

McGUIREWOODS



Digital Accessibility Lawsuits – Are You Ready?

May 18, 2021

John G. McDonald

Sabrina A. Beldner

Elizabeth P. Redpath

AGENDA

- **Background on Digital Accessibility**
- **11th Circuit Decision in *Gil v. Winn-Dixie* (April 7, 2021)**
- **California Digital Accessibility Litigation – “Dream Big”**
- **What’s Next?**

Background on Digital Accessibility

- **Why are websites and other digital platforms required to be accessible?**
- **How do you know if your website or digital platform is accessible?**
- **Who enforces website or digital accessibility requirements?**

Title III of the Americans with Disabilities Act (“ADA”)

- **Title III prohibits discrimination on the basis of disability by places of “public accommodation”**
 - A private entity whose operations affect commerce and fall into one of twelve defined categories.
 - These categories include places of lodging, restaurants, movie theatres, convention centers, retail establishments, doctors’ offices, train stations, museums, parks, schools, nurseries and recreational facilities.

How do you make your website or digital platform is accessible?

- **No DOJ guidelines**

- DOJ issued Advanced Notice of Proposed Rulemaking in Sept. 2010
- Repeatedly delayed and ultimately withdrawn

- **DOJ Position**

- Since 1996 DOJ has taken the position that websites are covered
- Last clarified by Assistant Attorney General Stephen E. Boyd in a Sept. 25, 2018 letter to Sen. Chick Grassley:

- **But what does it mean?**

- “[A]bsent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination.”

World Wide Web Consortium (W3C)

- **Web Content Accessibility Guidelines (WCAG)**
- **Multiple version over the years**
 - **Version 3.0 issued January 21, 2021**
- **Three criteria levels: A, AA, AAA**
 - Examples: text alternatives for images, time-based media alternatives, high-contrast images

Enforcement

- **Department of Justice and Private Actions**
- **Private Actions Have Exploded Over the Last Three Years**
 - 2018 – 2,314
 - 2019 – 2,890
 - 2020 – 3,550
 - Include cases filed in federal court or in California state court under the Unruh Act (UsableNet, Dec. 21, 2020)
- **Top States in 2020:**
 - New York – 1,756
 - California – 989
 - Florida – 542

Gil v. Winn-Dixie

- **Lawsuit:** Juan Carlos Gil files his lawsuit against Winn-Dixie on July 12, 2016 in the U.S District Court for the Southern District of Florida
- **Claims:**
 - Gil alleges Winn-Dixie's website – www.winndixie.com – violates Title III of the Americans With Disabilities Act (ADA)
 - Seeks declaratory and injunctive relief as well as attorneys' fees and costs
- **Bench Trial:** District Court Judge Robert Scola, Jr. holds a bench trial on June 5 and 6, 2017

Gil v. Winn-Dixie

■ **Facts of the Case:**

- 2015-16 Winn-Dixie maintained a website with very limited functionality
 - Store Locator
 - Refill existing prescriptions for in-store pickup
 - Link on-line coupons to customer's Winn-Dixie loyalty card
- Gil is legally blind and has cerebral palsy
- Gill uses a screen reader (JAWS – 95% of the time) to access websites
- Gil was a customer of Winn-Dixie since 1999-2000
- Winn-Dixie argues that their website is not a “public accommodation” requiring accommodation under Title III

Gil v. Winn-Dixie

- **Trial Court Decision:** Verdict and Order -- June 12, 2017
 - Website is “heavily integrated” with its store locations and operates as a “gateway to the physical store locations.”
 - Title III requires disabled individuals be provided “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”
 - Winn-Dixie’s website is inaccessible to the visually impaired
 - Winn-Dixie has violated Title III of the ADA
 - Winn-Dixie ordered to remediate its website in conformity with WCAG 2.0 Guidelines
 - Winn-Dixie ordered to pay Gil’s attorneys’ fees

Gil v. Winn-Dixie – 11th Circuit Appeal

■ Issues of the Case:

- Whether Gil has standing to bring this case?
- Whether Winn-Dixie's website is a place of public accommodation in and of itself, such that its inaccessibility violates Title III of the ADA?
- If it is not a place of public accommodation, whether the website otherwise violates Title III of the ADA?
- Whether the district court erred in its verdict and judgment in favor of Gil, including the court's injunction?

Gil v. Winn-Dixie – 11th Circuit Ruling

■ Does Gil Have Standing?

- Winn-Dixie argues that Gil has suffered no injury in fact and that he was able to use the physical stores for years.
- Gil argues he “was unable to avail himself of the goods and services” of Winn-Dixie’s website and that this interfered with his “ability to equally enjoy” those goods and services.
- Court finds that Gil’s difficulties caused by his inability to access the website constitutes a “concrete and particularized” injury that is not “conjectural” or “hypothetical”
- Gil has Article III standing to bring case.

Gil v. Winn-Dixie – 11th Circuit Ruling

- **Is the Website a Place of Public Accommodation?**
 - Under Title III, “[n]o 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.”
 - A violation of Title III occurs when an operator of a public accommodation “fail[s] to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”
 - The definition of a public accommodation is unambiguous and clear. The statute provides list of physical locations that are identified as public accommodations. The statute does not include websites.
 - Thus, the Court holds that a public accommodation is limited to an actual physical place

Gil v. Winn-Dixie – 11th Circuit Ruling

- **If Not a Public Accommodation, Does the Website Otherwise Violate Title III?**
 - The Court notes that the Winn-Dixie website at issue in 2015-2017, is very different from most retail websites.
 - Noting that the website does not contain a point-of-sale, the Court found that it does not function as an intangible barrier to an individual accessing the goods, services, privileges, or advantages of Winn-Dixie's physical store.
 - Accordingly, the Court held that Gil's inability to access Winn-Dixie's website does not violate Title III of the ADA.

Gil v. Winn-Dixie – 11th Circuit Ruling

- **Did the District Court Err in Its Verdict and Judgment?**
 - YES – Absent congressional action that broadens the definition of “public accommodations” to include websites, the court cannot extend ADA liability to the facts presented in this case.
 - District Court’s decision is vacated.

Gil v. Winn-Dixie – Supreme Court Appeal?

- Possible, but FIRST ...
- April 15, 2021, Gil filed a petition for a rehearing *en banc*
- April 22, 2021, advocacy groups join in:
 - National Federation of the Blind
 - National Counsel on Independent Living
 - National Association of the Deaf
 - Missouri Protection & Advocacy
 - Disability Rights Texas
 - Disability Rights Bar Association
 - Disability Rights Advocates
 - Civil Rights Education

Gil v. Winn-Dixie – Initial Takeaways

- A WIN for website owners within the 11th Circuit, **but** . . .
- A website case can be brought just about anywhere in the country, including in jurisdictions that are open to website accessibility claims, like California and New York.
- Also, the decision is very fact specific and it not clear what the Court would have done had the website included a true e-commerce component.
- Last, it is not clear what the 11th Circuit will do with the petition for an *en banc* rehearing or what the Supreme Court will do to address the clear split that is developing among the Circuit Courts.

California Digital Accessibility Litigation

- **Most likely claim will be brought or threatened in State Court**
- **Not just about the ADA**
- **California Unruh Civil Rights Act**

What Is The California Unruh Civil Rights Act?

- Requires “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind” and prohibits discrimination on the basis of any protected class (sex, race, religion, disability, etc.)
 - Essentially applies to anyone providing services, goods and accommodations to the public
- Remedies for violations
 - Treble damages, but no less than \$4,000 per access violation
 - Attorneys’ fees
 - Injunctive relief

What Is The California Unruh Civil Rights Act? (cont.)

- A violation of the ADA is statutorily deemed to be a violation of the Unruh Act, *without regard to intent*
- Exponential increase in disability actions under the Act physical barrier accommodation cases under the Act
- Physical accommodation and website accessibility cases
 - Suits by site-impaired individuals claiming lack of equal access to websites
 - Brought by “straw” plaintiffs who are recurring filers through the same law firms
 - Extortive claims for low-dollar settlements

Who Doesn't Love A Ladies' Night???

- *Koire v. Metro Car Wash*, 40 Cal.3d 24 (1985)
 - Male customer denied discounted car wash on “Ladies’ Day” and denied discounted admission at a nightclub sued under the Act
- The trial court held that sex-based price discounts did not violate the Act, but the California Supreme Court **reversed**:
 - Act requires “equal treatment of patrons in all aspects of the business”
 - Rejected notion that sex-based price differences were not arbitrary but were supported by “substantial business and social purposes”
 - Held arbitrary sex discrimination is *per se* injurious
 - Discrimination permitted for “compelling societal interest” (ex, excluding children from bars or adult bookstores)

Uber Eats & Black-Owned Businesses

- Uber Eats *waived delivery fees* for Black-owned restaurants starting last June through end of 2020
 - Uber deemed this promotion as a way to support the African-American community and was an incentive for customers to order from those businesses
 - Non-black owned businesses still had delivery fees
- At least **8,500** claims for arbitration have been filed over what have been described as “discriminatory delivery fees”
- At least one customer demand for arbitration alleged that this violates the Unruh Act and statutory damages and an injunction are being sought

Uber Eats Continued...

- *Koire* Court held “[i]t would be no less a violation of the Act for an entrepreneur to charge all homosexuals, or all nonhomosexuals, reduced rates in his or her restaurant or hotel in order to encourage one group's patronage and, thereby, increase profits. The same reasoning is applicable here, where reduced rates were offered to women and not men.”
- “The legality of sex-based price discounts cannot depend on the subjective value judgments about which types of sex-based distinctions are important or harmful.”

Unruh Act Applies to Websites

- Davis v. BMI/BMD Travelware (Colorado Bag'n Baggage)
 - San Bernardino Superior Court (March 21, 2016)
 - Court granted motion for summary judgment holding that plaintiff had “presented sufficient evidence that he was denied full and equal enjoyment of the goods, services, privileges and accommodations offered by [Colorado Bag'n Baggage.]”
 - Court ordered defendant to:
 - Pay plaintiff \$4,000 in statutory damages
 - Make their website “accessible” or terminate the website
 - Plaintiff may seek attorneys’ fees and costs

What Comes Next? – Legislation

- **The Online Accessibility Act (HR 1100)**
 - Introduced on February 8, 2021
 - By-partisan support – Sponsored by Lou Correa (D-CA) and Richard Hudson (R-NC) and Ted Budd (R-NC)
 - Amends the ADA to set forth requirements for consumer-facing websites and mobile applications
 - Opposed by advocacy groups

What Comes Next? – Regulations

■ Department of Justice – Rule Making

- Early indications that the Biden Department of Justice will engage in rule making
- Some predictions think there will be a Notice of Proposed Rule Making by the fall

What Comes Next? – DOJ Enforcement Actions

- **No DOJ Enforcement Actions During Trump Administration**
- **Multiple DOJ Enforcement Actions During Obama Administration**
 - *H&R Block* (March 25, 2014)
 - *Peapod Grocery* (November 14, 2014)
 - *Nat'l Museum of Crime and Punishment* (Jan. 13, 2015)
 - *Carnival Corporation* (July 13, 2015)
 - *edX* (April 2, 2015)
- **Expectation: Biden Administration will look more like Obama than Trump**

Best Practices

- **Team Up with Digital / Web Expert for Compliance Audit**
- **Formulate Action Items to Make Digital Assets More Accessible**
- **Develop Timeline for WCAG 2.1 AA Compliance**
 - DOJ typically allows up to 18 months
 - Private lawsuits typically allow 25 months
- **Implement Policy / Statement**

Questions or Comments?

John G. McDonald

jmcdonald@mcguirewoods.com

1 704 343 2276

Sabrina A. Beldner

sbeldner@mcguirewoods.com

1 310 956 3419

Elizabeth P. Redpath

eredpath@mcguirewoods.com

1 804 775 1184