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# Florida Federal Court Rules That Winn-Dixie's Website Violated the ADA

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Retailers throughout the country have been besieged by lawsuits and demand letters alleging that their websites are not accessible to the visually impaired and that this lack of accessibility violates Title III of the Americans with Disabilities Act (ADA). The plaintiffs' bar, without definitive guidance from the Department of Justice (DOJ) or the courts, has assumed that retail websites are "places of a public accommodation" under the ADA and that the appropriate compliance level should be the Website Content Accessibility Guidelines (WCAG) 2.0 A or AA.

On June 12, 2017 some of these questions were answered in what may be the first trial of a website accessibility case. In *Carlos Gil v. Winn-Dixie Stores, Inc.*, Civil Action No. 16–23020 (S.D. Fla.), U.S. District Judge Robert Scola ruled that: (1) Winn-Dixie's website was a "place of a public accommodation" under the ADA and (2) based on the testimony of the plaintiff and his expert, the website was not sufficiently accessible. As a result, the court issued injunctive relief and awarded attorneys' fees. The injunctive relief included a requirement that Winn-Dixie adopt and implement a website accessibility policy that ensures its website conforms to the WCAG 2.0 criteria and, further, that any third-party vendors who interact with the website also must conform to such criteria. The court also ordered that Winn-Dixie place on its homepage a statement concerning its website accessibility policy, provide training to all employees who write or develop programs or code, and test its website to identify any incidence of nonconformance every three months for the next three years.

This result is notable for a few reasons. First, plaintiffs' attorneys now have legal precedent, although not binding, that websites constitute places of public accommodation under the ADA and therefore must be accessible to the disabled. However, the court did not rule that all consumer facing websites are places of public accommodation, only that the Winn-Dixie website is because it is "heavily integrated with physical store locations and operates as a gateway to the physical store location." The court's ruling still allows for the argument that a website that is wholly unconnected to a physical location is generally not a place of public accommodation under the ADA as was held in *Gomez v.*

*Bang & Olufsen Am., Inc.*, No. 16– 23801 (S. D. Fla. Feb. 2, 2017), and *Access Now Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

Second, the court was unmoved by the estimate, on the high side, that it would cost Winn-Dixie approximately $250,000 to come into compliance. The court noted that Winn-Dixie spent more than $7 million in 2016 to revamp its website. Moreover, the plaintiff's expert testified that he believed it would cost far less to fix the issues with the site and Winn-Dixie presented no evidence of undue burden.

Third, the trial was a bench trial and not a jury trial. It is not clear from the decision whether the parties consented to a bench trial or the court ruled that, because of the nature of the relief requested, a jury trial was not appropriate.

Finally, the court ordered Winn-Dixie to remediate its site in conformity with the WCAG 2.0 guidelines, even though the DOJ still has not enacted website accessibility regulations applicable to the private sector. This does not come as any real surprise, as industry consultants have long recommended this standard, the DOJ adopted this standard in its regulations governing federal contractors, and it is unclear whether the defendant proposed an alternative. The challenge remains that the WCAG standards are not definitive. For example, they do not address whether a visually impaired individual can effectively navigate a website that is not 100% compliant.

In addition, while the court adopted the WCAG 2.0 criteria, it did not specify a level of compliance (A, AA, AAA) or whether substantial compliance was sufficient. For example, because of the changing nature of websites and the addition and deletion of material, most experts believe that it is almost impossible to achieve "100% compliance." The court did not tackle the thorny issue of what errors were material versus whether, despite some noncompliance, the consumer was still able to navigate his or her way around the website.

The court did not address this critical issue because it did not need to. Mr. Gil testified that when he arrived at Winn-Dixie's website, he found that approximately 90% of the tabs did not work. Had Winn-Dixie's website been more compliant, or had there been testimony by Winn-Dixie's experts that it was substantially compliant, the court would have had to address this issue.

While the court's adoption of the WCAG 2.0 criteria, including the company's responsibility for third-party content, is a significant ruling, the real battleground for the next wave of ADA website accessibility cases will be whether a company can defend its website as substantially compliant. This will be a highly technical trial involving experts and probably live demonstrations using website screenreaders.

Most retailers have already been threatened or sued, and it remains to be seen whether the plaintiffs' bar moves on to greener pastures or continues to file lawsuits and send demand letters to companies that have already been through this drill. In the meantime, retailers with physical locations are well-advised to develop website accessibility policies and state those policies on their homepages. Retailers should also invest in developing in-house IT expertise to bring their websites into compliance with the ADA.



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