

A New Way To Fight ADA Web Accessibility Claims In NY

By **Adam Michaels** (June 13, 2019, 1:56 PM EDT)

In a June 4, 2019 ruling, U.S. District Judge Katherine Failla of the U.S. District Court for the Southern District of New York embraced defendant The Kroger Co.'s argument that the changes it made to its website after being named in an Americans with Disabilities Act website accessibility lawsuit were sufficient to (1) bring the website into Web Content Accessibility Guidelines 2.0 compliance, (2) moot the ADA claim and (3) deprive the court of subject matter jurisdiction.[1]

This ruling not only provides targets of website accessibility lawsuits in New York an additional tool to combat claims at the motion to dismiss stage, but also promotes accessibility and the policy aims of the ADA by incentivizing website owners to achieve compliance with the WCAG standard quickly.



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The Kroger Holding

The claims in Kroger were typical of those brought in website accessibility litigation. Plaintiff Edwin Diaz, a visually impaired individual who requires a screen reader to use a computer, alleged he visited Kroger's website on several occasions and was unable to obtain information about Kroger's goods and services due to access barriers on the site. Diaz sought a permanent injunction under the federal ADA requiring Kroger to modify its website to comply with WCAG 2.0 guidelines, together with statutory and punitive damages and fines under New York state and city law.

Kroger moved to dismiss under Rule 12(b)(1) arguing that the website remediation it completed after the lawsuit was filed mooted the ADA claim and deprived the court of subject matter jurisdiction over the case. In support of its successful motion, Kroger proffered affidavit testimony from its design manager that:

- Kroger began its remediation efforts before the lawsuit was even filed;
- Kroger's website was now compliant with WCAG 2.0;
- The affiant personally reviewed the deficiencies alleged in the complaint and personally made sure that those deficiencies were remedied;
- Kroger had no reason to undo the changes it made; and

- Kroger was committed to keeping its website compliant with the applicable standard to ensure it remains accessible to as many as possible.

Based on this testimony, Judge Failla held that Kroger adequately demonstrated it had remedied all of the alleged ADA violations and, furthermore, that there was no reasonable likelihood that the alleged violations would recur, thereby rendering the ADA claim moot.

Judge Failla acknowledged that a few federal courts have rejected mootness challenges in website accessibility cases, but found that Kroger adequately addressed the deficiencies with the defense in those cases. Prior defendants, for example, relied upon proposed or incomplete remediation plans, yet Kroger's remediation was already complete. Additionally, unlike the plaintiffs in those other cases, Diaz did not identify any overlooked accessibility issues to challenge Kroger's assertion its website was now completely ADA and WCAG 2.0 compliant.

Judge Failla further acknowledged that some other courts have held that ADA website compliance suits can never be mooted because companies constantly revise and update their sites. However, Judge Failla rejected that position as an unwarranted "sweeping, technology-specific exception to the mootness doctrine."

Finally, Judge Failla conceded that her mootness analysis "breaks new ground," and that the Second Circuit "may ultimately disagree" with it. So alternatively, she also dismissed the case against Kroger, an Ohio company with no operations within 300 miles of New York City, on personal jurisdiction grounds.

What does this mean for the future of website accessibility cases?

While Kroger unquestionably provides defendants with a road map to extinguishing ADA liability by implementing and completing a remediation plan, several open issues remain.

It is unclear how Judge Failla would have ruled had Diaz identified some ongoing accessibility issue with the Kroger site. In both *Sullivan v. Study.com LLC* and *Del-Orden v. Bonobos Inc.* cases, SDNY courts rejected mootness challenges because the plaintiffs identified lingering accessibility problems in response to the defendants' claims of full compliance.[2] Here, Kroger's claim that its site was now fully compliant went unchallenged.

Diaz only demanded general WCAG 2.0 compliance and it is unclear whether a demand for more expansive or specific relief would have altered the outcome. In a recently filed SDNY website accessibility case,[3] the plaintiff demands compliance with a laundry list of specific and intrusive requirements that far exceed Diaz's request in Kroger, including:

- Retention of a qualified web accessibility consultant acceptable to the plaintiff;
- Remediation of all third-party content and plug-ins, in addition to the defendant's own content;
- Biennial onsite training of relevant employees on web accessibility;
- Retention and training of no fewer than three call center agents to assist customers who encounter accessibility difficulty;
- Periodic automated accessibility audits;

- Quarterly manual end-user accessibility/usability testing;
- Modification of the website to include a link on every page (1) setting forth the defendant's web accessibility policy and (2) permitting the submission of feedback on accessibility issues; and
- Permitting plaintiff, his counsel and his experts to monitor the website for two years and consult with defendant's consultants and review any written material provided by the consultant.

While Kroger's affiant had personal knowledge of the work performed, Kroger did not lay foundation for the affiant's competence or expertise with website and ADA compliance issues. This may be vulnerability on appeal. In future cases, defendants would be advised to buttress such motions with a companion affidavit from an accessibility consultant and with audit reports demonstrating compliance.

The court's opinion does not address the state law claims for violation of the New York State Human Rights Law, the New York City Human Rights Law and the New York Civil Rights Law and, ostensibly, these claims could be refiled in state court. The holding of this case has no application to website accessibility cases where federal subject matter jurisdiction is not at issue, such as in California state court cases alleging violation of the Unruh Civil Rights Act.

It is too early to determine the full impact of the Kroger decision in New York. However, Judge Failla has opened the door for website owners to attack these complaints through a motion to dismiss when they bring their websites into compliance with WCAG 2.0 standards shortly after a complaint is filed. Consistent with this ruling, to the extent they have not already done so, businesses are encouraged to conduct audits of their websites and mobile apps, remediate where necessary, and achieve compliance early.

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[1] Diaz v. The Kroger, Co., No. 18 Civ. 7953 (KPF) (S.D.N.Y. Jun. 4, 2019).

[2] Sullivan v. Study.com LLC, No. 18 Civ. 1939 (JPO), 2019 WL 1299966 (S.D.N.Y. Mar 21, 2019); Del-Orden v. Bonobos, Inc., No. 17 Civ. 2744 (PAE), 2017 WL 6547902 (S.D.N.Y. Dec. 20, 2017).

[3] Brown v. UncommonGoods, LLC, No. 19 Civ. 3931 (S.D.N.Y. May 2, 2019) (ECF Doc. 1).