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Public entities: Beware the rise of web accessibility litigation

By Sean De Burgh

Website accessibility probably isn't the first thing that comes to mind when you think about the Americans with Disability Act that was enacted nearly three decades ago. However, the rise of website accessibility lawsuits against both private and public entities in recent years may change that. With technology dramatically changing how local governments service the public, the developing legal issue concerns to what extent the ADA applies in the computerized world.

The ADA prohibits discrimination against individuals in various areas of public life, including transportation, schools, and employment. Title II of the ADA applies to public entities and precludes discrimination by public entities in all activities, programs and services. Most public entities go to great lengths to ensure equal access to physical activities, programs, and services by those with disabilities. But consider the numerous ways in which public entities use technology, including, but not necessarily limited to, applications, renewals, bill payment and record searches. Do these platforms create any obstacles for those with disabilities that should be addressed? With the onslaught of technological advances and others to come, public entities must consider how these advances impact people with disabilities.

In 2015, the U.S. Department of Justice conducted an investigation to evaluate, among other things, Merced County's compliance with Title II of the ADA vis-à-vis the county's web-based services and programs. The settlement agreement entered into by the parties required Merced County to:

"(a) Designate an employee as the web accessibility coordinator for Merced County who will be responsible for coordinating Merced County's compliance with the requirements of Section L of this Agreement. The web accessibility coordinator shall have experience with the requirements of title II of the ADA, the Web Content Accessibility Guidelines (WCAG) version 2.0, and website accessibility generally; and

"(b) Retain an independent consultant, approved by the United States, who is knowledgeable about accessible website development, title II of the ADA, and WCAG 2.0 to evaluate Merced County's website and any proposed online services for compliance with the ADA and, at minimum, WCAG 2.0 Level A and Level AA Success Criteria and other Conformance Requirements (WCAG 2.0 AA), and who shall be responsible for the annual website accessibility evaluation. Merced County will bear all costs and expenses of retaining and utilizing this independent consultant, including the costs and expenses of any staff. Merced County will compensate this independent consultant without regard to the outcome."

Then, in 2016, Miami University entered into a consent decree, after a blind plaintiff sued and the DOJ intervened, requiring it to make significant improvements that ensure that campus technologies are accessible to individuals with disabilities. As part of the consent decree, Miami University was required to pay $25,000 to certain individuals with disabilities identified by the court.

While not a lawsuit against a public entity, the recent 9th U.S. Circuit Court of Appeals decision in *Robles v. Domino's Pizza*, 913 F.3D 898 (9th Cir. 2019), is also instructive on this issue. In *Robles*, the plaintiff could only access the internet by using a screen reading software. Unable to order his pizza via Domino's website and mobile application, plaintiff sued under the ADA. The 9th Circuit held the following:

"Therefore, the ADA mandates that places of public accommodation, like Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind. [citation omitted]. This requirement applies to Domino's website and app, even though customers predominantly access them away from the physical restaurant: 'The statute applies to the services of a place of public accommodation, not services in a place of public accommodation. 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.' *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 953 (N.D. Cal. 2006) (emphasis in original) (internal citation omitted)."

California continues to see an increase in these type of ADA web accessibility cases. So what can public entities do about it? Many individuals with disabilities use "assistive technology" that allows them to use computers and access the internet. Blind individuals may use screen readers and those who cannot use a computer mouse may use voice recognition software to navigate their computers and the internet. Public entities should take the necessary steps to create a plan that ensures accessibility features are properly built into web pages or other technologies, with the overall goal being convenient, available access for everyone. The DOJ recommends that entities do the following: (1) establish a policy that the entity's web page will be accessible and create a process for implementation; (2) ensure that all new and modified web pages and content are accessible; (3) develop a plan for making existing web content more accessible; (4) train in-house staff and contractors that are responsible for web page and content development; (5) provide a telephone number or email address on home page for people to call regarding accessibility information; and (6) periodically have certain disability groups test your pages for ease of access and use.

As public entities proactively evaluate their obligations under the ADA as it applies to technologies, unnecessary and costly litigation can be avoided.

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