

In ADA Website Accessibility Cases, Remediation May Be a Successful Defense



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Companies, universities and other organizations around the country continue to face an onslaught of lawsuits brought under the Americans with Disabilities Act (ADA) alleging that commercial websites cannot be appropriately accessed by visually impaired individuals. A recent opinion from the U.S. District Court for the Southern District of New York provides a potential roadmap for companies to stave off litigation by taking action to remediate barriers to full website accessibility.

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In that case, *Diaz v. The Kroger Co.*, No. 18 Civ. 7953 (KPF) (S.D.N.Y. June 4, 2019), the court granted Kroger's motion to dismiss the first amended complaint, finding that it lacked subject matter jurisdiction because the ADA claims had been rendered moot by Kroger's remediation of its website to comply with the Web Content Accessibility Guidelines (WCAG) 2.0 — the website accessibility standards identified in the first amended complaint. Thus, the holding suggests that defendants may potentially moot ADA-website claims through swift, documented and completed remediation. The court also found that it lacked personal jurisdiction over the grocery chain based on the website alone because grocery delivery was not available to New York residents.

Case Analysis

In *Diaz*, the legally blind plaintiff alleged that the Kroger Company supermarket chain violated the ADA, the Human Rights Laws of both New York state and New York City, and the New York Civil Rights Law by failing to design, construct, maintain and operate its website in a way that was fully accessible to the plaintiff, who uses screen-reading software to convert online content to audio. Notably, none of the supermarket chain's brick-and-mortar locations are in New York state.

Kroger operates a website that enables consumers to purchase goods for delivery and also provides information on promotions and coupons, as well as calorie content and recommended cook times for certain foods. The plaintiff claimed that he visited the Kroger website several times, but was unable to access information about products available for delivery or other available goods and services because the information on the website could not be rendered as text and, thus, was not compatible with his screen-reader software.

Kroger's motion to dismiss asserted that the court lacked subject matter jurisdiction over the complaint because Kroger already had modified its website to remove access barriers. Crucially, **Kroger supported its motion by submitting an affidavit from its product design manager, which asserted that the website was now compliant with WCAG 2.0 standards and that he personally investigated the alleged deficiencies and confirmed that all alleged deficiencies were remedied.**

In determining that it lacked subject matter jurisdiction due to the mootness of the ADA claims, the court noted that the Kroger product design manager's affidavit overcame the types of shortcomings often identified by courts when rejecting mootness arguments. Specifically, the court noted that, unlike in other cases where a remediation plan had

been created but remediation was not yet complete, Kroger already had completed the remediation process. The product design manager's affidavit, which specifically addressed the website's current compliance with WCAG 2.0 standards, was attested to by the person whose job was well-positioned to understand and address the alleged accessibility problems. Furthermore, the affidavit stated that the company intended to remain compliant with the ADA, as well as any other applicable future standards.

The plaintiff's opposition did not dispute the affidavit's factual assertions regarding the remediation of the website, but merely argued that website content is, by its nature, constantly being modified and updated, which would jeopardize future compliance. The court rejected that argument and refused to find that an ADA-website claim can never be mooted based on the inherent characteristics of websites constantly being modified. This, of course, makes sense because to rule otherwise would mean that a company could never defeat an ADA-website claim and would be subject to endless litigation, notwithstanding the company's best efforts toward compliance.

The court held separately that it could not exercise personal jurisdiction over Kroger through New York's long-arm statute based on its website alone because the website did not provide grocery delivery to New York customers. The court looked to the Second Circuit's *Best Van Lines* test, which considers a website's level of "interactivity" on a spectrum ranging from passive informational websites, which do not confer jurisdiction, to fully interactive websites that knowingly transmit goods or services to customers in other states, which confer jurisdiction. The court required that the plaintiff establish a "reasonable probability" that the website actually was used to effect commercial transactions with New York customers in order to confer jurisdiction. The parties disputed whether New York residents could order groceries from the Kroger website, and the court conducted its own review of the website and confirmed that delivery was not available to any New York state ZIP code.

The nation's courts continue to fill in the gap left by the Department of Justice's failure to promulgate rules governing commercial websites and ADA compliance. While it remains to be seen if other courts will adopt the *Diaz* court's rationale as it relates to mootness, at least one jurisdiction has held that completed remediation efforts may render an ADA claim moot. If they have not done so already, companies, universities and other organizations with a web presence are well-advised to develop and make demonstrable progress in implementing a website accessibility compliance plan.