On Law

A Monthly Publication from CMDA

December 2016

Cummings • McClorey Davis & Acho, P.L.C.
Attorneys and Counselors At Law

Physical Disabilities in a Virtual World

Christopher A. McIntire

Businesses and public entities who routinely utilize their website to conduct business should be aware that there has been a steady increase in the number of lawsuits filed by disabled customers who cannot access websites. The complaints have ranged from websites that could not be navigated without a mouse, websites disabling or otherwise making it difficult for accessibility software on the site visitor's own computer to make full use of the site, and websites that do not include options to assist a visitor who is disabled.

In 2010, Hilton Worldwide was the subject of a Department of Justice (DOJ) suit for multiple violations of the Americans with Disabilities Act (ADA). One violation involved the reservation website, which did not allow visitors to book ADA accessible rooms online. Hilton explained that their website design software limited the number of room options in their dropdown menu; therefore they did not include the ADA accessible options in the menu. Ultimately, Hilton was forced to accept a wide ranging consent decree from the DOJ that included, for the first time, specific instructions regarding website accessibility. As part of the DOJ consent decree, Hilton was ordered to comply with the Web Content Accessibility Guidelines (WCAG), which included making all options available for visitors who wanted to book a room.

In addition to Hilton Worldwide, AOL, Charles Schwab, Netflix, Target, eBay, Ticketmaster and Travelocity have all either been sued or worked with advocacy groups to avoid litigation. In the Target class action suit, Target paid $6,000,000 and installed online screen reading software on their website. This is the first time a federal court decreed that an online store must provide accessible website service to disabled persons (*National Federation of the Blind v. Target Corporation*, 452 F.Supp.2d 946. N.D. Cal. 2006).

Public entities also need to make sure their websites are not in violation of the ADA. Can a disabled visitor do everything online that any other visitor can do? If you stream or post video/audio of public meetings is there an option to get close captioning? Is there a way for a disabled visitor to get help if they are having problems, either in real time or within 24 hours?

The Department of Justice is working on cyber ADA guidance, which they hope to roll out in 2018. Until then, businesses and public entities who routinely utilize their website to conduct business should follow the steps below to avoid a potential lawsuits filed by a disabled customer who cannot access their websites.

1.) Make sure your IT department is in compliance with the Web Content Accessibility Guidelines, which can be located online.
2.) Provide website visitors with options. Can visitors navigate the website with just a keyboard? Can forms be filled out without a mouse? Do you use "Alt-text" to describe photos, allowing text-to-voice software to describe photos they cannot see, and making sure any downloadable PDF files can be accessed by the visitor using assistive technology? Can visitors increase text size, either using a feature on their own browser or by clicking on a page link to enable a larger font?
3.) Keep it simple. Website developers may want to create a cutting-edge site, however all those bells and whistles can disrupt a visitor's accessibility, especially if the visitor has assistive technology on their computer.

We may never get it perfect. We just have to strive to "get it right." There will always be new technology, and as clients adapt to new technology, attorneys at CMDA are available to provide guidance to ensure businesses and public entities who routinely utilize their website to conduct business avoid lawsuits filed by disabled customers who cannot access websites.

Christopher A. McIntire

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in this issue

Implications of the Recently Enacted Medical Marihuana Facilities Licensing Act on Municipalities

With the recent legalization of recreational marihuana in Massachusetts, Maine, Nevada and California, the total number of states in which recreational marihuana use is legal stands at eight. Twenty states have legalized marihuana for medicinal use. While nationwide legalization is far from a foregone conclusion, with over half of the country legalizing marihuana use in some form the marihuana industry is poised to be the next big growth industry. However, in Michigan, prospective marihuana entrepreneurs are in a holding pattern as the state comes to terms with a statutory scheme plagued by gray areas.

In September 2016, in an effort aimed at resolving some of the ambiguities in the Michigan Medical Marihuana Act, Governor Rick Snyder signed three bills into law (House Bills 4209, 4827 and 4210). These bills are aimed at creating a licensing and regulatory framework for medical marihuana, which must be implemented by December 15, 2017. Currently, the Department of Licensing and Regulatory Affairs is in the beginning stages of establishing the new regulatory framework and it is no longer accepting applications or issuing licenses for marihuana facilities. In the meantime, prospective marihuana facilities must work with their local governments to procure the licenses and permits necessary to operate a marihuana facility.

Section 205 of House Bill 4209, now known as the Medical Marihuana Facilities Licensing Act, imposes a licensing mandate on municipalities (defined as a city, township or village). Specifically, Section 205 requires municipalities to adopt an ordinance authorizing any marihuana facility. Municipalities may also, through ordinances or zoning regulations, limit the type of marihuana facilities and/or the number of facilities operating within its borders. However, municipalities are prohibited from imposing regulations regarding the purity or pricing of marihuana or conflicting with statutory regulations for licensing marihuana facilities. Municipalities may also impose on marihuana facilities an annual, nonrefundable fee of up to $5,000 to help defray administrative and enforcement costs.

Within 90 days of receipt of notification that a person or entity has applied for a license to open a marihuana facility, municipalities must provide the following information to the newly created Medical Marihuana Licensing Board:

- A copy of the local ordinance authorizing the facility;
- A copy of any zoning regulations that apply to the proposed facility; and
- A description of any violation of the local ordinance or zoning regulations committed by the application if those violations relate to activities licensed under the act.

This information is exempt from disclosure under the Freedom of Information Act (FOIA).

Licenses to operate a marihuana facility are exclusive to the licensee and may only be transferred upon approval from the municipality and the Licensing Board. Failure to obtain approval is grounds for suspension or revocation of the license.

Municipalities in which marihuana facilities operate receive 25% of the funds in the newly created Medical Marihuana Excise Fund, based on the number of facilities operating in the municipality. Counties receive a greater portion. Licensees are required to submit annual financial statements to the municipality.

Matthew W. Cross

Matthew W. Cross, an attorney in our Traverse City office, focuses his practice on insurance defense, law enforcement defense and litigation, municipal law, and business law. He may be reached at (231) 922-1888 or mcross@cmda-law.com.

The Sixth Circuit Court of Appeals Expands an Employer's Defenses to a Claim of Discrimination

Gerald C. Davis

In the case of *Richardson v Wal-Mart Stores, Inc.*, the United States Court of Appeals for the Sixth Circuit, which includes the state of Michigan, interpreted, clarified and enlarged the defendant employer's defense to a claim of age discrimination under the Elliott-Larsen Civil Rights Act.

The Court of Appeals confirmed that the 62-year old plaintiff, Richardson, failed to offer either direct or indirect evidence that her job was terminated based on her age. It has been her allegation that Walmart illegally terminated her job because of her age. A former supervisor acknowledged her age, but the court recognized that the plaintiff could not establish her claim, because that supervisor was transferred to another store four months before Richardson was terminated, and that supervisor was not involved in the discharge decision. Richardson further claimed the store manager who terminated her "exhibited a pervasive pattern of discriminatory conduct toward her," and that this constituted

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The Sixth Circuit Court of Appeals Expands (cont.)

direct evidence of discrimination. While the store manager's actions may have shown he probably did not like Richardson, none of the facts demonstrate discrimination based on age. The Court of Appeals also recognized that Richardson failed to establish her claim based on circumstantial evidence of discrimination because, even though she offered *prima facie* evidence enough to go to a jury for a fact adjudication, the defendant Walmart offered a legitimate non-discriminatory reason for her termination, alleging she engaged in unsafe work practices in violation of Walmart's safety policies and her conduct brought her to the fourth and final steps of the company's progressive disciplinary policy.

In accordance with law, the plaintiff argued that Walmart's stated reasons were pretextual, that is, offered as a pretext for their real reason, which was discrimination.

Under case law and the theory of judicial precedence, where a court must follow the decisions of earlier courts regarding the same issue, a plaintiff must state enough facts to create legitimate questions of fact that support a basis of discrimination (*prima facie* evidence), and then it is for the trial court or a jury to decide if those assertions made by plaintiff are true. When the plaintiff has offered evidence of discrimination, the burden of proof then shifts to the defendant to state a legitimate non-discriminatory reason justifying their actions. If the defendant does that, the burden then shifts one more time, back to the plaintiff to prove that the defendant's stated non-discriminatory reasons were a pretext (false reason) for the real reason, which was discrimination.

In the *Richardson* case, the court noted that other employees, even those younger than Richardson were disciplined and fired for similar reasons. The Court of Appeals further stated that, even if the plaintiff could successfully dispute the disciplinary actions, "Walmart still would be entitled to summary judgment under the honest-belief rule, which prohibits a finding of pretext "if the employer can establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." Therefore, Walmart did not have to be correct in its judgment, as long as it honestly believed the facts upon which it relied for termination were true, or the facts existed as they honestly believed them to be.

The honest-belief rule also provides that an employer is entitled to summary judgment on pretext, even if conclusion is later shown to be "mistaken, foolish, trivial or baseless."

This is a published case, meaning it is intended to constitute legal precedent for future cases decided under similar fact scenarios.

Gerald C. Davis

Gerald C. Davis is a partner in our Livonia office where he concentrates his practice on corporate and business law, leveraged buy-outs, company reorganization and refinancing, analyzing investments for joint ventures, intellectual property, and drafting loan agreements. He may be reached at (734) 261-2400 or gdavis@cmda-law.com.

Attorneys Join CMDA

We are pleased to announce that two attorneys have recently joined our Firm.

Brandan A. Hallaq has joined our Firm as an attorney in our Livonia office.

Brandan A. Hallaq

Mr. Hallaq joined CMDA in 2015 as a law clerk. Attorneys and support staff immediately took to his thoroughness, dependability and kind personality. When he recently passed Michigan's bar exam, we were delighted he accepted the Firm's offer to continue his legal career at CMDA.

Mr. Hallaq focuses his practice in the areas of business and real estate law. He received a Juris Doctor degree from Wayne State University Law School and a Bachelor of Arts degree from Wayne State University.

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Matthew W. Cross has joined our Firm as an attorney in our Traverse City office.

Mr. Cross focuses his practice in the areas of insurance defense, law enforcement defense and litigation, municipal law, and business law. He has experience handling employment law, personal injury defense, business transaction and municipal issues and has earned dismissals in each of these areas.

He received a Juris Doctor degree from Wayne State University Law School and a Bachelor of Science degree, *magna cum laude*, from Ferris State University.

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Cummings, McClorey, Davis & Acho, P.L.C.

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To reference previous issues of On Law, please visit www.cmda-law.com.

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Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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