

'Place of Public Accommodation' Targets Internet

By Annie Kernicky

UNDER TITLE III OF THE AMERICANS WITH DISABILITIES Act (ADA), no individual may be discriminated against on the basis of disability with regards to the full and equal enjoyment of the goods, services, facilities or accommodations at any place of public accommodation. Title III typically has been interpreted to apply to such brick-and-mortar places as restaurants, hotels, stores,



Photo by Thomas E. Rogers

Sarah R. Lavelle, co-chair, Labor & Employment Law Committee (center); with Katherine W. Fogarty, associate (left); and Philip R. Voluck, managing partner, Kaufman Dolowich Voluck; at the Committee's meeting on Oct. 6.

schools and commercial facilities. However, the Internet and digital world have grown exponentially since the ADA was enacted in 1990, leading federal agencies, courts and lawyers to struggle with whether the virtual world of websites qualify as "place[s] of public accommodation."

On Oct. 6, Philip R. Voluck, managing partner, and

Katharine W. Fogarty, attorney, at Kaufman Dolowich Voluck, presented to the Labor and Employment Law Committee on this timely issue of web accessibility under the ADA.

Under the ADA, a "place of public accommodation" must fall within the following three criteria: it must be operated by a private entity, its operations must affect commerce and it must fall within one of the 12 categories of public accommodation. Because the ADA does not specifically state whether it applies only to brick-and-mortar versus digital "places," Voluck explained that businesses of all types are now being threatened with digital and website accessibility claims. Voluck noted that there are approximately 75 suits currently pending in federal courts against companies for allegedly inaccessible websites. These suits, Voluck explained, are across the country – including many in Pennsylvania – but are primarily brought by the same group of plaintiffs.

Despite the burgeoning litigation, the circuit courts are split on the issue of whether the ADA applies to websites, Voluck said. The Third, Ninth, and Eleventh Circuits apply the ADA only to websites that have a brick-and-mortar physical space, while the Second and Seventh Circuits apply the ADA even without a connection to a physical space, Voluck said. Adding even more confusion, Voluck noted, the Department of Justice (DOJ), which is responsible for ADA Title III enforcement, will not be issuing formal guidelines until at least 2018. Voluck said that the DOJ has, however, explicitly stated that it expects public accommodations to cover making websites accessible. Because up to 20 percent of Americans have some type of disability, whether that be visual, hearing, motor or cognitive, Voluck said the issue could have a significant effect on businesses and other entities with a public website.

Private standards, such as the Web Content Accessibility Guidelines (WCAG 2.0), provide guidance and suggestions as to what websites need to do to be ADA compliant, Fogarty said. For example, the WCAG 2.0 guidelines provide checkpoints as to "all non-text content (with certain exceptions) presented to the user should have an equivalent text alternative," and "web pages have titles that describe topic or purpose."

The good news for the owners of websites is that Title III of the ADA does not provide for the payment of compensatory damages to a plaintiff. Instead, the law provides only for limited relief in the form of remediation of the inaccessibility issues, and the payment of attorneys' fees and costs, Voluck said.

Voluck explained that typical settlement terms of a web accessibility claim include the adoption of a website accessibility policy, training related to specific job responsibilities, achieving substantial compliance with the WCAG 2.0 guidelines, and a monetary component. If the DOJ is involved, the agreement will not be confidential, he said. Given the threat of litigation, the current lack of official guidelines, and the split in circuits, this emerging area of law is expected to grow along with the digital world. Law firm websites may be the next target, Voluck concluded. As a result, he recommended that all owners of websites, including law firms, look into updating their website accessibility – both to comply with the law and to reach the estimated 20 percent of the population with a disability.

Annie Kernicky (annie.kernicky@flastergreenberg.com), associate at Flaster/Greenberg, is an associate editor of the Philadelphia Bar Reporter.

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