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Discrimination - American with Disabilities Act - United States District Court for the Southern District of Florida Holds That an Internet Website Is Not a Place of Public Accommodation: *Access Now, Inc. v. Southwest Airlines, Co.*

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DISCRIMINATION—AMERICANS WITH DISABILITIES ACT—UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA HOLDS THAT AN INTERNET WEBSITE IS NOT A PLACE OF PUBLIC ACCOMMODATION: *ACCESS NOW, INC. V. SOUTHWEST AIRLINES, CO.*

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IN ORDER TO eliminate discrimination and provide equal opportunities for individuals with disabilities, Congress enacted the Americans with Disabilities Act (ADA) in 1990.[1] Title III of the ADA prohibits discrimination in "place[s] of public accommodation."[2] Since Congress enacted the ADA, the world has seen major advances in technology and a dramatic increase in the use of the Internet.[3] Recently, in *Access Now, Inc. v. Southwest Airlines, Co.*,[4] the District Court for the Southern District of Florida had the opportunity to apply the ADA in this new marketplace. However, the court dismissed the case, finding that an airline website is not a place of public accommodation since it is not "a physical, concrete structure."[5] By narrowly construing this term, the court disregarded Congress' stated purpose in enacting the ADA[6] and failed to apply the Act in a modern society. Further, the court's second finding, that the plaintiffs failed to establish a nexus between the website and "a physical, concrete place of public accommodation,"[7] lacks merit because the court

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1 Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

2 *Id.* § 12182(a).

3 Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002).

4 *Id.*

5 *Id.* at 1318-19.

6 42 U.S.C. § 12101(b).

7 *Access Now*, 227 F. Supp. 2d at 1321.

fails to adequately distinguish Eleventh Circuit precedent on this issue. Consequently, individuals with disabilities, namely blind individuals, are unable to pursue the same opportunities on the Internet afforded to individuals who have their sight.

Southwest Airlines operates a website which provides customers with the means to purchase airline tickets, check fares and schedules, and stay up-to-date on sales and promotions.[8] A significant portion of the airline's business is derived from the Internet.[9] Although assistive technologies are available, which convert text and graphics to audio signals, Southwest's website does not provide the "alternative text" needed to utilize these systems.[10] Thus, while it is "technically possible" for a blind person to purchase tickets via the website, the plaintiffs in this case assert that it is "extremely difficult."[11]

Access Now, "a non-profit, access advocacy organization for disabled individuals," and Robert Gumson, a blind individual, filed suit in the United States District Court for the Southern District of Florida seeking injunctive and declaratory relief.[12] The plaintiffs alleged that Southwest operated its website in violation of the ADA, since the goods and services offered at the "virtual ticket counters" are inaccessible to blind persons.[13] In response, the court granted Southwest's motion to dismiss the complaint.[14]

Judge Seitz addressed the issue of whether an Internet website is a place of public accommodation under the ADA.[15] The court noted that the statute identifies twelve categories of public accommodation.[16] In addition, the court cited *Rendon v. Valleycrest Productions, Ltd.* for the proposition that "the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation."[17] While finding that the plain and unambigu-

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[8] *Id.* at 1315.

[9] *Id.* (reporting "that approximately 46 percent, or over $500 million, of its passenger revenue for first quarter 2002 was generated by online bookings via southwest.com").

[10] *Id.* at 1314-16.

[11] *Id.* at 1316 n.3.

[12] *Id.* at 1314.

[13] *Id.*

[14] *Id.* at 1316.

[15] *Id.* at 1317.

[16] *Id.*

[17] *Id.* at 1318 (citing Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283-84 (11th Cir. 2002)).

ous language of the statute does not include websites, the court nevertheless addressed the plaintiffs allegation that the website falls within the scope of Title III as "a place of exhibition, display and a sales establishment."[18] In rejecting this assertion, the court explained that those terms must be viewed in the specific context in which they were placed and, under the rule of ejusdem generis, general words that follow specific enumerations "should be limited to persons or things similar to those specifically enumerated."[19] The court stated that the general terms relied upon by the plaintiffs corresponded to specifically enumerated physical, concrete structures that restrict the meaning of the general terms so as to exclude websites from their scope.[20] Accordingly, the court concluded that Southwest's Internet website was not a place of public accommodation.[21]

The second issue addressed by the court was whether the plaintiff established a sufficient nexus between the website and a physical, concrete place of public accommodation.[22] Although the plaintiffs argued that the First Circuit, in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, held that a public accommodation is not limited to actual physical structures, the court dismissed the relevant language as dicta and noted that the Eleventh Circuit "has not read [the statute] nearly as broadly."[23] The court also dismissed as dicta language in *Doe v. Mutual of Omaha Insurance Co.*, a Seventh Circuit case which recognized a website as a facility within the core meaning of the statute.[24] Further, the court found the holding in *Martin v. Metropolitan Atlanta Rapid Transit Authority*, which stated that a website violated the ADA because it could not be read by sight-impaired persons using screen readers, unconvincing since the case was brought under Title II of the Act instead of Title III.[25] Lastly, the court distinguished *Rendon*, which found a sufficient "nexus between the challenged service and

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[18] *Id.*

[19] *Id.* (citing Allen v. A.G. Thomas, 161 F.3d 667, 671 (11th Cir. 1998) (quoting United States v. Turkette, 452 U.S. 576, 581-82 (1981))).

[20] *Id.* at 1319.

[21] *Id.*

[22] *Id.*

[23] *Id.* (analyzing Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994)).

[24] *Id.* at 1319 n.9 (refusing to follow Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999)).

[25] *Id.* at 1319 (rejecting Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362 (N.D. Ga. 2002)).

the premises of the public accommodation," by comparing the geographic nature of a television studio with the lack of any specific geographic location associated with a website.[26] Thus, the court concluded that the plaintiffs were unable to show that Southwest's website impeded "their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency."[27]

Although the court correctly articulated that the initial step in statutory construction is to look at the statute's plain and unambiguous meaning,[28] the court incorrectly narrowed the meaning of the provision under consideration. The court interpreted the statute as having an implicit requirement that a public accommodation be a "physical, concrete structure," since many of the entities listed in the statute may be categorized this way.[29] First, as recognized by the court, the statute does not explicitly impose this requirement.[30] Instead, a public accommodation is defined as a private entity whose operations affect commerce and whose enterprise falls into one of the twelve enumerated categories.[31] These categories include sales establishments: "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;" and service establishments: "a laundromat, dry-cleaner, bank, . . . travel service, . . . or other service establishment."[32] Not only is the listing of a travel service directly on point, it also illustrates one example of the court's flawed interpolation that an entity must be a concrete, physical structure since many travel services operate exclusively on the Internet.[33] Further, even if Southwest's website is not considered a travel service, it fits within the plain meaning of a sales and/or service establishment and meets the statute's other requirements that it be a private entity whose operations affect commerce. Lastly, the court fails to recognize the historical context in which the statute was enacted. Although the Internet was

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[26] *Id.* at 1320-21 (quoting *Rendon*, 294 F.3d at 1284 n.8).

[27] *Id.* at 1321.

[28] *Id.* at 1317 (citing *Rendon*, 294 F.3d at 1283 n.6 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997))).

[29] *See id.* at 1317-19.

[30] *Id.* at 1317 (stating that the issue of whether an Internet website is a place of public accommodation "presents a question of statutory construction").

[31] 42 U.S.C. § 12181(7).

[32] *Id.* § 12181(7)(E)-(F).

[33] *See generally Carparts*, 37 F.3d at 19 (noting that "[m]any travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services").

present in 1990, it was not widely used as a means of conducting business and providing services as it is today. By ending all twelve of the enumerated categories with "or other" followed by a general term,[34] Congress declined to make the list exclusive and specifically allowed for a broader application of the statute to entities and industries related to those specifically enumerated. Reading the open-ended language with the purpose of the statute—to prohibit discrimination and provide equal opportunities for the disabled—Southwest's website falls within the scope of the ADA and the court erred in excluding it.

The court also erred in citing *Rendon* as authority for limiting the definition of a public accommodation to a physical, concrete place. Although this terminology is not used in the case to define public accommodation,[35] the court mistakenly reads it as implicit in the holding. *Rendon*, however, addressed the issue of whether Title III encompassed a claim involving hearing-impaired individuals screened from participation in a television quiz show through the use of a fast finger telephone selection process.[36] Since the defendants in *Rendon* conceded that the show took place at a public accommodation,[37] the court did not address the scope of the term. Thus, the court in *Access Now* lacks either statutory authority or case precedent for its narrow definition of public accommodation.

Regarding the second issue in *Access Now*, whether the plaintiff established a sufficient nexus between the website and a physical, concrete place of public accommodation, the court failed to follow precedent. The *Rendon* decision is on point, finding that "Title III covers both tangible barriers . . . and intangible barriers . . . that restrict a disabled person's ability to enjoy the defendant entity's goods, services, and privileges."[38] In fact, as the court noted, an entity's refusal "to provide a reasonable auxiliary service that would permit the disabled to gain access to or use its goods and services," may create an intangible barrier.[39] Further, the court in *Rendon* stated that discrimination, through the imposition of screening requirements, does not have to "occur on site to offend the ADA."[40] In an attempt

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[34] 42 U.S.C. § 12181(7).
[35] *See Rendon*, 294 F.3d at 1279-86.
[36] *Id.* at 1280.
[37] *Id.* at 1283.
[38] *Id.*
[39] *Id.* at 1284 n.7.
[40] *Id.* at 1283-84.

to distinguish *Rendon*, the court in *Access Now* focused on the different geographic character of television studios and websites.[41] Not only does this distinction contradict the general premise in *Rendon*, the elimination of barriers for the disabled, but it ignores the fact that the website is a portal to Southwest's ticket counters—concrete, physical places which squarely fall within the court's narrow characterization of a public accommodation. Just as the fast finger telephone selection process served as a "discriminatory screening mechanism"[42] for accessing a television studio, Southwest's website served as a screening mechanism for accessing its ticket counters. In both cases, intangible barriers impeded access to physical, concrete facilities. Accordingly, following precedent from *Rendon*, the court in *Access Now* should have found a sufficient nexus between Southwest's website and a place of public accommodation.

Further support for application of the ADA to websites may be found in other federal circuit and district court cases. Although the court in *Access Now* dismissed the language as dicta, *Doe* specifically states:

> The core meaning of [the] provision, plainly enough, is that the owner or operator of a store, hotel, . . . travel agency, theater, Web site, or other facility (whether in physical space or in electronic space . . .) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.[43]

Even more on point, the *Martin* court specifically found an ADA violation where a website for the Metropolitan Atlanta Rapid Transit Authority was not formatted to allow sight-impaired persons using screen readers to obtain information and schedule service.[44] Although the core facts in *Martin* were almost indistinguishable from those in *Access Now*, the court relied on the distinction between a Title II claim and a Title III claim.[45] This distinction is unconvincing. Although Title II applies to public entities, whereas Title III applies to private entities,[46] both provisions are part of the same Act and, where possible, should be construed consistently. Further, whether the claim is under Title II or Title III, both provisions have a

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[41] *Access Now*, 227 F. Supp. 2d at 1321.
[42] *Rendon*, 294 F.3d at 1286.
[43] *Doe*, 179 F.3d at 559.
[44] *Martin*, 225 F. Supp. 2d at 1377.
[45] *Access Now*, 227 F. Supp. 2d at 1319 n.9.
[46] *Id.*

common purpose, which is to eliminate discrimination toward disabled individuals. Therefore, although the court in *Access Now* failed to give weight to the decisions, these cases demonstrate the recognition in other circuits of the ADA's application in modern society.

While applying the ADA in this context may initially prove costly for entities, this should not serve as a barrier. As the marketplace continues to move toward globalization and heightened competition, businesses will look increasingly toward low cost methods, such as the Internet, for marketing and selling their goods and services. Accordingly, consumers will become increasingly dependent on the Internet as the source for those goods and services as businesses scale down other outlets, such as physical, concrete store locations. As more entities conduct business exclusively over the Internet, it is easy to foresee that disabled individuals will, in effect, be squeezed out of the market and left unable to pursue the same opportunities as nondisabled individuals. Given Congress' finding at the time the ADA was enacted, that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older,"[47] the magnitude of this effect in the future is distressing.

Even in today's marketplace, the result in *Access Now* is untenable given the stated purpose of the ADA, the plain language of the statute, and judicial precedent. As stated by the court in *Carparts*, "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not[;] Congress could not have intended such an absurd result."[48] The court in *Access Now* failed to see the forest through the trees and, thus, constructed a roadblock for blind individuals attempting to access the same opportunities over the Internet as sighted persons.

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[47] U.S.C. § 12101(a)(1).

[48] *Carparts*, 37 F.3d at 19.


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Index


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