

## **NO LONGER A “WHISPER” - CALIFORNIA APPELLATE COURT JOINS LIST OF COURTS TO WEIGH IN ON WEBSITE ACCESSIBILITY**

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In the first decision by a California appellate court addressing the application of Title III of the Americans with Disabilities Act (“ADA”) to websites, the court in *Thurston v. Midvale Corp.* (Sept. 3, 2019) 2019 WL 4166620, affirmed summary judgment for the plaintiff and held that the ADA, as incorporated by California’s Unruh Act, applies to websites connected to a brick and mortar business.

California’s Court of Appeal for the Second Appellate District declined to adopt the position of the U.S. Court of Appeals for the Third Circuit that the ADA applies only to physical locations. Instead, the court followed the position of the U.S. Court of Appeals for the Ninth Circuit, holding that “including websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress’s mandate that the ADA keep pace with changing technology to effectuate the intent of the statute.” *Id.* at \*6. Declining to go a step further, the court refrained from holding that a website unconnected to a physical location is similarly subject to the ADA because that issue was not squarely presented.

The court also affirmed the trial court’s order requiring compliance with the Web Content Accessibility Guidelines (WCAG) 2.0, though it made clear that the defendant’s failure to comply with WCAG did not itself violate the ADA. It was merely evidence of the ultimate question – i.e., whether the website was accessible.

Finally, the court rejected the defendant’s argument that providing a telephone number and email address is an acceptable alternative to providing an accessible website, at least where it was undisputed that such options were not monitored 24 hours a day and therefore failed to provide equivalent convenience to a website reservation system.

The plaintiff had sued the owner of The Whisper Lounge, alleging violation of the Unruh Act, Civ. Code § 51, which incorporates as a violation any violation of the ADA. The plaintiff alleged she was unable to use a screen reader to read the menu or make a reservation on The Whisper Lounge’s website.

As we previously reported, the trial court granted summary judgment for the plaintiff, finding that the ADA applied to the defendant's website. In considering this issue, the California Court of Appeal noted that there is "essentially a three-way split" among federal courts as to whether the ADA, which prohibits discrimination in "any place of public accommodation," only applies to physical places.

The Third Circuit has held that "public accommodation" does not "refer to non-physical access." *Ford v. Schering-Plough Corp.* (3d Cir. 1998), 145 F.3d 601, 612. The First, Second, and Seventh Circuits have held that a "place of public accommodation" need not be a physical space. *Carparts Distri. Ctr. v. Automotive Wholesaler's* (1<sup>st</sup> Cir. 1994) 37 F.3d 12, 19-20; *Doe v. Mutual of Omaha Ins. Co.* (7<sup>th</sup> Cir. 1999) 179 F.3d 557, 559 (place of public accommodation encompasses both physical and electronic space and applies to websites); *Pallozi v. Allstate Life Ins. Co.* (2d Cir. 1999) 198 F.3d 28, 32 (ADA was "meant to guarantee ... more than mere physical access.")

The Ninth Circuit has taken an intermediate position and held that websites are covered by the ADA where there is a "nexus" between the website and a physical place of public accommodation. *Robles v. Domino's Pizza, LLC* (9<sup>th</sup> Cir. 2019) 913 F.3d 898, 905-906. While the *Thurston* Court noted that, as a California court, it is not bound by Ninth Circuit precedent, it went ahead and applied the nexus reasoning. It held that "at a minimum, the ADA covers a website with a nexus to a physical place of public accommodation," and that there was such a nexus between the defendant's restaurant and its website, which included a menu and reservation feature. The Court therefore did not address and left open the question of whether Unruh Act claims in California courts apply to exclusively e-commerce websites.

For questions or more information, or to schedule a website accessibility webinar for your company, contact the authors listed.

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