

Websites Under Attack — Defenses to ADA Claims for Retailers and Online Businesses

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Retailers and other businesses with an online presence continue to be targets of lawsuits filed by plaintiffs asserting claims under the Americans with Disabilities Act (ADA) and related state laws. In a nutshell, these suits — often postured as putative class action claims — assert that websites are not adequately accessible to individuals with visual impairments. Over the past few years, several of our clients, the vast majority of whom have already been actively committed to working with their internal teams and outside vendors to make their websites accessible to all, have nevertheless been hit with these claims. And while it is tempting to simply settle these cases for nominal sums, even where the complaints as filed are "cookie cutter" and the alleged website "defects" do not exist or have been easily remediated, it is important for website owners to know that they do have viable defenses against these claims. Moreover, for website owners in New York who do not also have a physical presence (i.e., a brick-and-mortar retail or other facility), recent precedent may provide an additional defense that can prove particularly effective both in settlement negotiations and in getting these claims dismissed by the court.

Defenses Available to Website Owners

One defense that has been available to website owners in New York and other states is lack of "standing," which is required by The Constitution of the United States. A plaintiff without standing — or an "injury in fact" — cannot bring a claim. In other words, it is not sufficient for the plaintiff to simply allege that they visited the site and found issues with accessing parts of it; instead, the plaintiff must allege and prove that they visited the site intending to make a purchase, and that they intended to return to the website (i.e., that there also was a "real and immediate threat of future injury"). If a plaintiff does not make these allegations in the complaint, it may be dismissed. However, the fact is that many courts may simply allow a plaintiff to replead and make the required allegations.

Another defense that has been recognized in New York and other jurisdictions is "mootness." ADA claims become moot — and a court lacks subject matter jurisdiction to hear such a claim — when a defendant demonstrates that "[i] there is no reasonable expectation that the alleged violation will recur and [ii] interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Diaz v. Kroger Co.*, 2019 WL 2357531, at *2-3 (S.D.N.Y. June 4, 2019) (dismissing claims as moot where Defendant remediated barriers and committed to maintaining accessibility) (quotations omitted). This defense can be effective not only in settlement negotiations, but also on motions to dismiss, where, as in *Diaz*, a website owner can show — typically through affidavit — that it has "remedied all of the alleged ADA violations; it has ensured that no additional barriers to accessing the Website exist; and it has committed to ensuring access on a going-forward basis." *Id*. at 3. Similarly, and more recently, in *Toro v. Medbar Corp.*, 2024 WL 2308804 (S.D.N.Y. May 22, 2024), the court found claims moot where the defendant remediated barriers and contracted for ongoing monthly compliance monitoring.

New York Adopts a Defense for Online-Only Businesses

Although various courts around the country have long held that the ADA only applies to websites that have a connection to a "brick and mortar" physical facility, the federal courts in New York previously had not definitely ruled on this issue until recently. On September 30, 2024, the US District Court for the Southern District of New York provided perhaps the most compelling defense for defendants who offer goods or services exclusively online. In *Jose Mejia v. High Brew Coffee, Inc.*, which involved a company that sold coffee exclusively online through its website, the district court analyzed the relevant structure and statutory text and held that a "stand-alone website is not a place of public accommodation" under the ADA. The court then dismissed the plaintiff's ADA claim and lawsuit on that basis. Soon after, the district court in *Sookul v. Fresh Clean Threads, Inc.*, 2024 WL 4499206 (S.D.N.Y. Oct. 16, 2024) reached the same conclusion regarding an online-only clothing retailer, holding that standalone websites are not public accommodations after conducting an extensive textual analysis of the ADA statute. *Id*. at *6. Most recently, in *Toro v. Vapor Boss*, 2024 WL 4818439 (S.D.N.Y. Nov. 15, 2024), the court again followed the reasoning in *Meija* and *Sookul* in instructing the plaintiff to show cause as to why his claim should not be dismissed for failure to state a claim against another online-only retailer.

This series of cases establishes clear precedent that defendants without accompanying physical locations in ADA website cases pending in the Southern District of New York now have another ace up their sleeve that may help them gain an early settlement or succeed on a relatively straightforward motion to dismiss.

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