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## WINN-DIXIE DECISION REJECTS ADA COVERAGE OF WEBSITES, CALLS ON CONGRESS FOR CLARIFICATION

by Frank Cruz-Alvarez and Britta Stamps Todd

As physical stores continue to expand their online presence, courts around the country have debated whether, or to what extent, the Americans with Disabilities Act applies to websites. The Eleventh Circuit issued the most recent opinion on the topic last week in *Gil v. Winn-Dixie Stores, Inc.*, but unless and until Congress amends the ADA to detail its intent regarding websites and technology, the debate over these nuances will rage on.

Winn-Dixie operates grocery stores, and, like many of its competitors, it also operates a website. Importantly for this case, Winn-Dixie does not offer any sales directly through its website. Rather, customers can use the website for other functions, such as to re-fill existing prescriptions for in-store pickup and link digital coupons to their Winn-Dixie rewards card to automatically apply the coupons upon check out at a physical store. Even when a customer submits an order for a prescription refill on the website, they must go to the store to pay for and pick up the prescription.

The plaintiff, who is legally blind, shopped at Winn-Dixie for fifteen years and occasionally filled his prescriptions in store. While in store to re-fill a prescription, the plaintiff would ask an associate to guide him to the pharmacy, where he would tell the pharmacist what he needed. This process made plaintiff uncomfortable because he could not tell if anyone standing nearby could overhear his conversation about prescriptions. When the plaintiff found out about Winn-Dixie's website, he tried to access the website to request his prescription refills online. To access websites, the plaintiff uses screen-reading technology that vocalizes the website content. But the plaintiff discovered Winn-Dixie's website was incompatible with screen-reading technology, rendering it inaccessible to him or other visually impaired customers.

The plaintiff filed suit against Winn-Dixie for a violation of Title III of the ADA, 42 U.S.C. §§ 12181-12189. The case eventually proceeded to a bench trial, after which the district court entered judgment for the plaintiff. The district court sidestepped the question of whether the website was a place of public accommodation "in and of itself," and instead concluded that the website was so "heavily integrated" with Winn-Dixie's physical stores that it "operates as a gateway to physical store locations." Among the relief granted was an injunction requiring Winn-Dixie to make its website accessible to individuals with disabilities, provide training on web accessibility to its relevant employees, and conduct regular website accessibility tests.

On appeal, the Eleventh Circuit first held that a website, in and of itself, is not a place of public accommodation under Title III of the ADA. The Eleventh Circuit reiterated the twelve categories of public accommodations listed in the ADA, which explicitly includes a "grocery store." The court

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also noted that the Department of Justice—which is responsible for promulgating regulations to implement the ADA—has also explained the meaning of a public accommodation, and likewise included a “grocery store” as a physical space constituting a place of public accommodation. But neither the ADA itself, nor the regulations or explanations provided by the DOJ, include websites as places of public accommodation. The Eleventh Circuit found the ADA’s plain language to be clear and unambiguous—the listed locations include only “tangible, physical places” but no “intangible places or spaces.” Based on that interpretation, the court held that websites are not places of public accommodation under Title III of the ADA, so the plaintiff’s inability to access the website itself is not a violation of Title III.

But the analysis does not stop there. The ADA’s general discrimination prohibition extends to instances where a place of 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.” 42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added). Other circuits have used a “nexus” standard, allowing a plaintiff to establish a Title III violation by demonstrating that a “nexus” exists between the auxiliary aid and the physical public accommodation. See, e.g., *Robles v. Domino’s Pizza LLC*, 913 F.3d 898 (9th Cir. 2019). The Eleventh Circuit clarified that it has not adopted any such nexus standard in its precedent, and declined to do so in *Gil*. Instead, the court reasoned that although the plaintiff’s screen-reading technology is an auxiliary aid and the plaintiff could not access the website with the auxiliary aid, Winn-Dixie did not prevent him from accessing services offered in its physical stores.

Judge Pryor issued a lengthy dissenting opinion, in part arguing that the lack of accessibility of Winn-Dixie’s website violated the ADA because it did not provide comparable experiences to disabled and non-disabled customers. In the absence of any express definition in the ADA of what constitutes “goods, services, privileges, or advantages,” the dissent reasoned that the prescription refill and coupon-linking functions of Winn-Dixie’s website constitute a “service, privilege, or advantage” because those functions offer privacy and time-saving benefits to able-bodied customers. The majority rejected this broad interpretation and held that while the privacy and time-saving benefits “might make the provision of ‘auxiliary aids and services’ *reasonable*,” they are not “*necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated different than other individuals because of the absence of auxiliary aids.” (emphasis in original).

Just as the majority rejected a broad reading of “services, privileges, or advantages,” so too must companies avoid a broad interpretation of this opinion and assume their website does not need screen-reading technology. The devil remains in the details for ADA lawsuits. The Eleventh Circuit may very well have reached a different outcome had Winn-Dixie’s website allowed customers to fully check out on their website, rather than requiring them to go to the physical store to pay for and pick up their refilled prescription. Many other websites, such as the Domino’s Pizza app at issue in the Ninth Circuit’s *Robles* decision, allow customers to order goods for at-home delivery. If those websites are inaccessible to visually-impaired customers, the evaluation shifts entirely. While websites are now definitively not considered places of public accommodation in and of themselves (at least within the Eleventh Circuit), lack of access to a website may still give rise to violations of Title III of the ADA.

The in-depth analysis required for each new case prompted the majority to close the *Gil* opinion with an invitation to Congress to broaden the definition of “places of public accommodation” to include websites if it intends to extend ADA liability beyond physical locations and into intangible, online access as well.