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COMMENTARY

Does the ADA Require Drink Dispensers to Talk?

In April 2015, Mary West and Patricia Diamond visited a Moe's Restaurant, where they attempted to use a "Freestyle" drink dispenser, which allows customers to select from over 100 different beverages using a touch-screen interface. Both women are blind, and neither could use the dispenser's touch screen. They asked for assistance from restaurant employees, but were ultimately assisted by another customer instead. Eleven days later, they filed a class action lawsuit in the Southern District of New York against the franchisee that owned the restaurant, claiming that it violated the Americans with Disabilities Act ("ADA," "the Act") by using machines that lacked "adaptive features," such as a screen reader with audio descriptions and tactilely discernible control buttons that enable blind customers to use the dispensers independently.

In December 2015, siding with the restaurant, Judge William Pauley III dismissed the action. Understanding his reasons — and why his decision is important — requires a short review of the "auxiliary aids" standard of the ADA.

The Auxiliary Aids Standard

Title III of the ADA generally prohibits retailers and other public accommodations from discriminating against individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . . ."[1] The Act contains both "general prohibitions" and "specific prohibitions," that guide the interpretation of the Act's antidiscrimination rule. "General prohibitions" are principles of nondiscrimination applicable to all entities subject to Title III.[2] "Specific prohibitions" apply Title III's prohibitions to particular situations, and control over the general prohibitions in circumstances where both specific and general apply.[3]

The auxiliary aid standard is a specific prohibition that requires covered public accommodations to "take those steps that 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," unless providing that accommodation would "fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered, or would result in an undue burden."[4] "Auxiliary aids and services" include things like qualified interpreters, qualified readers, taped texts, modifying equipment or devices, and other similar services or actions.[5]

The obligation to provide auxiliary aids is grounded in the general obligation of public accommodations to

"effectively communicate" with disabled customers, clients, patients, and participants, as well as with their companions.[6] According to Department of Justice ("DOJ") regulations, "[i]n order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability."[7]

West v. Moe's Franchisor LLC

In *West v. Moe's Franchisor LLC*, Judge Pauley rejected the idea that the specific accommodation demanded by the plaintiffs was required by the ADA, dismissing their case.[8] He recognized that, although Title III requires "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation," the auxiliary aids standard is "flexible" and "[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place."[9]

He further explained that, while public accommodations "should" consult with disabled individuals to determine what auxiliary aid is needed, "the ultimate decision respecting what measures to take rests with the public accommodation, as long as it results in effective communication." For example, he noted that "a restaurant would not be required to provide menus in Braille for patrons who are blind, if the waiters in the restaurant are made available to read the menu."[10]

Ultimately, Judge Pauley held that the plaintiffs failed to state a claim for violation of Title III because disabled patrons could seek assistance from Moe's employees in using the Freestyle dispensers. He explained that the auxiliary aids standard permits restaurants "to use qualified readers to assist visually-impaired patrons with menu selections," and that "[n]othing in the ADA or its implementing regulations supports Plaintiffs' argument that Moe's must alter its Freestyle machines in a way that allows blind individuals to retrieve beverages without assistance."[11] He acknowledged that, while technological additions to the Freestyle machines might be both feasible and preferable, the law did not require the restaurant to acquire those additions. He also concluded that he could not infer from a single visit that the franchisee had failed to appropriately train its employees to assist customers with disabilities.[12]

Practical Implications for Businesses

West is an interesting case for a number of related reasons. First, the case illustrates the tension between the evolution and availability of advanced technology and the statutory obligation to provide an accommodation. Twenty-five years ago, Congress acknowledged that "technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities," and that "[s]uch advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities."[13] Courts seize on this and similar ADA legislative history to observe that "[a]s new devices become available, public accommodations must consider using or adapting them to help disabled guests have an experience more akin to that of nondisabled guests."[14]

But *West* confirms that the auxiliary aids standard does not *require* public accommodations to adopt the most advanced technology, merely because it becomes available. Instead, the focus of the auxiliary aids standard is on "effective communication". This is consistent with DOJ's regulatory guidance interpreting Title III, which acknowledges that the "use of the most advanced technology is not required," and that public accommodations have the right to "choose among various alternatives," so long as the result is effective communication.[15]

Second, *West* clarifies the relationship between independent use and third-party assistance. As noted above, DOJ's regulations urge that auxiliary aids and services should, among other things, protect "the privacy *and independence* of the individual with a disability."[16] Taken literally, this regulation could suggest that an auxiliary aid is not effective unless it empowers individuals with disabilities to use and enjoy a public accommodation's goods and services independently—that is, without the assistance of others. The plaintiffs in *West* urged Judge Pauley to require such independence, pointing to regulations requiring it for automated teller machines.[17] But preservation of independence should

not, as a definitional matter, be the *sine qua non* of an effective auxiliary aid. As Judge Pauley recognized, Title III and DOJ's regulations expressly recognize that third-party assistance, through qualified readers and interpreters, can qualify as effective auxiliary aids, depending on the circumstances, especially when privacy concerns are absent (as they were in merely obtaining one's preferred cola product).

Finally, *West* almost certainly has ramifications that reach far beyond drink dispensers in brick and mortar restaurants. In recent months, businesses and other public accommodations that maintain a presence on the internet have been barraged by demand letters and lawsuits in which the plaintiffs/claimants argue that websites are inaccessible to individuals who are blind or who have vision impairments *because* they fail to comply with certain accessibility guidelines published by the World Wide Web Consortium, commonly referred to as the "WCAG 2.0."[18]

Despite the certainty asserted in these claims, whether Title III applies to internet websites at all is far from a settled question.[19] And because WCAG 2.0 is comprised of privately issued "guidelines" that do not have the force of law, it remains unclear whether and to what extent WCAG 2.0 will be adopted as a legally enforceable Title III standard. The Department of Transportation has adopted WCAG 2.0 as the standard for airline website accessibility.[20] The Department of Health and Human Services so far has taken a different approach in its proposed Affordable Care Act nondiscrimination regulations.[21] And DOJ, which first proposed to issue Title III website accessibility regulations in July 2010,[22] remains undecided, predicting only that a notice of proposed rulemaking will be issued some time in 2018.[23] Unless DOJ promulgates enforceable regulations adopting WCAG 2.0 as the standard for website accessibility, *West*'s holding and rationale suggest that a website's failure to comply with WCAG 2.0 by itself is not a violation of Title III if (assuming accessibility is required) another accommodation or auxiliary aid is available.[24]

Although Judge Pauley expressed serious misgivings that the Amended Complaint could be rehabilitated, he gave the plaintiffs 45 days to re-plead. That deadline has passed, and the plaintiffs have neither taken him up on that invitation nor filed a Notice of Appeal. Although the Second Circuit will apparently not have the opportunity to weigh in, Judge Pauley's opinion provides helpful guidance regarding the nature and extent of Title III's auxiliary aid standard at a dynamic time in the development of adaptive technologies and accessibility standards.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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Endnotes

1 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201(a).

2 42 U.S.C. § 12182(b)(1); 28 C.F.R. §§ 36.202 – 36.212.

3 28 C.F.R. § 36.213.

4 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. §§ 36.303(a) & (g).

5 42 U.S.C. § 12103(1)(A)-(D). DOJ's regulations provide additional, and more technologically current, examples of "auxiliary aids and services," including on-site or video remote interpreting services, videotext display, screen reader software, and other effective methods of making visually delivered materials available to individuals with vision impairments. 28 C.F.R. § 36.303(b)(1)-(4).

6 28 C.F.R. § 36.303(c); *see National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 955-56 (N.D. Cal. 2006).

7 28 C.F.R. § 36.303(c)(1)(ii).

8 2015-CV-2846, 2015 U. S. Dist. LEXIS 165070 (S.D.N.Y. Dec. 9, 2015)

9 *Id.* at *6 & *7.

10 *Id.*

11 *Id.* at *9.

12 *Id.* at *10 - *11.

13 H.R. Rep. No. 101-485(II), at 108 (1990).

14 *Baughman v. Walt Disney World Company*, 685 F.3d 1131 (9th Cir. 2012); *see also, e.g., Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1163 (9th Cir. 2011).

15 28 C.F.R. pt. 36, App. B at 727-28 (2010).

16 28 C.F.R. § 36.303(c)(1)(ii) (emphasis added.)

17 Current ADA Accessibility Guidelines for ATMs do not by their terms apply to other types of interactive transaction machines like the Freestyle dispenser. *See* 36 C.F.R. pt. 1191 app. D, Advisory 707.

18 For more information on WCAG 2.0, see http://www.w3.org/TR/WCAG20/.

19 *Compare, e.g., Cullen v. Netflix, Inc.*, 2015 U.S. App. LEXIS 5257 (9th Cir. 2015) ("Netflix is not subject to the ADA"); and *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1319 (S.D. Fla. 2002) (the term "place of public accommodation" does not include southwest.com), *with, e.g., Nat'l Fed'n of the Blind v. Scribd Inc.*, 2015 U.S. Dist. LEXIS 34213 (D. Vt. 2015) (websites are public accommodations); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (same).

20 *See* Dep't of Transportation, Nondiscrimination on the Basis of Disability in Air Travel -- Accessibility of Websites and Automated Kiosks, 78 Fed. Reg. 67882 (Nov. 12, 2013).

21 *See* Dep't of Health & Human Services, Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172 (Sept. 8, 2015).

22 *See* Dep't of Justice, Advance Notice of Proposed Rulemaking, Accessibility of Web Information Services of State and Local Governments and Public Accommodations, 75 Fed. Reg. 43460 (July 26, 2010)

23 *See* Dep't of Justice, Fall 2015 Statement of Regulatory Priorities, http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html.

24 *See* Department of Justice, September 9, 1996 Letter to Senator Tom Harkin, http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal712.txt. (owners of inaccessible websites may provide web content in "other alternate accessible formats," including "Braille, large print, and/or audio materials"); Dep't of Justice, Advance Notice of Proposed Rulemaking, Accessibility Of Web Information And Services, 75 Fed. Reg. at 43466 ("covered entities with inaccessible Web sites may comply with the ADA's requirement for access by providing an accessible alternative, such as a staffed telephone line, for individuals to access the information, goods, and services of their Web site").