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ADA Accessibility Liability Exposure for Police Websites

LAWSUITS TARGETING PRIVATE COMPANIES WHOSE WEBSITES ALLEGEDLY VIOLATE THE EQUAL ACCESS REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT (ADA) ARE ON THE RISE.¹ THE SAME CLAIMS AND REMEDIES CAN BE APPLIED TO SUITS AGAINST GOVERNMENTS AND LAW ENFORCEMENT AGENCIES.

Police agencies, court systems, and sheriff's departments, as well as detention and correctional facilities and programs are all addressed by Title II of the ADA. As the U.S. Department of Justice (DOJ) notes, individuals with disabilities are entitled to the full range of protections afforded by the ADA when they are subject to these programs and participate in related activities.² People who have hearing, vision, and speech disabilities are entitled to effective communication, but they also navigate the web in a variety of ways. People who are blind may use screen readers, which are devices that speak the text that appears on a screen. People who are deaf or hard of hearing may use captioning. And people whose disabilities affect their ability to grasp and use a mouse may use voice recognition software to control their computers and other devices with verbal commands. Reasonable modifications in policies and procedures may be needed to make participation possible for individuals with a wide variety of disabilities and health conditions.

Public safety agencies have become accustomed to ADA claims under Title III when making arrests or designing a new or remodeled facility; however, little, if any, attention has generally been paid to ensuring that a department's website is "handicap accessible." The ways that websites are designed and set up can create unnecessary barriers that make it difficult or impossible for people with disabilities to use them, keeping users from accessing information and programs that businesses and state and local governments make available to the public online.

Title II of the ADA provides that no person with a qualified disability shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."³ Public entities include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a

State or States or local government."⁴ Similarly, in Title III, "No individual shall be discriminated against 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.**"⁵

Courts have found that a public entity is not only prohibited from denying equal opportunity but that public entities also cannot prevent a qualified individual with a disability from enjoying any aid, benefit, or service, regardless of whether other individuals are granted access. Therefore, a plaintiff is not required to identify a comparison class of similarly situated individuals given preferential treatment.

Presently, courts are interpreting how Title II of the ADA applies to public entities' websites, often with inconsistent results. For example, there is no consensus as to whether public entities must make archived information accessible or whether the requirement applies only to documents pertaining to current and future issues and events. Also, there is disagreement as to whether the plaintiff must actually partake of the public entity's services and programs or whether the plaintiff's representation that he is interested in learning about the services and programs or plans to visit the area is enough to state a claim.

Heavily litigated issues such as these usually produce judicial guidance that businesses can follow. This has not been the case with ADA website litigation. For example, the U.S. Supreme Court has rejected the invitation to take up the ADA website issue.⁶ And circuit courts are not in agreement about whether a private company needs a brick-and-mortar location in order to be subject to a website inaccessibility suit. All circuits except the 11th have recognized websites as a place of public accommodation under any circumstances, but even then, can still be a

Title III claim on other grounds. The First, Second, and Seventh Circuits—with some specific exceptions—have adopted a “broad view” and concluded that Title III applies to all websites.⁷ The so-called “middle view,” taken by the Third, Sixth, and Ninth Circuits limits Title III to websites that have a nexus to an ADA-covered physical facility. For example, the Ninth Circuit’s decision in *Earll v. Ebay* states, “Because eBay’s services are not connected to any ‘actual, physical place,’ eBay is not subject to the ADA.”⁸ Also in *Gomez v. Miersch*, the court ruled that there could be no claim viable if the complainant never planned to access the brick-and-mortar location. That would also apply to all governments and law enforcement agencies.⁹

On March 18, 2020, the DOJ issued “Guidance on Web Accessibility and the ADA.” While no formal regulations have been issued, the DOJ has consistently taken the position that the ADA’s requirements apply to all the services, programs, or activities of state and local governments, including those offered on the web.¹⁰

The guidance lists the following as examples of website accessibility barriers:

- Poor color contrast
- Use of color alone to give information
- Lack of text alternatives (“alt text”) on images
- No captions on videos
- Inaccessible online forms
- Mouse-only navigation (lack of keyboard navigation)

The ADA leaves it to government agencies to decide how they will comply with the ADA’s general requirements of nondiscrimination and effective communication and how they will ensure that the programs, services, and goods they provide online are accessible to people with disabilities. The DOJ does not have a regulation establishing detailed standards, but the department’s longstanding interpretation of the general nondiscrimination and effective communication provisions applies to web accessibility.¹¹

ENFORCEMENT OPTIONS

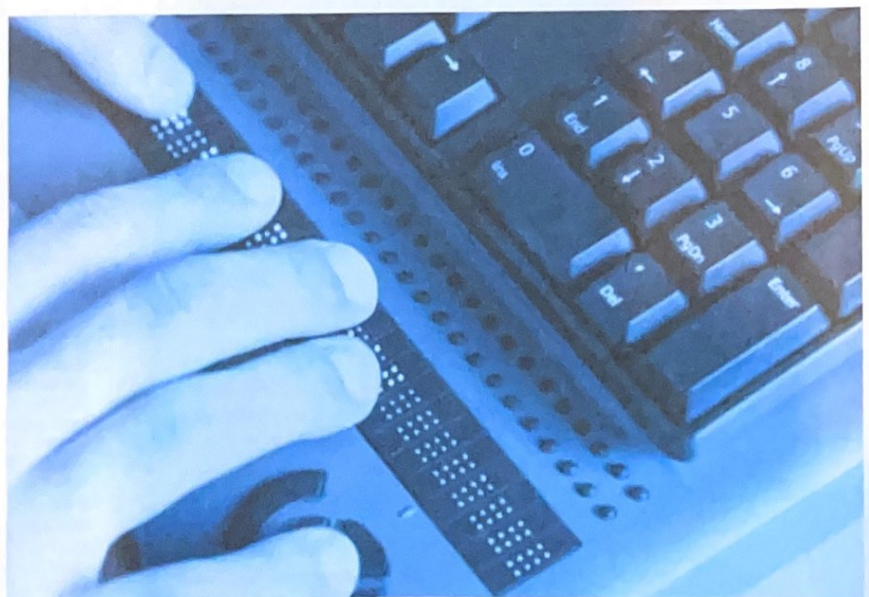
Complaints alleging violations of the ADA can be filed with the DOJ against any state or local government police department or other law enforcement agency, court system, jail, or prison.¹² Individuals can also bring private lawsuits against state or local government agencies, although, there are limitations on the types of damages that can be obtained. Generally, awards are focused on remediation, meaning making the site accessible. However, legal fees can often be very high, motivating defendants to settle quickly. It

should be noted that some cases that have been brought by prisoners have alleged not only violations of the ADA, but violations of their basic constitutional rights as well (the right to due process under the law or the right to be free from cruel and unusual punishment). Additionally, some states have adopted so-called mini-ADAs that include money damages to plaintiffs.

Private lawsuits have generally not involved governments to date. But this may change quickly once the plaintiff bar realizes how susceptible many local governments are to these kinds of claims.

Enforcement actions by the DOJ to date have focused on agreements rather than litigation with units of government. As part of the DOJ’s Project Civic Access enforcement work, agreements have been reached with the City and County of Denver, Colorado; City of Jacksonville, Florida; City of Durham, North Carolina; and County of Nueces, Texas. In addition, the DOJ reached an agreement with Miami University in Ohio to resolve the United States’ lawsuit alleging that the university discriminated against students with disabilities by providing inaccessible web content and learning management systems. Along the same lines, the DOJ reached an agreement with Louisiana Tech University to address claims that the university violated the ADA by using an online learning product that was inaccessible to a blind student.

Many private companies have received pre-suit demands from attorneys or letters from individuals purporting to be disabled and requesting some type of accommodation to obtain website content they claim is inaccessible.



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Litigation to date has primarily been initiated by private complainants who have vision and hearing impairments, alleging that the website fails to be compatible with screen reader software or fails to have closed captioning for videos.¹¹ The former becomes particularly troublesome for public entities, which tend to have hundreds or sometimes thousands of documents—agendas, minutes, calendars, permit applications, etc.—posted on their websites, often in a format not accessible to screen readers. More than 93 percent of website accessibility cases filed in 2018 settled, and of the cases filed in 2019, 55 percent settled within 60 days, according to Usablenet's 2022 *Midyear ADA Digital Accessibility Lawsuit Report*. In its 2022 midyear report, Usablenet noted that almost 100 lawsuits were being filed each week, with an estimated total of 4,455 by the end of 2022.¹⁴

The Usablenet report noted that while the DOJ restated a guidance in March 2022, it failed to give businesses clarity and, in fact, seems to have encouraged plaintiffs rather than offered hope of relief for businesses. The bulk of cases so far have been filed in California, New York, and Florida.¹⁵ Lawsuits in Florida surged after the DOJ issued its March guidance, growing from only 45 cases in the first quarter to more than 100 in the second quarter of 2022.

These kinds of cases have produced a cottage industry among a handful of law firms. The Usablenet report pointed out that the top 10 plaintiff law firms account for 80 percent of all filed cases. In contrast, the top 10 defense law firms represent less than 15 percent of cases. The report points out that while there are more than 1,000 different defendant lawyers across hundreds of law firms working on active ADA-based lawsuits, only 38 plaintiff law firms and 114 plaintiffs constitute all the filed claims.¹⁶

DEFENSE STRATEGIES

Remediation, while no guarantee of success in court, is the next best thing to avoid litigation by designing a completely accessible website. It is most likely to succeed if it occurs before the plaintiff files a court complaint. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the U.S. Supreme Court stated that a request for injunctive relief will only be considered moot by a defendant's voluntary compliance with the law if

the defendant meets the “formidable burden” of demonstrating that it is “absolutely clear the alleged wrongful behavior could not reasonably be expected to recur.”¹⁷ In a 2018 case involving an ADA website accessibility claim, *Haynes v. Hooters of America*, the U.S. Court of Appeals for the Eleventh Circuit rejected the mootness argument based on a website remediation plan entered in prior unrelated litigation.¹⁸ Similar arguments and results have occurred in other federal courts.¹⁹

Defendant police agencies will need to show that, even if a technical violation exists, such a violation is not an actual barrier to access nor impacts the overall usability of the website. Alternatively, they will need to rely on experts to persuade courts that substantial compliance with the Web Content Accessibility Guidelines (WCAG) is sufficient to moot a case. For example, an expert should be able to testify that a certain percentage of compliance is reasonably and commercially attainable for the particular site, especially since the WCAG standards have not been incorporated in the ADA or any DOJ regulations.

RECOMMENDATIONS

All governmental websites should be inspected by one of the free online services to determine whether there are any significant inaccessibility issues.

Law enforcement executives should consult counsel concerning litigation strategies, including retaining a digital accessibility expert. Police agencies should consider voluntarily adopting the most recent standards of the WCAG, which the federal government adopted as the guidelines for its websites, and Section 508, which are the established industry standard for website accessibility.²⁰

U.S. police executives should be also cautious about outsourcing enforcement activities because complying with the ADA is a non-delegable duty. □

NOTES:

¹Data are based on UsableNet's research team's collection across multiple legal sources from January 1, 2022, to June 23, 2022, www.usablenet.com.

²U.S. Department of Justice (DOJ), Civil Rights Division, “Guidance on Web Accessibility and the ADA,” March 2022, <https://beta.ada.gov/resources/web-guidance>.

³42 U.S.C. § 12132.

⁴28 C.F.R. § 35.104.

⁵42 U.S.C. § 12182(a).

⁶See, *Domino's Pizza LLC v. Robles*, 140 S. Ct. 122 (2019).

⁷See, *Gil v. Winn-Dixie Stores*, 993 F.3d 1266 (11th Cir. 2021). The website for Winn-Dixie Stores allegedly could not be read with a screen reader for the blind. The court held that the website was not subject to Title III. A departure from other Second Circuit courts that have found that all websites are subject to Title III is *Winegard v. Newsday LLC*, 2021 U.S. Dist. LEXIS 153995, (E.D.N.Y. Aug. 16, 2021). This case concerned a plaintiff with a hearing disability who claimed that Newsday's website discriminates against the deaf by not having close captioning in its videos. The court held that a website without a nexus to a brick-and-mortar physical location is not subject to Title III.

⁸*Earll v. Ebay*, 599 Fed. Appx. 695, 696 (9th Cir. 2015).

⁹*Gomez v. Miersch*, US Dist Ct LEXIS 77444 (N.D. Cal. 2022). See also *Martinez v. Cot'n Wash, Inc.*, No. B314476 (Cal. Ct. App. Aug. 1, 2022), which discussed the application of brick-and-mortar nexus to a California UNRUH Act state law accessibility claim.

¹⁰U.S. DOJ, "Justice Department Issues Web Accessibility Guidance Under the Americans with Disabilities Act," press release, March 18, 2022, <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>.

¹¹See 42 USC §§ 12132, 12182(a); 28 C.F.R. §§ 35.130, 35.160(a), 36.201, 36.303(c).

¹²U.S. DOJ, Civil Rights Division, "File a Complaint," ADA complaint portal, <https://beta.ada.gov/file-a-complaint>.

¹³See, for example, Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

¹⁴UsableNet, 2022 Midyear ADA Digital Accessibility Lawsuit Report, <https://info.usablenet.com/2022-midyear-digital-accessibility-lawsuit-report-download-page>.

¹⁵In 2022, January had 75 cases filed in California, 170 in New York, and 10 in Florida. February had 69 in California, 208 in New York, and 13 cases filed in Florida. March had 119 cases in California, 327 in New York, and 22 in Florida. April had 79 cases in California, 129 in New York, and 17 in Florida. May had 87 cases in California, 311 in New York, and 48 in Florida. June had 80 cases in California, 266 in New York, and 36 cases in Florida.

¹⁶Data are based on UsableNet's research team's collection across multiple legal sources from January 1, 2022, to June 23, 2022, www.usablenet.com.

¹⁷Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 170 (2000).

¹⁸Haynes v. Hooters of America, 893 F.3d 781 (11th Cir. 2018).

¹⁹Wu v. Jensen-Lewis Co., 345 F. Supp. 3d 438 (S.D.N.Y. 2018); Del-Orden v. Bonobos, Inc., 2017 U.S. Dist. LEXIS 209251 (S.D.N.Y. Dec. 20, 2017).

²⁰WCAG, "Web Content Accessibility Guidelines (WCAG) 2 Overview," <https://www.w3.org/WAI/standards-guidelines/wcag>.



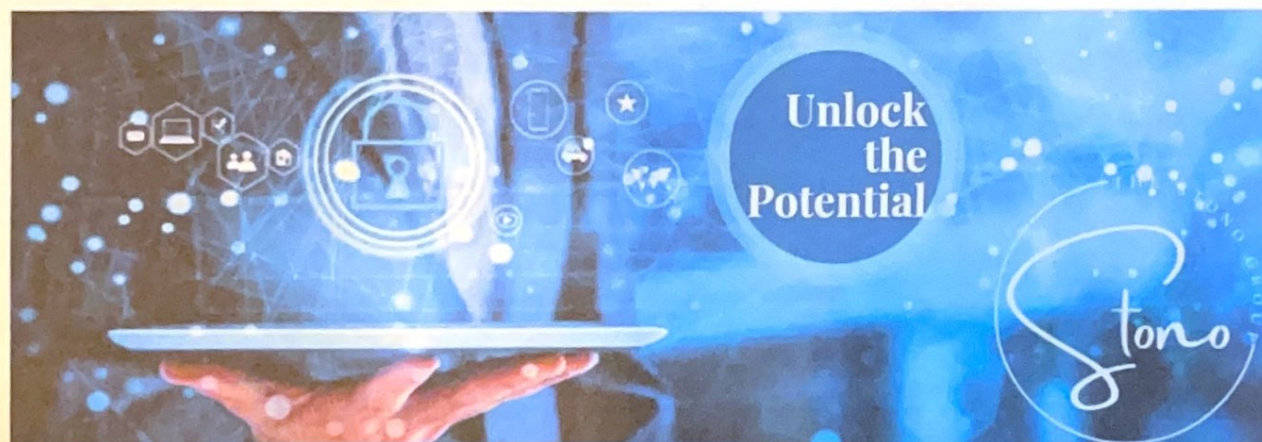
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