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ADA Claims Continue to Snag Online Merchants

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By Christina Grigorian

Title III of the American Disabilities Act, 42 USC §§ 12181 – 12189 (ADA), generally prohibits discrimination on the basis of an individual's disability in a place of "public accommodation." Initially after the ADA's enactment in 1990, lawsuits typically related to physical changes that businesses were required to make to brick-and-mortar sites to ensure that such locations provided necessary accommodations for individuals with disabilities. However, in recent years, there has been a significant litigation trend where plaintiffs (through counsel[i]) are asserting Title III claims premised in the inability for those with visual or hearing impairment to access merchant websites. While a few courts have rejected this theory, most courts have found that a Title III claim premised on failure to provide accommodations for website usage to those who are visually or hearing impaired are actionable under the ADA.

Background. A 2019 industry report found that "70 percent [of websites in e-commerce, news and information, and government categories] had certain 'critical blockers' that rendered them inaccessible to visually impaired users."

Lawsuits based on violations of Title III are neither new nor novel. According to published reports, more than 11,400 people filed suit alleging a violation of Title III in 2021, representing a 4 percent increase from 2020 and a 320 percent increase since 2013.

Current Litigation. Most recently, on June 10, the US District Court for the Western District of Pennsylvania certified a class action involving a plaintiff's claim that an apparel merchant's website was not accessible to those who are blind or visually impaired, finding that such website violated the equal access requirements of Title III.

The case, *Murphy v. The Hundreds is Huge, Inc.*,[ii] involved a plaintiff who is visually impaired who claimed, for himself and on behalf of others similarly situated, that the online retailer "did not have

adequate policies and practices reasonably calculated to cause the website for its online store . . . to be fully accessible to blind or visually disabled individuals in violation of the ADA." In the memorandum that certified the class and approved the proposed class action settlement, the Court noted that, based on the statistics provided by the plaintiff,[iii] "approximately 7.3 million adults who have difficulty seeing and 1.8 million adults who are blind can be expected to use the internet."

For purposes of the Court-approved settlement, the defendant agreed to (1) modify its digital properties "to remove barriers they allegedly present to access by blind and visually impaired visitors and users" of the merchant's website, and (2) revise its policies and procedures concerning such access. To accomplish these agreed-upon actions, the parties agreed to the appointment of an "Accessibility Consultant" who was tasked with undertaking certain assessments concerning the merchant's to-be-revised website.

Federal Guidance. On March 18, the US Department of Justice released guidance on internet accessibility and confirmed that the ADA's requirements apply to merchants' offerings on websites (DOJ Guidance), stating that Title III applied to "businesses that are open to the public." The DOJ Guidance makes clear the agency's position that "the ADA's requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web." In connection with its specific findings, the agency stated that the following website characteristics were often the cause of website inaccessibility:

- Poor color to contrast
- Reliance on color to provide information
- Lack of text alternatives, or alt text, on images
- No captions on videos
- Inaccessible online forms
- Mouse-only navigation rather than keyboard navigation

Conclusion. Based on both this litigation trend as well as the DOJ Guidance affirming the agency's interpretation of the extension of the protections in Title III to those with visual and hearing disabilities, internet merchants should closely examine their websites to determine if such sites meet necessary accessibility requirements. Not only will such analyses ensure that compliance with applicable federal law, it will also ensure that this part of the market is not hindered in accessing the goods and services sold on such website.

i Under 42 USC § 12188, a plaintiff is entitled to injunctive to make "facilities readily accessible." Plaintiff's counsel typically seeks fees in these suits and whether or not a website is

"accommodating" can be a fact-intensive question. Notably, "[i]ndividual awards of money damages are not available in an action pursuant to Title III of the ADA." *Murphy v. The Hundreds is Huge, Inc.* (citation below).

ii *Murphy v. The Hundreds is Huge, Inc.*, 1:21-CV-00204-RAL (W.D. Pa. Jun. 10, 2022).

iii These statistics stated that more than 90 percent of adults in the United States use the internet and that more than 3.3 percent of the US population over the age of 15 have difficult seeing, including 2 million people who are "blind or unable to see."

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CONTACTS

For more information, contact your Katten attorney or any of the following attorneys.



Christina J. Grigorian
+1.202.625.3541
christina.grigorian@katten.com

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