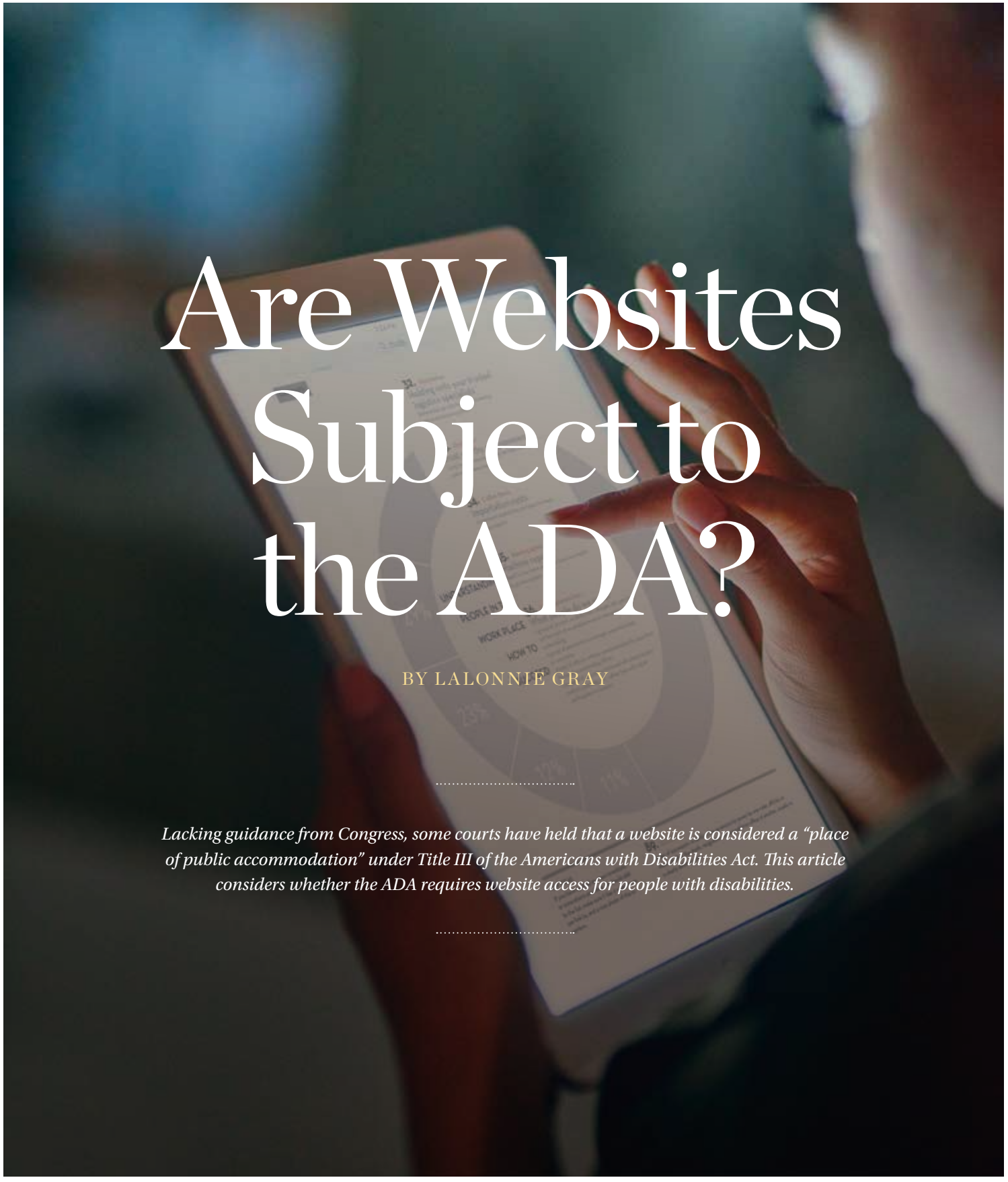

Are Websites Subject to the ADA?

BY LALONNIE GRAY

Lacking guidance from Congress, some courts have held that a website is considered a "place of public accommodation" under Title III of the Americans with Disabilities Act. This article considers whether the ADA requires website access for people with disabilities.

Well over half of the world's population is connected to the Internet.[1] In the United States alone, there are over 286 million Internet users, which is approximately 88.5% of the U.S. population.[2] With the Internet rapidly growing, an increasing number of individuals with disabilities are alleging that they are not being provided equal access to websites.

After ratification of the Americans with Disabilities Act (ADA), Congress did not include websites in its exhaustive list of public entities under its "public accommodation" definition. Because Congress has not addressed whether a website is a place of public accommodation under the ADA, litigants are taking the issue to court for the judiciary to decide. There are equally strong arguments on both sides of the issue, so it is no surprise that circuits have split on the issue. (Neither the Tenth Circuit nor the Colorado federal district court has addressed the issue.) Due to the circuit split, companies are uncertain of whether they are required by law to make their websites accessible to persons with disabilities.

The ADA Website Issue Develops

On July 26, 1990, President George H. W. Bush signed into law the ADA.[3] Congress found that individuals with a disability or regarded as having a disability were being subjected to discrimination in "such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[4] In passing the ADA, Congress intended to eliminate discrimination against individuals with disabilities.[5] Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[6]

Public accommodations are businesses that are generally open to the public and fall into any of 12 defined categories, such as hotel, restaurant, or museum.[7] The 12 categories are exhaustive, and the scope of covered entities within each category is very broad. Although Congress amended the Act in 2008, it did not revise the definition of "a place of public accommodation" to include a website.[8] Thus, courts have no direct guidance from Congress on whether websites are public accommodations.

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Courts Construe "Public Accommodation"

Contrary to Congress's goal to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[9] courts are split on whether a website constitutes a place of public accommodation for purposes of Title III of the ADA. Courts in the First and Second Circuits have found that a website constitutes a place of public accommodation for purposes of Title III. In *National Association of the Deaf v. Netflix, Inc.*,[10] plaintiffs alleged that defendant violated Title III of the ADA by failing to provide equal access to its video streaming website, "Watch Instantly," for deaf and hearing-impaired individuals. Among other contentions, defendant argued that plaintiffs failed to allege the existence of a "place of accommodation" as required for a claim under the ADA. Specifically, defendant disputed that a website in general, and Watch Instantly in particular, can be a place of public accommodation under the ADA. Plaintiffs asserted that defendant was a business providing a subscription service of Internet-based streaming video through the Watch Instantly website and, as such, was analogous to a brick-and-mortar store or other venue that provides similar services, such as a video rental store. The court reasoned that the fact that the ADA does not include web-based services as a specific example of a public accommodation is irrelevant. Rather, the ADA's legislative history makes clear that Congress intended the ADA to adapt to changes in technology. The court explained that Congress did not intend to limit the ADA to the specific examples listed in each category of public accommodations, and as long as plaintiffs could argue that the Watch Instantly website fell within at least one, if not more, of the enumerated ADA categories, Watch Instantly was subject to Title III of the ADA. Next, defendant argued that the Watch Instantly website cannot be a place of public accommodation because it is accessed only in private residences, not in public spaces. The court found defendant's argument unpersuasive and held that while the home is not itself a place of public accommodation, entities that provide services in the home may qualify as places of public accommodation. In sum, the court held that defendant's website was a place of accommodation within the meaning of the ADA.

Similarly, in *National Federation of the Blind v. Scribd Inc.*,[11] plaintiffs argued that defendant violated Title III of the ADA because defendant's website and mobile applications were inaccessible to the blind. Defendant—a digital library that operated reading subscription services on its website and on apps for mobile phones and tablets—contended that

plaintiffs did not allege facts demonstrating that it owned, leased, or operated a place of public accommodation because the ADA does not apply to website operators whose goods or services are not made available at a physical location open to the public. The court held that a digital library's reading subscription services website and mobile applications were places of public accommodation under Title III of the ADA. The court explained that excluding businesses that sell services through the Internet would run afoul of the purposes of the ADA, and the library's services fell within at least one public accommodation category, including a place of exhibition or entertainment, a sales or rental establishment, a service establishment, a library, a gallery, or a place of public display or collection.

Conversely, the Ninth and Eleventh Circuits have held that a plaintiff must allege a sufficient connection between the website at issue and a physical structure. For example, in *National Federation of the Blind v. Target Corp.*,[12] plaintiff argued that unequal access to Target.com denied the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation. Defendant contended that Target.com is not a place of public accommodation within the meaning of the ADA, and that the complaint was deficient because it did not allege that individuals with vision impairments were denied access to one of Target's brick-and-mortar stores or the goods they contain. The court held that it was clear that the purpose of the statute—seeking to bar actions or omissions that impair a disabled person's "full enjoyment" of services or goods of a covered accommodation—is broader than mere physical access. The court found that plaintiff had alleged sufficient facts to state a claim because the website was heavily integrated with brick-and-mortar stores and operated as a gateway to the stores.

Further, the Ninth Circuit has found that the websites of company-defendants that do not have a physical place—such as Facebook, Ebay, and Netflix—are not covered under Title III of the ADA. For example, in *Earll v. eBay, Inc.*,[13] plaintiff alleged that she, as a deaf individual, was unable to register as a seller on defendant's website because defendant failed to provide her with an accommodation to its telephonic identity verification policy. The Ninth Circuit affirmed the district court's dismissal of plaintiff's claim because it had "previously interpreted the term 'place of accommodation' to require 'some connection between the good or service complained of and an actual physical place.'" Because eBay's services were not connected to any actual physical space, eBay was not subject to the ADA.

Similarly, in *Young v. Facebook, Inc.*,[14] the court held that a social networking website was not a "place of public accommodation" within the meaning of Title III of the ADA. The court found that the website's operator was not subject to liability on a claim brought by a mentally disabled user alleging that the operator violated the ADA's public accommodation provision by failing to provide a human customer service system to assist individuals with mental disabilities. The court explained that the website itself operated only in cyberspace and the website's physical headquarters was not the place where the online services to which the user claimed she was denied access were offered to the public. The court further held that, even though the operator of the social-networking website sold its gift cards in various brick-and-mortar retail stores across the country, Internet services provided by the website did not have a nexus to a physical place of public accommodation for which the operator could be liable under Title III of the ADA, absent a showing that the operator owned, leased, or operated those retail stores.[15]

In *Access Now, Inc. v. Southwest Airlines, Co.*,[16] the district court held that plaintiffs—a blind person and a nonprofit advocacy organization for blind individuals—failed to establish a nexus between an airline's Internet website and a physical, concrete place of public accommodation, which precluded an action against the airline under Title III of the ADA. Specifically, the court determined that defendant's website was not a place of public accommodation because it did not exist in any particular geographical location, but rather was a virtual space, so plaintiffs were unable to show that the website impeded their access to a specific physical space, as required by the ADA.

On July 31, 2018, the Eleventh Circuit held that a plaintiff, who is blind, stated a plausible claim for relief in his suit against Dunkin' Donuts LLC where he alleged that defendant violated Title III of the ADA by not maintaining a website compatible with screen reading software.[17] The district court had dismissed plaintiff's complaint, reasoning that plaintiff failed to allege a nexus between the barriers to access that he faced on the website and his inability to access goods and services at Dunkin' Donuts' physical store.[18] The appellate court reversed the district court's holding, stating that "the website is a service that facilitates the use of Dunkin' Donuts' shops, which are places of public accommodation."[19] For example, the alleged inaccessibility of defendant's website denied plaintiff access to the services of defendants' shops that are available on the website, such as information about store locations and the ability to buy gift cards online.[20] Taking all of plaintiff's allegations as true, the court found that plaintiff's allegations survived defendant's motion to dismiss.[21] Thus, the matter was remanded back to the district court.[22]

Federal Regulations

In its July 26, 2010 Advanced Notice of Proposed Rulemaking, the Department of Justice (DOJ) announced its intention to regulate the area of website accessibility for public accommodations. The DOJ subsequently delayed its proposed regulations until 2018.[23] On July 20, 2017, the Trump Administration issued its first Unified Regulatory Agenda, which categorized web accessibility under Title II and III on the inactive list.[24] On December 15, 2017, the DOJ announced that it has withdrawn its previously announced Advanced Notice of Proposed Rulemaking pertaining to Title II and III of the ADA.[25] In its letter, the DOJ explained that it is "evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate." Thus, there will be no regulations about whether a website is considered a place of public accommodation in the foreseeable future. Nevertheless, guidance is available for entities confronting whether their websites must be accessible to disabled individuals.

How to Proceed in Colorado

Because neither the Tenth Circuit nor the U.S. District Court of Colorado has ruled on the issue, Colorado attorneys should remain cognizant of the arguments and holdings in other jurisdictions. In addition, specific authority provides direction when dealing with certain entities.

Federal Contractors and Agencies

Federal contractors and agencies are subject to Section 508 of the Rehabilitation Act of 1973, so their websites and electronic content must be accessible to disabled individuals. On January 18, 2017, the U.S. Architectural and Transportation Barriers Compliance Board published a final rule requiring the websites of federal agencies to conform to Web Content Accessibility Guidelines 2.0 Levels A and AA (WCAG 2.0 AA) by January 18, 2018.[26] Thus, federal contractors and agencies' websites must be in compliance with the WCAG 2.0 AA Standard.

Private Companies

Because the WCAG 2.0 AA is the standard adopted for federal government websites and the DOJ uses this standard in its settlement agreements and consent decrees concerning website accessibility, it is likely that the DOJ will adopt WCAG 2.0 AA as the applicable standard for public accommodations. While private businesses are not yet legally obligated to comply with WCAG 2.0—and if WCAG 2.0 becomes the standard, they will have adequate notice to comply with the standard—private companies may wish to implement the accessible technology that works best for them at this time, understanding that lawsuits are increasing. Private companies opting to maintain the status quo must bear in mind that, based on relevant case law, if their website has a sufficient nexus to a brick-and-mortar structure, a Colorado court could find that the website is subject to the ADA.

Higher Education

Private universities may be subject to both Title III of the ADA and Section 504 of the Rehabilitation Act of 1973. Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal financial assistance from the U.S. Department of Education.[27] In the higher education context, a person alleging a failure to accommodate under either Title III or the Rehabilitation Act must satisfy the same elements,[28] among which is that a university "is a private entity that owns, leases or operates a place of public accommodation (for ADA purposes) and receives federal funding (for Rehabilitation purposes)."[29]

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Universities may consider adopting website standards based on Office of Civil Rights (OCR) investigations. Among other things, the OCR investigates the accessibility of universities' websites to persons with disabilities. These investigations may result in joint resolutions entered into by a university and the OCR. Universities may use such resolutions as guidance for implementing non-discrimination standards, such as

- designating a Section 504/Title III coordinator;
- adopting and publishing a notice of nondiscrimination;
- establishing an Electronic Information Technology (EIT) policy;
- establishing grievance procedures regarding EIT accessibility barriers;
- administering annual training requirements for university senior academic leadership, department heads, and information technology staff; and
- establishing an accessible website.

Similar to private companies, private universities are not obligated to comply with any set standard for website accessibility. Thus, universities may choose to maintain the status quo or to implement accessible technology that works best for the university, with an understanding that the WCAG 2.0 AA standard may be adopted by the DOJ.

Conclusion

Numerous issues related to public accommodations must be considered when analyzing whether a website is covered by the ADA. As the Internet continues to expand and the number of users increases, this issue will continue to arise. Colorado lawyers must remain informed of evolving case law and regulatory standards on website compliance with the ADA. CL

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NOTES

1. Kemp, "Digital in 2018: World's Internet Users Pass the 4 Billion Mark," We Are Social (Jan. 30, 2018), wearesocial.com/blog/2018/01/global-digital-report-2018.

2. Internet Users by Country (2016), Internet Live Stats, www.internetlivestats.com/internet-users-by-country.

3. *See* Introduction to the ADA, Information and Technical Assistance on the Americans with Disability Act, www.ada.gov/ada_intro.htm.

4. 42 USC § 12101(a)(3).

5. 42 USC § 12101(b)(1).

6. 42 USC § 12182(a).

7. Pursuant to 42 USC § 12181:

> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—
>
> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

8. Act of Sept. 25, 2008, Pub. L. No. 110-325, 122 Stat. 3554.

9. 42 USC § 12101(b)(1).

10. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F.Supp.2d 196 (D.Mass. 2012).

11. *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F.Supp.3d 565 (D.Vt. 2015).

12. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 954 (N.D.Cal. 2006).

13. *Earll v. eBay, Inc.*, 599 Fed. Appx. 695 (9th Cir. 2015).

14. *Young v. Facebook, Inc.*, 790 F.Supp.2d 1110 (N.D.Cal. 2011).

15. *See also Cullen v. Netflix, Inc.*, 880 F.Supp.2d 1017 (N.D.Cal. 2012) (finding that a website for a provider of on-demand video streaming programming was not an actual physical place, and therefore was not a place of public accommodation under the ADA); *Young*, 790 F.Supp.2d 1110 (finding that the website itself operated only in cyberspace and the website's physical headquarters was not the place where the online services to which the user claimed she was denied access were offered to the public); *Ouellette v. Viacom*, No. 10–cv-133, 2011 WL 1882780, at *4–5 (D.Mont. Mar. 31, 2011) (finding that a website by itself was not a physical place, and plaintiff did not allege a sufficient connection between the website and a physical structure); *Jancik v. Redbox Automated Retail, LLC*, No. 13-cv-1387, 2014 WL 1920751 (C.D.Cal. 2014) (finding there was not a sufficient nexus between the Redbox instant videos and the Redbox kiosks—"one is not the 'gateway' to the other"—and thus a direct movie-streaming website was not a place of public accommodation for purposes of plaintiff's ADA claim. In so holding, the court stated that the Ninth Circuit's definition of "place of public accommodation" is narrow and encompasses only "actual, physical places.").

16. *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F.Supp.2d 1312 (S.D.Fla. 2002).

17. *Haynes v. Dunkin' Donuts LLC*, No. 18-cv-10373, 2018 WL 3634720, at *1 (11th Cir. July 31, 2018).

18. *Id.*

19. *Id.* at *2.

20. *Id.*

21. *Id.*

22. *Id.* at *3.

23. U.S. Dep't of Justice, Fall 2015 Statement of Regulatory Priorities, www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html.

24. Maurer, "DOJ Halts Plan to Create Website Accessibility Regulations," Society for Human Resource Management (Sept. 25, 2017), www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/website-accessibility-disabilities-regulations-doj.aspx.

25. Dep't of Justice, Nondiscrimination on the Basis of Disability Notice of Withdrawal of Four Previously Announced Rulemaking Actions (Dec. 15, 2017), www.adatitleiii.com/wp-content/uploads/sites/121/2017/12/ada-rule-withdrawal.pdf.

26. Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5790 (Jan. 18, 2017) (to be codified at 36 CFR Parts 1193 and 1194).

27. U.S. Dep't of Educ., Protecting Students with Disabilities, www2.ed.gov/about/offices/list/ocr/504faq.html.

28. *Doe v. Okla. City Univ.*, 406 F. App'x 248, 250–51 (10th Cir. 2010) (internal citation omitted) ("(1) that the plaintiff is disabled and otherwise qualified academically, (2) that the defendant is a private entity that owns, leases or operates a place of public accommodation (for ADA purposes) and receives federal funding (for Rehabilitation Act purposes), and (3) that the defendant failed to make reasonable modifications that would accommodate the plaintiff's disability without fundamentally altering the nature of the public accommodation[.]").

29. *Id.* at 251.