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Website Compliance with the ADA: *Gil v. Winn-Dixie Stores* and a Web of Confusion for Businesses and Nonprofits

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Title III of the Americans with Disabilities Act ("ADA") requires businesses and nonprofit organizations to provide disabled individuals the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[1] There is significant debate, however, as to whether *websites* are covered by the ADA. There is no regulatory guidance on this topic and courts have taken varied approaches to the issue.

The 11th Circuit recently weighed in with a decision in *Gil v. Winn-Dixie Stores, Inc.*[2] The appellate court reversed a district court decision which had found that Winn-Dixie discriminated against Juan Carlos Gil, a visually-impaired customer, in violation of the ADA, by not adapting its website to work with screen readers.[3] Mr. Gil had argued that the website's inability to work with screen readers deprived him of use of the website in the same manner as sighted customers. The district court held that because Winn-Dixie integrated its website with its physical operations, the ADA required Winn-Dixie to adapt its website for visually impaired shoppers like Mr. Gil. Winn-Dixie appealed this decision to the 11th Circuit.

The Appellate Decision in *Gil*

The 11th Circuit (in a 2 to 1 decision), held that Winn-Dixie did not violate the ADA by maintaining a website that was inaccessible to visually impaired individuals reliant on screen readers because websites were not listed as "places of public accommodation" among the twelve enumerated places of public accommodation set forth in the plain language of the ADA. The appellate court also held that the Winn-Dixie website, though inaccessible to Mr. Gil, was not an "intangible barrier" in violation of the ADA preventing Mr. Gil from "fully and equally enjoying [Winn-Dixie's] goods, services, privileges or advantages." The court reasoned that the website had limited functionality—*i.e.* shoppers could only use it to place express prescription orders and redeem digital coupons. All customers, like Mr. Gil, had to go to the physical store to purchase or pick up items, and therefore, the majority held, the website did not prevent Mr. Gil from receiving services.

The dissent argued that Winn-Dixie had discriminated against Mr. Gil because he could not access the same services as sighted customers, thereby treating disabled individuals as "second-class" shoppers. The dissent asserted that the test is not whether a disabled individual can access services in-store; but rather, whether the disabled receive less favorable treatment than the non-disabled with respect to accessing a business' services. Namely, Winn-Dixie blocked Mr. Gil from receiving the same services through its website that sighted individuals receive.

Decisions in Other Circuits

The decision in *Gil* is limited to the facts and law within the 11th Circuit's geographic reach – Alabama, Florida, and Georgia.[4] Yet other Circuits have held that websites *are* "places of public accommodation" under the ADA regardless of whether they have a physical location, which would require them to reasonably accommodate the disabled in order to access services. Moreover, a number of federal district courts have held that businesses violate the ADA when they fail to make their websites with a significant connection or nexus to the physical premises accessible to disabled patrons.[5]

In a recent 9th Circuit decision, *Robles v. Domino's Pizza*, the appellate court determined that the ADA applied to the business' website and mobile application. The court found that the pizza franchise was a place of public accommodation, and that, as such, the ADA requires it to provide auxiliary aids and services to make visual materials available to individuals who are blind. The court noted that: "'The [ADA] statute applies to the services of a place *of* public accommodation, not services *in* a place of public accommodation. [emphasis added] To 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.'"

The split in the circuit courts makes navigating website accessibility uncertain. Since a website can be viewed anywhere in the country, the law in one state regarding accessibility to the disabled may be different from the law in another state for the same website. Therefore, the *Gil* decision provides little clarity to businesses and nonprofit organizations trying to determine whether their website is a "place of public accommodation" that must be accessible to the disabled, whether they are creating an "intangible barrier" to the disabled, and if so, what is required to make the website accessible. These uncertainties are further complicated since the *Gil* case turns on the fact that Winn-Dixie did not offer goods for sale on its website.

Nonprofit Organizations

These appellate court decisions apply equally to nonprofit organizations. Indeed, under the ADA's twelve listed categories of places of public accommodation, nonprofit organizations may easily be found, including among "service establishments" (e.g., hospitals); "places of public display or collection" (e.g., museums); "places of recreation" (e.g., zoos); "places of education" (e.g., schools); or "social service center establishments" (e.g., homeless shelters).[6] But whether the nonprofit's website itself is a "place of public accommodation" remains an open question. For nonprofit organizations that are government contractors, there are separate and detailed requirements regarding accessibility of services to the disabled and veterans. Even those nonprofits *not* deemed to be "places of public accommodation" under the ADA still might fall within a similar classification under state or local laws. There may also be a mission-centered or reputational reason that a nonprofit might seek to ensure its websites and mobile applications are accessible to its stakeholders and employees with disabilities.

What Organizations Can Do Now

The U.S. Supreme Court may eventually weigh in as the final arbiter on these issues, given the split in the circuit courts and the absence of definitive federal regulations under the ADA. Until then, businesses and nonprofit organizations may nonetheless consider taking certain measures to help mitigate potential legal and reputational risk:

- Evaluate how accessible your websites are to the disabled and ensure that your websites and mobile applications and any content and links to other services meet at least the Web Content Accessibility Guidelines (WCAG) 2.0 for accessibility. See https://www.w3.org/WAI/standards-guidelines/wcag/.
- Continue to audit your website and mobile application accessibility on a regular basis, particularly as you add or modify content and as new regulatory guidelines may develop. Also, seek input from individuals who may be impacted by your website's accessibility.
- Place an accessibility statement/policy on your websites and mobile apps to provide transparency around efforts to make your services accessible to the disabled. Provide a telephone number or email address – for example, "webaccess@businessname.com" – for individuals to contact the organization with questions about accessibility.
- Consider auditing and updating vendor agreements to ensure proper protocols for website accessibility under WCAG 2.0. Provide appropriate indemnifications of your organization and provisions to protect your organization in the event of a website/mobile app accessibility lawsuit.

- Determine whether insurance policies will defend your organization in the event of an ADA website or mobile app accessibility lawsuit.
- Conduct training on website accessibility and require the training for those who may post materials on your website. Also consider how your organization will address reputational risk in the event of a lawsuit.
- Confer with legal counsel on other best practices to minimize legal risk, including any developments in state, local and federal laws and regulations concerning website accessibility.

Also see "Think Accessibility When Designing Your Webpage and Apps," a client alert published by Schnader after the district court rendered its decision in this case in 2017 – https://www.schnader.com/blog/think-accessibility-when-designing-your-webpage-and-apps/. ◆

[1] 42 U.S.S. § 12182(b)(2)(A)(iii).
[2] *Gil v. Winn-Dixie Stores, Inc.,* No. 17-13467 (11th Cir. Apr. 7, 2021).
[3] A screen reader is assistive technology that translates text into speech, and is used with computers by individuals who are blind or visually impaired.
[4] The 11th Circuit panel's decision in *Gil* may not be the final word—even in the 11th Circuit. Mr. Gil has requested an *en banc* review by the full Circuit and there could be an eventual appeal to the United States Supreme Court.
[5] *E.g. National Association of the Deaf v. Netflix, Inc.,* 869 F. Supp. 2d 196 (D. Mass. 2012); *Del-Orden v. Bonobos, Inc.*, No. 17 Civ. 2744 (PAE), (S.D. N.Y Dec. 20, 2017); *Carroll v. FedFinancial Credit Union*, 324 F. Supp.3d 658, 666 (E.D. Va. 2018).
[6] Note, however, that Title III of the ADA does not apply to private clubs, religious entities, or public entities. Private clubs may lose their exemption to the extent that they are made available for use by nonmembers as a place of public accommodation.

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