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Student can't seek damages for retaliation under ADA

Wi-Fi 'hypersensitivity' claim rejected by panel

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A student who alleged the private school he attended failed to accommodate his electromagnetic hypersensitivity could not pursue a retaliation claim for damages under the Americans with Disabilities Act, the 1st U.S. Circuit Court of Appeals has ruled.

The plaintiff — identified in the lawsuit as "G." to protect his privacy — with his parents brought ADA public accommodation and retaliation claims against The Fay School in Southborough.

After several years of negotiations with school officials and litigation, all of the plaintiff's disability discrimination claims were either dismissed or mooted by his transfer to another school.

The plaintiff argued on appeal that, even though he could no longer pursue injunctive relief for retaliation, his retaliation claim for compensatory and nominal damages should have been allowed to proceed.

But the 1st Circuit panel, addressing an issue of first impression, concluded that damages are not an available remedy for a Title V retaliation claim based on an exercise of rights under Title III of the ADA.

"Because here the underlying practice that was opposed is disability discrimination in a place of public accommodation, which is prohibited by Title III, we look to Title III's enforcement provision, [42 U.S.C.] §12188, to determine which remedies are available for the family's retaliation claim," Judge Kermit V. Lipez wrote for the panel. "[T]hose remedies are '[t]he remedies and procedures set forth in section 2000a-3(a),' the remedies provision of Title II of the Civil Rights Act, which does not provide for compensatory damages."

The court also affirmed a summary judgment in favor of the school on the plaintiff's claims for breach of contract and misrepresentation premised on language in the school's student handbook.

"In short, the family fails to identify terms in the handbook that are sufficiently definite and certain to form a binding contract," Lipez wrote. "This understanding is reinforced by the enrollment contract that G's parents signed, which specifically states that the handbook 'set forth general expectations regarding the Students' enrollment at the School,' but 'does not constitute a contract between [them] and the School.'"

The 31-page decision is *G., et al. v. The Fay School, et al.,* Lawyers Weekly No. 01-168-19. The full text of the ruling can be found at masslawyersweekly.com.

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Schwartz said the court's holding on remedies not only follows clear statutory language but is understandable from a policy perspective.

"When you think about Title III, it makes sense that it only provides injunctive relief," Schwartz said. "If you're treating somebody badly in a place of [public] accommodation, you need to stop doing it, but it doesn't mean they're owed [damages akin to] wages" awarded in the employment context.

The most important aspect of the case for education lawyers, according to Schwartz, was the court's analysis of the relationship between an enrollment agreement and student handbook.

"There are very few courts that have actually recognized that the enrollment agreement is the only contract between a school and a family," Schwartz said. "The student handbook is not a contract."

Boston attorney John J.E. Markham II represented the plaintiffs.

"We were disappointed that we couldn't get some of our claims to trial because they had merit," Markham said.

But Markham said he was heartened that U.S. District Court Judge Timothy S. Hillman in the proceeding below at least accepted the proposition that electromagnetic hypersensitivity is a disability for a small subset of individuals.

"When we started the case, that had been scoffed at," Markham said.

Other attorneys see the case as a clear win for the defense bar.

"The court's confirmation that plaintiffs and their attorneys can't do an end run around the limited damages provisions of Title III is an important decision," said Providence lawyer Jillian S. Folger-Hartwell.

"In my view, the intended purpose of Title III is to ensure proper access to places of public accommodation," she said. "It's not intended to be a vehicle for plaintiffs and their attorneys to get a monetary windfall out of a suit like that."

Matthew C. Reeber, also of Providence, agreed that the 1st Circuit reached the correct result on the remedy issue. In fact, Reeber said, the school was "fortunate" that it had what amounted to a defense that Title III does not allow for money damages in light of email evidence that school officials at least initially did not take the concerns raised by the student's parents seriously.

"In 'traditional' discrimination cases, that type of an email would have been fatal to the defense because it's evidence of a pretextual motive," Reeber said.

But Marblehead attorney Maureen T. DeSimone said she was disappointed by the ruling.

"Unfortunately, the court refused to extend the remedies for Title V retaliation in the Title III public accommodation claims," she said. "It was a very strict reading of the statute."

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— Sara Goldsmith Schwartz, Andover

Cutting-edge case

Counsel for the school, Sara Goldsmith Schwartz of Andover, said education attorneys from across the country have been following the case for a variety of reasons. The case is one of the first in the country to address the question of whether there is such a thing as hypersensitivity to Wi-Fi, she said.

"We spent years litigating that issue, but won on all of that," Schwartz said. "The plaintiffs in this case failed [to prove their case] both on specific causation and on general causation."

Wi-Fi dispute

According to the plaintiff, he experiences headaches, nausea, nose bleeds, dizziness and heart palpitations when exposed for long periods of time to radio wave radiation emitted from electronic devices, including Wi-Fi transmissions.

In 2009, the same year the plaintiff enrolled as a first grader, The Fay School installed wireless internet. In 2012, the school expanded its Wi-Fi network to operate at a higher frequency band. In October 2012 the plaintiff's mother first began expressing to school officials her concerns about the harmful effects the Wi-Fi system had on her son.

A series of emails later introduced as evidence indicated that school officials were initially dismissive or derisive of the family's concerns.

A doctor specializing in electromagnetic hypersensitivity thereafter made a "preliminary" diagnosis that the plaintiff was sensitive to electromagnetic fields.

After continuing to raise concerns within the school community about the dangers of wireless internet, the plaintiff's mother was removed from the school's parents association.

In November 2014, the plaintiff, represented by counsel, made a formal request for accommodation. The plaintiff requested that the school take various measures to reduce his risk of exposure to electromagnetic field emissions on campus.

The school, in turn, requested that the parents provide further medical documentation of the plaintiff's condition. In March 2015, the plaintiff's specialist formally diagnosed him as suffering from electromagnetic hypersensitivity.

By agreement of the parties, the plaintiff underwent an independent medical examination. The specialist who examined the plaintiff at that time found no scientific basis for concluding the plaintiff's reported symptoms had any relationship to electromagnetic radiation.

In August 2015, the plaintiff and his parents sued the school for disability discrimination. In January 2017, in the middle of seventh grade, the plaintiff's parents enrolled him in another school after the defendant refused their demands to remove Wi-Fi from the plaintiff's classrooms. The plaintiff completed middle school at private schools that did not have a Wi-Fi network.

Meanwhile, in the federal lawsuit, the plaintiff alleged disability discrimination under Titles III and V of the ADA. Title III prohibits disability discrimination in places of public accommodation. Title V includes the ADA's anti-retaliation provision. In addition to his ADA claims, the plaintiff also sued the school for breach of contract, misrepresentation and negligence.

After nine days of *Daubert* hearings, Judge Hillman granted a defense motion for summary judgment on all claims with the exception of Title V retaliation. In particular, the judge held that the plaintiff had failed to create a triable issue of fact as to the plaintiff's disability as required for a Title III disability discrimination claim.

The lower court proceeded to grant the school's motion for judgment on the pleadings with respect to retaliation, concluding that the plaintiff's claims for injunctive relief had been rendered moot by the passage of time and that damages are not an available remedy for a Title V retaliation claim based on opposition to violations of Title III.

Limited remedy

Lipez wrote that the scope of remedies available to the plaintiff on his retaliation claim hinged on the meaning of 42 U.S.C. §12203(c), which specifies the remedies available under Title V by reference to Titles I, II and III.

Section 12203(c) states that the "remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively."

Lipez concluded that Congress's addition of the word "respectively" at the end of §12203(c) meant that the statute operated to apply "separate remedial schemes" to Titles I, II and III.

"Given this reading, a different set of remedies is available under Title V for retaliation depending upon the discriminatory practice opposed — the remedies specified in §12117 (Title I's enforcement provision) apply when the basis is Title I, the remedies in §12133 (Title II's enforcement provision) apply when the basis is Title II, and the remedies in §12188 (Title III's enforcement provision) apply when the basis is Title III," the judge wrote.

The applicability of Title III's enforcement provision, §12188, meant that injunctive relief was the only remedy available for the plaintiff's retaliation claim.

"To adopt the family's interpretation that all of the remedies in Titles I, II, and III are available to enforce a retaliation claim — including damages, regardless of the basis of the retaliation, would render the 'respectively' language in §12203(c) superfluous," Lipez wrote.

The panel rejected the plaintiff's contention that interpreting §12203(c) to exclude compensatory damages thwarted legislative intent.

"To the contrary, Congress chose to allow a plaintiff to recover only injunctive relief for a discrimination action brought under Title III," Lipez wrote. "Interpreting Title V's remedies provision as providing only injunctive relief for a Title V claim premised upon opposition to violations of Title III is thus entirely consistent with the scheme of the ADA."

G., et al. v. The Fay School, et al.

THE ISSUE	Could a student who claimed that the private school he attended failed to accommodate his electromagnetic hypersensitivity pursue a retaliation claim for damages under the Americans with Disabilities Act?
DECISION	No (1st U.S. Circuit Court of Appeals)
LAWYERS	John J.E. Markham II of Markham & Read, Boston (plaintiffs) Sara Goldsmith Schwartz and Anthony L. DeProspo Jr., of Schwartz Hannum, Andover (defense)