. Go figure!

The National Alliance on Mental Illness has pointed out that people in mental health crisis are more likely to encounter police than get medical health. That organization notes that 2 million people with mental illness are booked into jails each year with se-

rious mental health conditions. The argument our legislators should be making for funding in this area is that jailing people with mental illness creates heavy burdens on law enforcement, corrections officers and state and local budgets. It does not protect public safety. Isn't it more economically sensible to provide for counsel?

Note: Joseph A. Hanshe, co-chair of the Criminal Court Committee, practices criminal law (Trials and Appeals), medical malpractice, and is a court examiner appointed by the New York State Supreme Court Appellate Division Second Department to assist the Supreme Court in overseeing and monitoring guardianships and trust accounts associated with guardianships.

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