

MEMO# 20960

March 15, 2007

Website Retailer Sued By The National Federation Of The Blind Alleging Violations Of The Americans With Disabilities Act

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TO: TECHNOLOGY ADVISORY COMMITTEE No. 10-07 RE: WEBSITE RETAILER SUED BY THE NATIONAL FEDERATION OF THE BLIND ALLEGING VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT

Last March, the National Federation of the Blind (the “Plaintiffs”) sued a website retailer (the “Defendant”) in a class action filed in the U.S. District Court for the Northern District of California, San Francisco Division, alleging violations of the Americans with Disabilities Act (“ADA”) and related California laws. [\[1\]](#) The lawsuit alleges that the Defendant violated these laws by making its website inaccessible to the blind, thereby violating federal and state laws prohibiting discrimination against the disabled. Though the Defendant sought to have the suit dismissed based upon the Plaintiffs’ failure to state a claim, the court has determined that certain claims in the Plaintiffs’ suit may proceed. This case raises issues concerning the legal obligations imposed on website operators under the ADA, which was enacted in 1990, before the World Wide Web was widely used and before the existence of retail web pages. [\[2\]](#) The arguments raised in this action, and the court’s reasoning in ruling on the Defendant’s motion to dismiss are summarized below. [\[3\]](#)

I. Background

Title III of the ADA prevents discrimination against the disabled in “a place of public accommodation.” “Discrimination” under the ADA includes the denial of opportunity, by the disabled, to participate in programs or services, and providing the disabled with

separate, but unequal, goods or services. To ensure that the disabled have full and equal enjoyment of the goods and services of places of public accommodation, the ADA requires “reasonable modification” of policies, practices, and procedures, the provision of auxiliary aids to ensure effective communication with the disabled, and the removal of architectural and communications barriers.

In 1998, Congress passed the Workforce Rehabilitation Act. Section 508 of this Act requires that all federal agencies purchase only accessible Electronic and Information Technology (“IT”). An advisory committee empanelled by the U.S. Access Board proposed Accessibility Standards for the government to comply with Section 508. These standards became effective in June 2001 for all purchases of IT by federal agencies. The imposition of these standards on federal agencies led to the development in the private sector of compliant IT products. Around this same time, the World Wide Web Consortium released the Web Content Accessibility Guidelines (“WCAG”), which include provisions similar to the Section 508 Web Accessibility Standards.

The protocols developed under Section 508 and the WCAG rely heavily on the use of “alternative text.” With alternative text, pictures that are links or active buttons (e.g., “Search”) on a website have a text equivalent that is the function of the button or link. For pictures that provide information, the text equivalent conveys the same information. Images that are just for decoration or formatting purposes have a text equivalent too, which is called the null or empty text equivalent. The null text equivalent tells assistive technology to ignore the picture. A blind individual can use screen reader software, which vocalizes the alternative text and describes the content of the webpage. If the screen reader can read the navigation links, a blind individual can navigate the site with a keyboard instead of a mouse. This is important because “the keyboard as a replacement for the mouse is absolutely essential for some people with disabilities.” [\[4\]](#) According to the Plaintiffs’ suit, designing a website to be accessible to the blind “is technologically simple and not economically prohibitive.” [\[5\]](#)

II. The Defendant’s Motion to Dismiss; The Court’s Holdings

In this case, the Defendant website is owned by a “bricks and mortar” nationwide retail chain. Users of the Defendant’s website can purchase many of the items available in the related retail stores as well as access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons that can be redeemed at the store. Because of the connection between the website and the retail stores, the Plaintiffs argue that the ADA applies to the Defendant’s website. In response, the Defendant argues that the ADA only applies to physical spaces – not to websites. Defendant additionally argues that, if the ADA is applied to websites, such application will violate the dormant commerce clause of the U.S. Constitution. The court’s discussion of the issues raised in the Defendant’s motion to dismiss is summarized below.

A. The Plaintiffs’ ADA Claims

The Plaintiffs’ legal theory under the ADA is that unequal access to the Defendant’s website denies the blind the full enjoyment of the good and services offered at the related retail

stores, which are places of public accommodation. The Defendant contends that, as a website, it is not a place of public accommodation and therefore cannot be sued under the ADA. The Defendant further contends that if the website is the alleged service of the retail stores, it still has not violated the ADA because the ADA prohibits only discrimination occurring on the premises of a place of public accommodation, and discrimination is limited to the denial of physical entry to, or use of, a space, and the Defendant has not denied Plaintiffs physical access to its related retail stores. The court addressed each of the Defendant's arguments in turn.

1. A Place of Public Accommodation

The court began by noting that under the law of the Ninth Circuit, a "place of public accommodation" within the meaning of Title III of the ADA is a physical place. The Third, Sixth, and Eleventh Circuit Courts have joined the Ninth Circuit in this view. It next considered the issue of whether the ADA applies to the services of a public accommodation or only those services *in*

2. Conduct Constituting Discrimination

The court next considered Defendant's argument that, in order for the Plaintiffs' claims to be actionable under the ADA, the off-site discrimination must deny physical access to the Defendant's brick-and-mortar stores. In considering this issue, the court noted that the purpose of the ADA is broader than mere physical access and extends to actions or omissions that impair a disabled person's "full enjoyment" of the services or goods of a covered accommodation. Considering this broader purpose with the facts presented, the court noted that many of the benefits and privileges of the website are services of the related retail stores and that the challenged services are heavily integrated with the brick-and-mortar stores and operate in many ways as a gateway to the stores. According to the court, the case law does not support the Defendant's attempt "to draw a false dichotomy between those services which impede physical access to a public accommodation and those merely offered by the facility." [6] Because Plaintiffs have alleged that the inaccessibility of the website denies the blind the ability to enjoy the services of related retail stores, the court found the Defendant's argument unpersuasive and declined to dismiss the case for failure to allege a denial of physical access to the retail stores.

3. The Auxiliary Aid Provisions in the ADA

The Defendant next argued that under the "auxiliary aid provisions" of the ADA the court should dismiss the Plaintiffs' action because public accommodations are explicitly exempted from having to provide auxiliary aids or services to the disabled if doing so would fundamentally change the nature of the good or service or result in an undue burden. In considering this issue the court noted that, in regulations implementing the ADA, the Department of Justice has noted that the ADA obligates public accommodations to communicate effectively with customers who have disabilities concerning hearing, vision, or speech. So, for example, under the ADA a restaurant must ensure that an employee is available to explain a menu to a blind customer and a museum offering audio tours must provide alternative formats of the tour that a deaf person could use. However, the ADA's public accommodation requirements do not require a public accommodation to alter the

nature or mix of good it provides. Instead, the requirements are intended to ensure that the public accommodation communicates with customers in formats that accommodate the disabled. So, for example, a bookstore is not required to stock books in Braille and a restaurant is not required to have menus printed in Braille so long as waiters are available to explain the menu. According to the Defendant, so long as it provides the information contained on its website in some other format (e.g., by telephone), it need not modify its website. In response, the court noted that the issues of whether reasonable accommodations have been provided is an affirmative defense that can be asserted once the Plaintiffs have stated a claim. As such, raising this issue in a motion to dismiss is premature and the court declined to dismiss the action on this basis.

4. The Court's Holding on the Defendant's ADA Arguments

In summary, on the Defendant's claim that the Plaintiffs' have failed to state a claim under the ADA the court ruled that:

...to the extent that Plaintiffs allege the inaccessibility of [the website] impedes the full and equal enjoyment of goods and services offered in [the related retail stores], the Plaintiffs state a claim and the motion to dismiss is denied. To the extent that [the website] offers information and services unconnected to [the retail stores], which do not affect the enjoyment of goods and services offered in [the retail stores], the Plaintiffs fail to state a claim under Title III of the ADA. [\[7\]](#)

Accordingly, the Defendant's motion to dismiss on this basis was denied in part and granted in part.

B. The Plaintiffs' Claims under California Law

On the Plaintiffs' claims under California's Unruh Civil Rights Act and Disabled Persons Act, the court noted that a violation of the ADA constitutes a violation under each of these acts. Because the Plaintiffs were able to state a claim under the ADA, the court decided it was unnecessary to reach a decision on the Defendant's challenge to the Plaintiffs' claims under these acts.

C. The Defendant's Commerce Clause Arguments

The Defendant argued that, even if the Plaintiffs are able to state a claim under the California Acts, applying those acts to regulate the Defendant's website violates the dormant commerce clause [\[8\]](#) by regulating (1) conduct occurring wholly outside of California and (2) an area of commerce that is reserved exclusively for Congress.

1. California's Extraterritorial Regulation of the Internet

The court first considered the Defendant's argument that California's Acts would regulate commerce beyond the borders of California. The court noted that, while some courts have

invalidated state laws regulating the Internet on the grounds that *any* regulation of the Internet regulates conduct occurring outside the borders of the state, other courts have held that states may regulate the Internet without violating the commerce clause. For examples, courts have upheld state anti-spam laws by distinguishing the regulation of e-mail from the regulation of Internet postings because e-mail messages can be targeted to recipients in particular geographic areas whereas Internet postings are available to any Internet user regardless of location. Similarly, courts have upheld statutes that were intended to apply only to local conduct or those the state would only enforce with respect to conduct occurring in the state.

The Defendant attempted to distinguish the Plaintiffs' claims from claims that have been upheld under the dormant commerce clause by arguing: (1) those cases did not directly regulate the Internet because they did not involve the programming of a website; (2) none of the laws in those cases controlled conduct beyond the borders of the states; and (3) the practical effect of regulating the Defendant website is to regulate conduct outside of California because of the nature of the Internet.

In response to the Defendant's first argument, the court found it "factually correct but legally meaningless" because programming of a website has no heightened constitutional or statutory protection. On Defendant's second point, the court noted that, while criminal laws are not enforced against conduct occurring outside the state, this is generally true of civil statutes as well so conduct occurring in other states would be unaffected by the law in question. On Defendant's third point, the court noted that because the Defendant's website is a website that is viewed by customers nationwide, a modification mandated by California necessarily regulates the transactions of customers in other states who use the website. The Plaintiffs countered that it is technologically and economically feasible to establish a separate website directing visitors to the website to a California-specific site that is in compliance with state laws and avoids a commerce clause violation. On balance, the court did not find the Defendant's argument on the issue of extraterritorial impact persuasive:

Defendant's argument – that if this court applies the Unruh Act and the Disabled Persons Acts to [the Defendant's website], the practical effect will be to force it to modify its website for all customers nationwide – is not sustainable. This assumes that [the Defendant] would decline to design a separate California site, and instead simply modify its [current website] for consumers nationwide. . . . The commerce clause is not necessarily implicated since [the Defendant] could choose to make a California-specific website.

Indeed, even if [the Defendant] chooses to change its entire website in order to comply with California law, this does not mean that California is regulating out-of-state conduct. Courts have held that when a Defendant chooses to manufacture one product for a nationwide market, rather than target its products to comply with state laws, Defendant's choice does not implicate the commerce clause. [\[9\]](#)

The court found that it would be premature for the court to determine what the practical effect of imposing California's accessibility requirements on the Defendant would be.

2. Regulation of the Internet is the Exclusive Province of Congress

Finally, the court considered the Defendant's argument under the dormant commerce clause that regulating the Internet is the exclusive province of Congress. It noted that several courts have held that only Congress can regulate the Internet because it requires uniform, national regulations. On the other hand, the court noted that a state's ability to extend benefits or protections to its citizens through laws is not necessarily precluded by the failure of Congress to act. According to the court, the lack of Congressional action explicitly to address accessibility requirements for private websites should not be construed to bar California from extending its legal protections to websites. Rather than reaching any definitive conclusion on this issue, the court held that the commerce clause is not triggered at this preliminary stage in the proceedings and thus the court declined to rule on it for purposes of the Defendant's motion to dismiss.

III. The Plaintiffs' Motion for a Preliminary Injunction

The Plaintiffs sought issuance of a preliminary injunction during the pendency of these proceedings. The court found that it would be premature for it to rule on an injunction because there are sufficient questions raised in the proceeding with respect to whether the average blind person is able to access the Defendant's website. In the court's view, if it were to grant the Plaintiffs' request for an injunction, it would require the Defendant to take affirmative steps, with the attendant man-hour and monetary expenditures while the case was pending. Absent a showing that the relevant law and facts are clearly in favor of the Plaintiffs – which the Plaintiffs could not make – the court denied their request for a preliminary injunction.

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endnotes

[1] See Amended Complaint for Injunctive and Declaratory Relief and Damages, National Federation of the Blind v. Target Corporation, Case No. C 06-01802 MHP (N.D. Cal. Mar. 30, 2006) , which is available at: http://www.dralegal.org/downloads/cases/target/nfb_v_target_complaint.pdf. Violation of the ADA constitutes a violation of California's Unruh Civil Rights Act and Disabled Persons Act.

[2] In 1996 the Civil Rights Division of the U.S. Department of Justice stated “[c]overed entities under the ADA are required to provide effective communication through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.” See Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Senator Tom Harkin, dated Sept. 9, 1996, which is available at: <http://www.usdoj.gov/crt/foia/tal712.txt>.

In 2004, New York Attorney General Elliot Spitzer announced settlements with Priceleline.com (which has no physical presence) and Ramada.com (which has a related physical presence) in an action asserting that the inaccessibility of their websites to the visually impaired violated the ADA. In settling this proceeding, the two companies agreed to make their websites accessible by implementing standards under the World Wide Web Consortium. The Attorney General's press release on this action is available at: http://www.oag.state.ny.us/press/2004/aug/aug19a_04.html.

[3] See Memorandum & Order, National Federation of the Blind v. Target Corporation Case No. C 06-01802 MHP (N.D. Cal. Sept. 5, 2006) (the "Order"), which is available at: http://www.dralegal.org/downloads/cases/target/062_order_deny_PI_grant_part_MTD.pdf.

[4] See Expert Declaration of Dr. James W. Thatcher in Support of Plaintiffs' Motion for Preliminary Injunction, National Federal of the Blind v. Target Corporation, Case No. C 06-01802 MHP (N.D. Cal. Apr. 2006) at p. 8. This Expert Declaration is available at: <http://jimthatcher.com/target/jwtdeclaration.pdf>.

[5] Order at p. 2.

[6] Order at p. 9.

[7] Order at p. 11.

[8] The dormant commerce clause is a long-standing legal doctrine in U.S. Constitutional law that limits the power of states to legislate in ways impacting interstate commerce. The premise of the doctrine is that the U.S. Constitution reserves for Congress the exclusive power to regulate commerce among the states and therefore by extension, individual states are excluded from, or limited in, their ability to legislate on such matters.

[9] Order at pp. 17-18.