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CLIENT ALERT

Website Wars: Eleventh Circuit Rules in a Split Decision That Websites are Not Public Accommodations for Purposes of the Americans With Disabilities Act

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After more than two years of deliberation, the Eleventh Circuit issued its decision in *Gil v. Winn-Dixie* on April 7, 2021. Writing for the majority, Judge Elizabeth Branch reversed a trial court decision and found that Winn-Dixie's website, which is incompatible with screen reading software used by the plaintiff, who is blind, did not violate Title III of the Americans with Disabilities Act ("ADA"). In doing so, the court's opinion in this closely-watched case advances the law in several frequently litigated issues in ADA Title III website accessibility disputes.

The Appellate Court's Opinion

The Eleventh Circuit's decision includes two key takeaways: (1) that websites are not "places of public accommodation" under the ADA; and (2) a rejection of the "nexus" standard, notably adopted by the Ninth Circuit. In what it described as a strict textual reading of the ADA, the majority concluded that the retailer's website was not a "place of public accommodation" within the meaning of the ADA. Judge Branch emphasized that the statute includes an "expansive list" of examples of public accommodations—all of which are physical locations, not websites. The court further reasoned that the website's functionality did not interfere with the plaintiff's right to "full and equal enjoyment" of a place of public accommodation, because he had visited its physical locations on many occasions.

The majority also rejected the plaintiff's theory that the grocery store violated the ADA because its website was a "nexus" to its physical locations, and thus must be accessible to people with disabilities. Among other courts, the Ninth Circuit adopted the "nexus" theory in its widely-publicized 2019 opinion in *Robles v. Domino's*.

The Eleventh Circuit also rejected the plaintiff's alternative theory of liability under the ADA. Gil argued that the website's inaccessibility created an "intangible barrier" to the goods and services at the brick-and-mortar store. The court rejected this claim, focusing on the fact that the website had "limited use" and was not the sole access point to the store. Language in the majority opinion supports a relatively narrow interpretation of the statutory "auxiliary service" issue that is frequently litigated in ADA Title III cases. *See* 42 U.S.C. § 12182(b)(2)(A)(i)-(ii).

Penning a dissent as long as the majority's opinion, Judge Jill Pryor explained, "[t]he ADA is a sweeping piece of legislation; it is hardly surprising that its terms prohibiting discrimination are broad and inclusive." By narrowing the applicability of the ADA, Judge Pryor worried about the unintended consequences. "As I read it, the majority opinion gives stores and restaurants license to provide websites and apps that are inaccessible to visually-impaired customers so long as those customers can access an inferior version of these public accommodations' offerings."

Implications for Businesses

The Eleventh Circuit's decision is significant for businesses that exclusively operate online, at least within the Eleventh Circuit, because it holds that a website itself is not a place of public accommodation under the ADA. The majority opinion also contains an analysis of Article III standing requirements, which may help clarify the law on this frequently litigated issue. In addition, brick-and-mortar businesses that provide alternative means for disabled patrons to obtain goods and services, such as in-person or by phone or email, instead of just through a website, will find support in the court's discussion of the "nexus" requirement.

It is nonetheless unlikely that the court's decision signals the beginning of the end of ADA Title III website access litigation. The majority's decision appears to have created a clear circuit split with the Ninth Circuit, and advocates are reportedly planning on further appeals, perhaps by seeking review in the Supreme Court. It remains to be seen whether other circuits will follow the majority's view with respect to the court's conclusions. And it is an open issue whether this analysis will apply to state disability laws that are based on the ADA.

Finally, it is not clear how this decision will be applied to other websites sponsored by large retailers, particularly those used for sales or with broader product offerings than Winn-Dixie's. The court stressed in its holding that Winn-Dixie's website was "limited use," because it did not impact the use of the grocery store itself, a potentially dispositive fact that may not be the case for other websites. In this respect, the court noted, and "[m]ost importantly, it is not a point of sale; all purchases must occur at the store." This suggests that the Eleventh Circuit could reach a different conclusion in a case involving a website offering online sales.

Companies that operate websites will want to continue to monitor developments in this area, as the courts continue to process a substantial number of website accessibility claims filed by private party advocates. In addition, there is some indication that the Justice Department in the Biden Administration may decide to approach ADA cases with a more robust enforcement posture.

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