
World Wide Web Controversy: The Evolving Landscape of ADA Website Jurisprudence in Florida

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Florida is among the nation's leaders in the number of website accessibility lawsuits being filed against both governmental and private entities for alleged violations of the Americans with Disabilities Act of 1990, as amended ("the ADA").¹ What began as a means for redress for disabled individuals has morphed into a cottage industry for plaintiffs' attorneys using "testers" and aggressively seeking early settlements driven by defendants' fear of attorney's fees awards. The recent windfall of litigation over alleged ADA website compliance violations has sparked tremendous controversy among practitioners, the courts, and the disabled. This seemingly indomitable tide of litigation will likely only be thwarted by legislative intervention, hopefully in the form of clear guidelines promulgated by the Department of Justice.²

"The ADA covers three main types of discrimination, each of which is addressed in one of the statute's three main sub-chapters: Title I prohibits discrimination in private employment; Title II prohibits discrimination by public entities (state or local governments); and Title III prohibits discrimination by a 'place of public accommodation,' which is a private entity that offers commercial services to the public."³ ADA website lawsuits filed against governmental entities are filed pursuant to Title II of the ADA.⁴ The majority of ADA website lawsuits filed to date have been Title III claims against private entities.⁵ Thus, the bulk of the available case law analyzes claims brought in this context. While plaintiffs' allegations tend to be largely the same, regardless of the type of entity being sued, the courts' analyses differ significantly depending on whether the suit is brought under Title II or Title III.

ADA website lawsuits are primarily being filed by visually impaired individuals who access the Internet by utilizing screen reading software, such as JAWS or NVDA, which translates written text and images into spoken words. While less prevalent, ADA website lawsuits are also filed by hear-



EDITOR'S NOTE: Individuals who rely on adaptive technologies to access the Internet are increasingly filing lawsuits when a website is not fully compatible with those adaptive technologies. This article summarizes the approaches different federal circuits have taken in response to such lawsuits, and encourages private entities to ensure their websites can be enjoyed by patrons with disabilities.

ing impaired individuals who are able to access video content on the internet by utilizing closed captioning. Plaintiffs filing such claims typically seek declaratory and injunctive relief, as well as attorney's fees under the ADA.

Title III Lawsuits

The ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who ... operates a place of public accommodation."⁶ To state a claim under Title III, a plaintiff must establish "(1) that the plaintiff is disabled; (2) that the defendant owns, leases, or operates a place of public accommodation; and (3) that the defendant denied the plaintiff—on the basis of the disability—full and equal enjoyment of the premises."⁷

There is a circuit split on whether the ADA limits places of public accommodation to physical spaces. As one court recently noted, "[t]he spate of these cases has outpaced any regulations from the Department of Justice on what businesses must do to have ADA compliant websites, and courts have reached no consensus."⁸ The Third, Fifth, Sixth, and Ninth Circuits have held that places of public accommodation are limited to physical locations, while the First, Second, and Seventh Circuits have held that websites may be public accommodations under the ADA.⁹

The Eleventh Circuit has taken a hybrid approach, holding the ADA bars non-physical barriers that deprive an individual of the right to access or enjoyment of a physical location.¹⁰ District courts in the Eleventh Circuit have applied this principle to allow ADA actions against defendants whose websites facilitate the use of a physical place of public accommodation.¹¹ Thus, in the Eleventh Circuit, to state an actionable claim for an ADA violation under Title III, there must be a nexus between the defendant entity's website and a brick-and-mortar location.¹²

Recently, in *Haynes v. Dunkin Donuts, LLC*,¹³ the Eleventh Circuit reversed a district court order dismissing a complaint for failure to state a claim under Title III, finding the plaintiff alleged a sufficient nexus between the barriers to access that he faced on the website and his inability to access goods and services at the physical store.¹⁴ Haynes alleged that defendant's website, which allowed customers to locate physical Dunkin' Donuts stores and purchase gift cards online, provided access to and information about the

goods, services, facilities, privileges, advantages or accommodations of Dunkin' Donuts' shops.¹⁵ Haynes argued that because the website was not compatible with screen reader software, no blind person could use those features. The Eleventh Circuit found that Dunkin' Donuts' website "is a service that facilitates the use of Dunkin' Donuts' shops, which are places of public accommodation." Therefore, "the alleged

inaccessibility of Dunkin' Donuts' website denies Haynes access to the services of the shops that are available on their website, including information about store locations and the ability to buy gift cards. The failure to make these services accessible to the blind can be said to exclude, deny, or otherwise treat blind people differently than other individuals."¹⁶

A website facilitates the use of a physical location when it has features that enhance access to,

and the use and enjoyment of, a physical location.¹⁷ If a plaintiff has pled that a website has these requisite facilitating features and that the website is not compatible with a screen reader, a claim under Title III of the ADA has been properly alleged.

In contrast to websites that facilitate the use of a physical location, district courts in the Eleventh Circuit have held that websites that provide only information on the goods, services, and store locations of the defendant lack the requisite facilitating features to be actionable under the ADA. Accordingly, Florida defense practitioners are prevailing on dispositive motions where plaintiffs are unable to show that the inaccessible aspects of the website in question do not impede the plaintiff's ability to enjoy the physical location itself.¹⁸

Title II Lawsuits

Title II of the ADA imposes an affirmative obligation on a governmental entity to provide full and equal enjoyment of its "services, programs and activities" to individuals with disabilities.¹⁹ Thus, to state a claim under Title II, a plaintiff must allege: "(1) that he or she is a 'qualified individual with a disability;' (2) that he or she was 'excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity' (3) 'by reason of such disability.'"²⁰ Title II plaintiffs are not required to show any nexus between the website and a physical location. Instead, a Title II plaintiff must plead that he or she was excluded from participation in or denied the benefits of the public entity's services, pro-

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grams, or activities due to the inaccessibility of features or information on the entity's website.

Title II claims are currently on the rise in Florida, likely due to the relative lack of case law in this area and less onerous showing required by plaintiffs. Accordingly, defense practitioners have been quick to settle such claims. However, a recent Middle District opinion may encourage more defense practitioners to file dispositive motions in Title II claims based on lack of standing.²¹ Where applicable, defense practitioners defending against Title II claims should argue that the plaintiff failed to satisfy Article III standing requirements due to the lack of an immediate threat of future injury based on three factors: plaintiff's connection with the defendant governmental entity, the type of information that is inaccessible, and the relationship between the inaccessible information and plaintiff's alleged future harm.

Conclusion

Currently, any entity with a website displaying content that is not equally accessible to individuals with disabilities using adaptive technology is vulnerable to ADA website accessibility litigation. Website accessibility lawsuits pose a high risk to defendants and defense practitioners alike due to plaintiffs' potential for attorneys' fees awards and the threat of multiple, repeat lawsuits. Regardless of whether they have been sued, defense practitioners should encourage their clients to ensure their websites can be accessed and enjoyed by disabled audiences. While defense practitioners are enjoying increasing success on dispositive motions, the future of these lawsuits remains ominous and daunting in the absence of legislative intervention.

¹ See, e.g., Minh N. Vu et al., *Website Accessibility Cases Push ADA Lawsuits to New High* (Feb. 21, 2019), available at <https://www.tnt.com/website-accessibility-cases-push-ada-lawsuits-to-new-high/>; Shannon Behnken, *Businesses 'sitting ducks' for lawsuits because websites aren't ADA compliant*, (Feb. 6, 2019), available at <https://www.wfla.com/8-on-your-side/better-call-behnen/businesses-sitting-ducks-for-lawsuits-because-websites-aren-t-ada-compliant-1/1740337239>; Victoria Hudgins, *ADA Lawsuits Are on the Rise; Website Complaints Biggest Targets*, Legaltech news (Jan. 24, 2019), available at <https://www.law.com/legaltechnews/2019/01/24/ada-lawsuits-are-on-the-rise-website-complaints-biggest-targets/>; *ADA Website Accessibility Lawsuits on the Rise: Companies Should Review Their Potential Exposure* (Apr. 20, 2018), available at <https://www.jdsupra.com/legalnews/ada-website-accessibility-lawsuits-on-16925/>.

² To date, the DOJ has not promulgated clear standards for website accessibility for the disabled.

³ *A.L. by & through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1289 (11th Cir. 2018) (citing 42 U.S.C. §§ 12112(a), 12132, 12182(a)).

⁴ ADA website lawsuits against governmental entities are also often brought under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("section 504"). "Discrimination claims under the ADA and the Rehabilitation Act are governed by the same standards, and the two claims are generally

discussed together." *J.S., III by & through J.S. Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 985 (11th Cir. 2017). Because the same analysis applies to both claims, this Article will not separately discuss Section 504 claims.

⁵ 42 U.S.C. § 12188.

⁶ 42 U.S.C. § 12182(a).

⁷ *Bell v. FTMC, LLC*, No. 8:17-CV-3100-T-23AAS, 2018 WL 4565745, at *1 (M.D. Fla. Sept. 24, 2018) (Merryday, J.).

⁸ *Price v. Escalante - Black Diamond Golf Club Llc*, 2019 U.S. Dist. LEXIS 76288, *1-2 (M.D. Fla. April 29, 2019) (Moody, J.).

⁹ See e.g., *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997) (holding that a public accommodation is a physical place); *Contra Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed'n of Grain Millers, AFLCIO-CLC*, 268 F.3d 456, 458 (7th Cir. 2001) (holding that the intent of Title III was to grant the disabled equal access to goods and services regardless of the site of a sale); see generally *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801--LENARD, 2017 U.S. Dist. LEXIS 15457, at *12-13 (S.D. Fla. Feb. 2, 2017).

¹⁰ *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1284 (11th Cir. 2002) (finding that a plaintiff's claim that the automated telephone system for gameshow registration discriminated against the hearing impaired was valid).

¹¹ See *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368 (S.D. Fla. 2018).

¹² *Price v. City of Ocala, Florida*, No. 5:19-cv-00039-JSM-PRL, at *5 (M.D. Fla., April 22, 2019) (Moody, J.) (citing *Price v. Everglades College, Inc.*, No. 6:18-CV-492-ORL-31GJK, 2018 WL 3428156, at *2 (M.D. Fla. July 16, 2018)). This has been referred to as the "nexus requirement." See, e.g., *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-CV-23801, 2017 WL 1957182, at *3 (S.D. Fla. Feb. 2, 2017) (discussing the requirement that there be a "nexus between the website and the physical place of public accommodation," such that "an inaccessible website impedes access to a physical location.").

¹³ 741 Fed. Appx. 752 (11th Cir. 2018) (permitting an ADA action against Dunkin' Donuts because "[i]t appears that the website is a service that facilitates the use of Dunkin' Donuts' shops, which are places of public accommodation.").

¹⁴ *Id.* at 754.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Gomez v. Knife Mgmt., LLC*, No. 17-cv-23843- GAYLES, 2018 U.S. Dist. LEXIS 159178, at *5 (S.D. Fla. Sep. 14, 2018); see, e.g., *Dunkin' Donuts*, No. 18-10373 at *2 (reversing order granting motion to dismiss where plaintiff alleged website sold gift cards which allowed users access to in-store privileges.); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017) (denying motion to dismiss where plaintiff alleged website provided access to coupons and an ability to refill prescriptions online for in store pickup).

¹⁸ See, e.g., *Price v. Everglades Coll., Inc.*, No. 618CV492ORL31GJK, 2018 WL 3428156 (M.D. Fla. July 16, 2018) (granting motion to dismiss where plaintiff alleged facts showing he was unable to access the university's address from its website, but not that this impeded his enjoyment of the university itself); *Price v. AFT Mgmt., Corp.*, No. 17-61310-CIV-DIMI-TROULEAS/S, 2018 U.S. Dist. LEXIS 25896, at *10 (S.D. Fla. Feb. 14, 2018) (finding that the court is unwilling to allow ADA accessibility claims against websites that only provide information on goods, services, and the location of stores as this would "eviscerate the framework established by district courts within the Eleventh Circuit construing *Rendon*.").

¹⁹ 42 U.S.C. § 12132.

²⁰ *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting § 12132).

²¹ See *Price v. City of Ocala, Florida*, No. 5:19-cv-00039-JSM-PRL (concluding the plaintiff did not satisfy Article III standing requirements because there was inadequate support for his allegation of an immediate threat of future injury based on three factors: plaintiff's connection with the defendant governmental entity, the type of information that is inaccessible, and the relation between the inaccessible information and plaintiff's alleged future harm).