

RETAILERS BEWARE: YOU MAY HAVE TO MAKE YOUR WEBSITES ACCESSIBLE TO THE BLIND UNDER THE A.D.A.

By: Spencer C. Skeen and B. Allison Borkenheim

On September 6, 2006, a federal district court judge ruled that a retailer may be sued if its website is inaccessible to the blind. The ruling was issued in a case brought by the National Federation of the Blind ("NFB") against Target Corporation in the United States District Court for the Northern District of California, (Case No. C 06-01802 MHP).

The case was brought by the NFB, the NFB of California, and Bruce Sexton, a blind college student. The suit charges that Target's website (www.target.com) is inaccessible to the blind, and therefore violates the Americans with Disabilities Act ("ADA"), the California Unruh Civil Rights Act, and the California Disabled Persons Act. Generally, the ADA prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations of any place of public accommodation." The ADA defines "place of public accommodation" as "a facility, operated by a private entity, whose operations affect commerce."

The suit was filed as a class action on behalf of all blind Americans who "are being denied access to Target.com." The plaintiffs charge that: (1) Target.com fails to meet the minimum standard of web accessibility; (2) it lacks an invisible code embedded beneath graphic images that allows screen readers to detect and vocalize a description of the image to a blind computer user; (3) it contains inaccessible image maps and other graphical features, preventing blind users from making use of all of the functions of the website; and (4) because the website requires the use of a mouse to complete a transaction, blind Target customers are unable to make purchases on Target.com independently.

The plaintiffs originally filed the complaint in Alameda Superior Court on February 7, 2006. The case was removed to federal district court and assigned to Judge Marilyn Patel. Target filed a motion to dismiss the case, arguing that there is no law requiring Target to make its website accessible to the blind. The court denied Target's motion to dismiss and held that the federal and state civil rights laws do apply to a website such as Target.com.

Judge Patel rejected Target's argument that only its physical store locations were covered by the civil rights laws. The judge reasoned that the case could continue because the plaintiffs alleged that "the inaccessibility of Target.com denies the blind the ability to enjoy the services of Target stores." She, however, dismissed the plaintiffs' claims "[t]o the extent that Target.com offers information and services unconnected to Target stores. . . ."

Judge Patel also refused to grant the plaintiffs' request for a preliminary injunction which would have forced the company to make its site readily accessible to and usable by blind persons within 90 days.

Discussion

In her ruling, Judge Patel stressed the importance of the connection between the brick-and-mortar Target stores and its website, citing witness testimony that individuals often searched the website prior to making purchases at Target's physical store locations. The court believed that the ADA applied to a website, to the extent the website is an extension of the physical store location, and part of its overall integrated merchandising efforts.

Although the ruling indicates retailers may have to make their websites accessible to the blind, the decision turned on the fact that there was a connection between the website and Target's physical locations. The court left undisturbed an earlier decision rendered in 2004, titled *Access Now v. Southwest Airlines Co.* In that case, the court held that a "virtual ticket counter" was not a place of public accommodation. Judge Patel noted, however, that the issue presented in the Target case—whether there is a nexus between a challenged service and an actual, physical

place of public accommodation was not reached in Access Now. This suggests the suit may have been dismissed had the defendant been eBay.com or Overstock.com, which have no physical locations and thus, are not connected with places of "public accommodation."

It is important to remember this ruling is preliminary in nature. In refusing to grant Target's motion to dismiss, Judge Patel was not indicating that Target was necessarily liable for violations of the ADA. She was merely suggesting the ADA applies to websites when the website is an extension of the retailer's storefront.

The impact of this limited ruling will unfold. However, the notion of equal access to websites has caught the attention of the courts. Retailers who use the Internet as an extension of their storefront would be well-advised to consult with legal counsel concerning whether it may be necessary to ensure that their websites are accessible to persons with disabilities.

Mr. Skeen is a senior counsel with Procopio, Cory, Hargreaves & Savitch LLP. Ms. Borkenheim is an associate with the firm. Both attorneys assist clients with claims brought under Americans with Disabilities Act; wage and hour class actions; and employment, real estate, insurance, and business disputes.