

# Access Now, Inc. v. Southwest Airlines, Co.

227 F.Supp.2d 1312 (S.D. Fla. 2002)



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U.S. District Judge Patricia A. Seitz

THIS MATTER is before the Court on Defendant Southwest Airlines, Co.'s ("Southwest") Motion to Dismiss Plaintiffs' Complaint [DE-11]. Plaintiffs, Access Now, Inc. ("Access Now"), a non-profit, access advocacy organization for disabled individuals, and Robert Gumson ("Gumson"), a blind individual, filed this four-count Complaint for injunctive and declaratory relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq.* Plaintiffs contend that Southwest's Internet website, Southwest.com, excludes Plaintiffs in violation of the ADA, as the goods and services Southwest offers at its "virtual ticket counters" are inaccessible to blind persons. Southwest has moved to dismiss Plaintiffs' Complaint on the grounds that Southwest.com is not a "place of public accommodation" and, therefore, does not fall within the scope of Title III of the ADA. The Court has considered the parties' thorough papers, the extremely informative argument of counsel, and the exhibits presented during oral argument. For the reasons stated below, The Court will grant Southwest's motion to dismiss.

## Background

Having found that nearly forty-three million Americans have one or more mental or physical disabilities, that such individuals continually encounter various forms of discrimination, and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous," Congress enacted the ADA in 1990. Pub. L. No. 101-336, § 2(a), 104 Stat. 327, 328.

Congress' stated purposes in enacting the ADA were, among other things, to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Id.* Among the statutorily created rights embodied within the ADA, is Title III's prohibition against discrimination in places of public accommodation. 42 U.S.C. § 12182(a).

Since President George Bush signed the ADA into law on July 26, 1990, this Nation, as well the rest of the world, has experienced an era of rapidly changing technology and explosive growth in the use of the Internet. Today, millions of people across the globe utilize the Internet on a regular basis for communication, news gathering, and commerce. Although this increasingly widespread and swiftly developing technology provides great benefits for the vast majority of Internet users, individuals who

suffer from various physical disabilities may be unable to access the goods and services offered on many Internet websites. According to Plaintiffs, of the nearly ten million visually impaired persons in the United States, approximately 1.5 million of these individuals use the Internet.

In an effort to accommodate the needs of the visually impaired, a number of companies within the computer software industry have developed assistive technologies, such as voice-dictation software, voice-navigation software, and magnification software to assist visually impaired persons in navigating through varying degrees of text and graphics found on different websites. However, not only do each of the different assistive software programs vary in their abilities to successfully interpret text and graphics, but various websites also differ in their abilities to allow different assistive technologies to effectively convert text and graphics into meaningful audio signals for visually impaired users. This lack of coordination between programmers and assistive technology manufacturers has created a situation where the ability of a visually impaired individual to access a website depends upon the particular assistive software program being used and the particular website being visited.

In light of this rapidly developing technology, and the accessibility problems faced by numerous visually impaired Internet users, the question remains whether Title III of the ADA mandates that Internet website operators modify their sites so as to provide complete access to visually impaired individuals. Because no court within this Circuit has squarely addressed this issue, the Court is faced with a question of first impression, namely, whether Southwest's Internet website, Southwest.com, is a place of public accommodation as defined by the ADA, and if so, whether Title III of the ADA requires Southwest to make the goods and services available at its "virtual ticket counters" accessible to visually impaired persons.

Southwest, the fourth largest U.S. airline (in terms of domestic customers carried), was the first airline to establish a home page on the Internet. Southwest's Internet website, Southwest.com, provides consumers with the means to, among other things, check airline fares and schedules, book airline, hotel, and car reservations, and stay informed of Southwest's sales and promotions. . . .

Despite the apparent success of Southwest's website, Plaintiffs contend that Southwest's technology violates the ADA, as the goods and services offered on Southwest.com are inaccessible to blind persons using a screen reader.<sup>n3</sup> (Compl. P4). . . .

Specifically, Plaintiffs maintain that "the Southwest.com website fails to provide 'alternative text' which would provide a 'screen reader' program the ability to communicate via synthesized speech what is visually displayed on the website." (Compl. P11). Additionally, Plaintiffs assert that the Southwest.com website "fails to provide online forms which can be readily filled out by [Plaintiffs] and fails to provide a 'skip navigation link' which facilitates access for these blind consumers by permitting them to bypass the navigation bars on a website and proceed to the main content." (Compl. P12).

. . . . Plaintiffs ask this Court to enjoin Southwest from continuing to violate the ADA, to order Southwest to make its website accessible to persons who are blind, and to award Plaintiffs attorneys' fees and costs. Southwest has moved to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The Court has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

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## **Discussion**

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## **B. Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted**

The threshold issue of whether an Internet website, such as Southwest.com, is a "place of public accommodation" as defined by the ADA, presents a question of statutory construction. As in all such disputes, the Court must begin its analysis with the plain language of the statute in question. . . . A court need look no further where the statute in question provides a plain and unambiguous meaning.

### **1. Southwest.com is Not a "Place of Public Accommodation" as Defined by the Plain and Unambiguous Language of the ADA**

Title III of the ADA sets forth the following general rule against discrimination in places of public accommodation:

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*.

42 U.S.C. § 12182 (a) (emphasis added).

The statute specifically identifies twelve (12) particularized categories of "places of public accommodation." 42 U.S.C. § 12181(7). . . .

....

Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover "virtual" spaces would be to create new rights without well-defined standards.

Notwithstanding the fact that the plain and unambiguous language of the statute and relevant regulations does not include Internet websites among the definitions of "places of public accommodation," Plaintiffs allege that the Southwest.com website falls within the scope of Title III, in that it is a place of "exhibition, display and a sales establishment." (Compl. P9). Plaintiffs' argument rests on a definition they have created by selecting language from three separate statutory subsections of 42 U.S.C. § 12181(7). See § 42 U.S.C. §§ 12181(7)(C), (H) & (E). While Plaintiffs can, as advocates, combine general from three separate statutory subsections, and apply them to an unenumerated specific term, namely Internet websites, the Court must view these general terms in the specific context in which Congress placed each of them.

Under the rule of *ejusdem generis*, "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated." *Allen v. A.G. Thomas*, 161 F.3d 667, 671 (11th Cir. 1998) (quoting *United States v. Turkette*, 452 U.S. 576, 581-82, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)). Here, the general terms, "exhibition," "display," and "sales establishment," are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely; "motion picture house, theater, concert hall, stadium"; and museum, library, gallery"; and "bakery, grocery store, clothing store, hardware store, shopping center," respectively. 42 U.S.C. §§ 12181(7)(C), (H) & (E). Thus, this Court cannot properly construe "a place of public accommodation" to include Southwest's Internet

website, southwest.com.

## **2. Plaintiffs Have Not Established a Nexus Between Southwest.com and a Physical, Concrete Place of Public Accommodation**

Although Internet websites do not fall within the scope of the ADA's plain and unambiguous language, Plaintiffs contend that the Court is not bound by the statute's plain language, and should expand the ADA's application into cyberspace. [n7](#) . . . .

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In *Rendon*, a recent Eleventh Circuit case addressing the scope of Title III, a group of individuals with hearing and upper-body mobility impairments sued the producers of the television game show, "Who Wants To Be A Millionaire," alleging that the use of an automated fast finger telephone selection process violated the ADA because it excluded disabled individuals from participating. . . . [T]he Eleventh Circuit noted that the plaintiffs stated a claim under Title III because they demonstrated "a nexus between the challenged service and the premises of the public accommodation," namely the concrete television studio. *Id.* 294 F.3d at 1284 n. 8.

. . . .

. . . [T]he Internet website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space . . . . Although Plaintiffs contend that this "is a case seeking equal access to Southwest's virtual 'ticket counters' as they exist on-line," (Pl.'s Resp. at 13), the Supreme Court and the Eleventh Circuit have both recognized that the Internet is "a unique medium--known to its users as 'cyberspace'--located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001) (quoting *Reno v. ACLU*, 521 U.S. 844, 851, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997)). Thus, because the Internet website, Southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency. [n12](#) Having failed to establish a nexus between Southwest.com and a physical, concrete place of public accommodation, Plaintiffs have failed to state a claim upon which relief can be granted under Title III of the ADA.

## **Conclusion**

Accordingly, based upon the foregoing reasons, it is hereby ORDERED that Defendant Southwest's Motion to Dismiss Plaintiffs' Complaint [DE-11] is GRANTED, and this action is DISMISSED WITH PREJUDICE. All pending motions not otherwise ruled upon are denied as moot, and this case is CLOSED.

## **FOOTNOTES**

[3](#) Plaintiffs claim that although purchasing tickets at Southwest.com is "technically possible, plaintiffs

found purchasing a ticket to be extremely difficult..." (Compl. at 7). Plaintiffs do not argue that they are unable to access such goods and services via alternative means such as telephone or by visiting a particular airline ticket counter or travel agency.

[7](#) Plaintiffs concede that neither the legislative history of the ADA nor the plain language of the statute and applicable federal regulations, contain any specific reference to the Internet or cyberspace. (Tr., Oct. 16, 2002).

[12](#) It is important to note that aircrafts are explicitly exempt from Title III of the ADA. 42 U.S.C. § 12181(10). Plaintiffs do not argue that Southwest's website impedes their access to aircrafts.