

May 6, 2019

Surf-By Lawsuits Come to New Jersey Threatening Business Websites

Two lawsuits filed in the Federal District Court for the District of New Jersey on April 29, 2019, against Wyndham Hotel Group, LLC and Burlington Coat Factory Direct Corp. suggest “surf-by” lawsuits may be coming to New Jersey, attacking business websites in numerous industries. See *Jack Kang v. Wyndham Hotel Group, LLC* (2:19-cv-11753) and *Jack Kang v. Burlington Coat Factory Direct Corp.* (1:19-cv-11752). A “surf-by” lawsuit is an action brought by a blind or visually-impaired plaintiff alleging an American with Disabilities Act (“ADA”) violation due to plaintiff’s inability to access a business’s website using screen-reading software that makes the written text or images audible. These actions are cousins to “drive-by” lawsuits, where plaintiffs drive by businesses to identify minor and technical ADA violations, without actually visiting the business before filing a lawsuit.

Where a “drive-by” plaintiff may allege a six-inch step-up into the store prohibits access to the physically disabled, a “surf-by” plaintiff may allege that website images without alt-text coding prohibits access to the visually impaired. Thousands of “surf-by” lawsuits have been filed in New York, Florida, and California against businesses in numerous industries including education, retail, restaurants, art, insurance, hospitality, and recreation. New Jersey has been generally spared, but perhaps the plaintiffs’ bar is ready to test the law here in the Garden State.

In the newly filed lawsuits, California resident Jack Kang alleges he is legally blind and cannot access the websites at www.wyndhamhotels.com and www.burlingtoncoatfactory.com while using his screen-reading software, ChromeVox. Specifically, plaintiff alleges the websites are violative of the ADA because the sites: (a) lack alternative text; (b) contain empty links without text; (c) contain redundant links; and (d) contain linked images without alt-text. Plaintiff alleges that the denial of full and equal access to Wyndham’s and Burlington Coat’s websites denies the visually-impaired access to their products and services offered at their physical locations. Plaintiff seeks a Court order requiring Wyndham and Burlington Coat to make their websites readily accessible to the blind, as well as attorneys’ fees, costs of suit, and other relief deemed just by the Court.

The ADA requires places of public accommodation to meet certain standards of accessibility for disabled visitors. “Surf-by” lawsuits claim websites are places of public accommodation requiring accessibility. Written in 1990, the ADA does not specifically address website accessibility and the Department of Justice (“DOJ”) has yet to promulgate regulations further defining the law. Nationally, the caselaw is unsettled with some decisions favoring plaintiffs and consumers, while others have favored defendants and businesses. As alleged in the two newly-filed New Jersey lawsuits, the World Wide Web Consortium’s Web Content Accessibility Guidelines 2.0 (“WCAG 2.0”) are considered well-established guidelines for making websites accessible to the blind. The WCAG 2.0 has been relied upon by the DOJ in enforcement actions and Courts across the country when reviewing website accessibility claims.

New Jersey Courts have yet to decide specific website accessibility claims. A critical issue the Courts will grapple with is whether the alleged inaccessible website has a “sufficient nexus” to the defendant’s physical location. The Third Circuit sets the legal precedent for New Jersey Courts and it narrowly construes the phrase “place of public accommodation” to apply to physical locations only. *See e.g., Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612, 614 (3d Cir. 1998) and *People v. Discover Financial Services*, 387 Fed. App’x 179 (3d Cir. 2010). However, the Third Circuit has also found that discrimination occurring via a nonphysical medium, such as the internet, can be actionable under the ADA if there is “some nexus between the services or privileges denied and the physical place . . . as a public accommodation.” *Menkowitz v. Pottstown Mem’l Med. Ctr.*, 154 F.3d 113, 122 (3d Cir. 1998).

Federal Courts in Pennsylvania, also subject to the Third Circuit precedent, recently ruled upon “surf-by” lawsuits in ways favorable and unfavorable to plaintiffs. In August 2018, the Eastern District of Pennsylvania found that a plaintiff was permitted to proceed to discovery where the allegedly inaccessible websites had a “sufficient nexus” to a physical location owned or operated by the defendant. *See Tawam v. APCI Fed. Credit Union*, 2018 U.S. Dist. LEXIS 131185, at *23 (E.D. Pa. Aug. 6, 2018) (plaintiff adequately established a sufficient nexus between the defendant federal credit union’s website and its physical location where the plaintiff’s inability to access the public information provided on the website – accounts offered, interest rates, etc. – prevented him from “finding and visiting the [defendant’s] location or learning about services offered at [defendant’s] locations.”). However, the same Court granted a motion to dismiss a month later in the matter of *Walker v. Sam’s Oyster House, LLC*, 2018 U.S. Dist. LEXIS 158439, at *5-6 (E.D. Pa. Sept. 18, 2018). In *Walker*, the Pennsylvania Court found that the plaintiff did not sufficiently plead a nexus between the defendant restaurant’s website and physical location because plaintiff failed to allege that “had he been able to access the website, he would have traveled to the restaurant for a meal.”

New Jersey businesses in every industry should be familiar with website accessibility standards and the threat of this litigation finding a foothold in New Jersey. Defending these actions can be expensive given the need for costly expert review and remediation, not to mention the threat of the ADA’s attorney fee-shifting provisions. Early “surf-by” lawsuits’ defenses include an

aggressive, up-front motion to dismiss or calculated negotiations seeking *de minimis* settlement and an agreement to remediate the website at issue. For more information, contact John P. Campbell, Esq. (jpc@spsk.com) or Franklin Barbosa, Jr. Esq. (fb@spsk.com).

Schenck Price Smith & King, LLP is experienced in defending website accessibility claims, negotiating the settlement of website accessibility actions, analyzing web developer contracts and agreements to provide advice and counsel on accessibility issues, and working with experts in the website coding industry who can assist in the prevention of website accessibility lawsuits.

DISCLAIMER: This Alert is designed to keep you aware of recent developments in the law. It is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of the client.