



MEMORANDUM

To: California Association of Mutual Water Companies

From: James Ciampa

Re: New Website Accessibility Court of Appeals Decision

Date: August 22, 2022

Over the past several years, we have heard many scary tales of potential liability for website accessibility violations of the Americans with Disabilities Act (the "ADA"). The situation has been worsened by the failure of the United States Department of Justice to provide any clarifying regulations, instead supplying only guidance on website accessibility issues.

A recent case from the California Court of Appeals for the Second District, which covers Los Angeles and Ventura Counties, provides some positive news on the website accessibility front. The case, *Martinez v. Cot'N Wash*, involved a claim under California's Unruh Act in connection with a retail website that was inaccessible to the visually impaired because it was not fully compatible with screen reading software. An Unruh Act violation requires either that the ADA is violated or that the plaintiff alleges sufficient facts demonstrating the website operator's discriminatory intent. Both the trial court and Court of Appeal ruled the website at issue was not a place of public accommodation to which the ADA applies. However, the important fact of this ruling is that the defendant business here did not have a physical location - it solely dealt with online sales. However, the court's analysis is helpful on the general website accessibility issue.

In this case, Cot'N Wash operates a public website that provides access to its products and services, including an online store. Cot'N Wash does not have a physical retail store at which it offers its products and services. The plaintiff was permanently blind and uses screen reading technology to access the internet and read content. The plaintiff discovered that Cot'N Wash's website lacked components that would make its website accessible to visually impaired persons who need to use screen reading technology.

After several rounds of correspondence between the parties' attorneys, the plaintiff filed his lawsuit against Cot'N Wash, alleging violation of the Unruh Act. Cot'N Wash filed a demurrer (motion to dismiss) to the plaintiff's complaint on the ground the complaint failed to allege sufficient facts to demonstrate a violation of the Unruh Act. The trial court granted the motion and dismissed the case and the plaintiff appealed.

On appeal, the Court of Appeal first determined that there were not sufficient facts stated in the complaint to show any intentional discrimination by Cot'N Wash - there were no facts alleged that showed "willful, affirmative misconduct with the intent to accomplish discrimination" on the basis of disability. The court rejected the plaintiff's argument that Cot'N Wash's failure to address the known discriminatory aspect of its website as alone being sufficient to establish intentional discrimination under the Unruh Act.

The court next turned to the ADA violation and reviewed the conflicting appellate court decisions in this area, with a particular focus on cases where no physical location is involved. The court emphasized the ADA's requirement that goods and services must be from "any place of public accommodation" for an ADA violation to possibly occur. The court identified the issue here as whether the Cot'N Wash website is a "place of public accommodation."

With respect to current case law, three federal circuits have held that websites are public accommodations. However, four federal circuits have ruled that websites are not public accommodations, but an ADA violation could occur if the denial to equal access to a website prevents or impairs a disabled person from enjoying the goods and services offered at the defendant business' physical facilities.

The court then looked at the plain language of the statute, maxims of statutory interpretation and legislative history. The court found that "place" as used in the statute overwhelmingly refers to a physical location. However, the court was not able to establish that as the "plain meaning" of the phrase "place of public accommodation," either through that plain language or through the ADA's legislative history.

The appellate court then applied a practical and common sense interpretation to the phrase. The court pointed out that Congress and the Department of Justice have been aware of the confusion in this area for many years. However, neither has taken action legislatively or by regulation to remedy the confusion. In fact, Congress has made other amendments to the ADA over the years but has not addressed the website accessibility issue despite specific calls from some members of Congress. The court interestingly stated, "Congress's failure to provide clarification in the face of known confusion - and, to a lesser extent, the DOJ's similar failure - is not a reason for us to step in and provide that clarification. To the contrary, it is a reason for us not to do so."

Based on its analysis, the appellate court concluded the language of the statute does not permit the court to adopt an interpretation of the statute that is not dictated by its language. The court ruled Cot'N Wash's website was not a place of public accommodation and thus no Unruh Act claim could be stated on that ground. The court therefore affirmed the trial court's granting of the dismissal.

Although most water suppliers have physical office locations, this appellate court decision is helpful in clarifying the legal distinction under the ADA and California's Unruh Act and may be helpful in the future to convince other courts that websites are not "places of accommodation" under any circumstances that would give to rise to liability under those statutes.