Do I still have a claim? - Effects of *Cummings v. Premier Rehab* on the future of claims under the Americans with Disabilities Act or Section 504

On April 28, 2022, the United States Supreme Court, in Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022), found that damages are unavailable for discrimination without a physical injury in all federal disability laws (such as the ADA and Section 504), and some sex and raced based discrimination laws. As a result of this decision, and the lack of development of Florida state and local remedies, most cases involving the day to day lives of persons with disabilities will not be able to be brought.

This decision overturned almost thirteen years of caselaw in the 11th Circuit (Florida, Alabama and Georgia) as well as in most courts across the United States by finding that in certain civil rights statutes that are premised on the receipt of federal financial assistance, damages for mental pain and suffering that are not a result of a physical injury are not compensable. Now, unless a claim for disability discrimination results in a physical injury or the victim suffered some actual monetary damages, there will be no claim for any damages in federal court. However, even if there is a claim for actual damages, a victim still has a high hurdle before even actual damages can be obtained. In order to get damages, the victim must establish that a key decisionmaker had knowledge of the protected rights, and notwithstanding that knowledge chose to discriminate.

In 2007, my client, Annette Sheely, prevailed in a case which permitted damages for psychological harm as a result of discrimination when she wanted to accompany her son – with her service animal – into the waiting area of an MRI facility.[i] Since Ms. Sheely's case, I have handled over 20 reported cases that have upheld or involved this ability to receive damages, and dozens of others that were not published.[ii] In addition to my cases, there have been thousands of other cases that have relief on these cases which had set the standard for receiving damages under Section 504 and the ADA.

However, last week the Supreme Court had disagreed with this line of cases. For Section 504 of the Rehabilitation Act and laws that rely on the interpretation of Section 504 (like the ADA), Congress used its power under the Spending Clause of the U.S. Constitution to give them the authority to make these laws. Under the Spending Clause, a court must interpret the damages in the same way as a contract would be interpreted. Prior to the Supreme Court decision, most courts ruled that emotional harm from discrimination were foreseeable damages if discrimination occurred and the contact was breached. The Supreme Court disagreed and found that emotional harm was not foreseeable. I believe that this is incorrect. Emotional damages are the main and expected injury from discriminatory behavior, and as such, it is foreseeable. Now, the only remedy would be to change the law and specify that damages are available.

What claims still exist for victims of disability discrimination?

Primarily, this law does NOT affect the ability to bring a lawsuit with the ultimate goal of ending a discriminatory practice. For purposes of receiving damages, this Supreme Court decision does

not affect laws that have damages unrelated to the Spending Clause of the Constitution and does not alter state law remedies. For example, this does not change federal claims under laws based on other rights, such as employment rights, housing rights, educational rights, and other discrimination based on race or color. Some local ordinances and Florida Law protect persons from disability discrimination, however, each of these statutes and ordinances may be limited in the types of accommodations they cover or require additional administrative procedures before a claim can be made.

Currently, the remedies under the Florida Civil Rights Act are identical to those under the ADA or Section 504 for those entities that fall within the definition of public accommodation in the statute. This includes (1) places of lodging; (2) places of entertainment (3) Food service establishments, or (4) an establishment within or containing the establishments in (1) to (3). However, to bring these claims, a complaint must be filed with one year to the Florida Commission on Human Relations. At that time, the complaint will be investigated, and when a decision finding cause or no cause is provided, the victim could choose to administratively challenge the decision in an administrative forum, and if cause is found, then the matter can be brought in court or an administrative forum. As administrative forum are unable to provide damages for mental pain and anguish, and for punitive damages, I often suggest going to court when a cause finding is issued. Because the limitation of funding for the commission, investigations of claims often take a substantial amount of time. In that event, a victim is entitled to bring a claim after 180 days.

Depending on where a victim of discrimination is harmed will also depend on whether that particular city or county have their own ordinances which prohibit such discrimination and provide damages. Some are identical to the Florida Civil Rights Act, and others include many other categories of facilities. In addition, some of these ordinances require filing a complaint first with the agency that is in charge of these complaints.

Will these claims for disability discrimination in public accommodations or governmental facilities be brought?

The availability of damages as a remedy, even minimal damages, gave victims an incentive to spend the time and energy necessary to maintain a federal court lawsuit. Most lawsuits under the Americans with Disabilities Act are filed on behalf of disability rights activists and by lawyers who receive their fees and costs if their clients prevail on the lawsuit. The only remedy for the victim of discrimination is the benefit of returning to the premises that should no longer discriminate against them.

However, these lawsuits succeed because they most often involve removal of physical barriers to people with mobility impairments or complicated electronic barriers created for the blind or print impaired on websites. However, with most claims of discrimination involve a policy or procedure that can easily be changed. If a policy or procedure is changed, and its not likely to reoccur, a court may determine that any remedy is removed, and if this happens before a decision

whether discrimination had occurred, a court may deem the case to be moot and dismiss the case. The consequences to this are that there would be no entitlement for attorneys' fees and costs to the plaintiff for their case.

As a lawyer in this area of law for the past 25 years, the limitation of access to the courts for an effective remedy has been diminished considerably. Until 2001, when filing a lawsuit for discrimination, and the existence of the lawsuit fixed the problem, then the lawyer representing the victim of discrimination would be entitled to her fees. In 2001, the Supreme Court changed this practice to only allowing fees to be awarded to the victim's attorney when there is action by a court that changed the legal relationship between the parties, which includes a money judgment, judicial action that forces a change in the practice, or a judicially enforced settlement agreement.

This decision allowed a Defendant to attempt to drag a case out until the discriminatory policy is permanently changed, and then to deem the case moot so it would be dismissed. This has been the strategy in most of my cases against the State of Florida, even when it involved the egregious practice that the State of Florida maintained to place medically fragile children into geriatric nursing homes rather then to pay for home-based care. Once Ms. Sheely's decision was issued, demanding damages for victims of discrimination would prevent a case from being deemed to be moot as a claim for damages would remain, even if the practice had stopped. Without the availability of damages to prevent a defendant from rendering a case moot, only cases with clear cut issues or deeply established policies could be brought without the probability of dismissal.

The result will be that mostly activists will continue to file lawsuits under Section 504 and the ADA for cases that are economically infeasible to litigate the case, and the case can be easily resolved, or for a case that involves a deeply entrenched and widespread problem in which a ruling on the merits of a case is required for its resolution.

What about other claims that can be used in addition to Section 504 or Title II of the ADA?

This will not change actions for victims of disability discrimination in states that have laws similar to the Americans with Disabilities Act and provide for damages. This will also not change for those cases which include damages from other federal laws. For example, if the violation of the ADA is combined with an action under Civil Rights Act for violation of constitutional rights, it is not going to change the availability of damages under the other act. For example, if a person is wrongfully imprisoned by the police because of his or her disability, then there may be a cause of action for damages under the Civil Rights Act, and for relief to force the police to remedy their polices under Section 504 and the ADA.

This will also affect lawyers who bring ADA suits with a state law negligence count in order to get jurisdiction in Federal Court. To the extent that the federal claims are deemed to be moot, a court can dismiss the case without prejudice for the lawyer to re-file in state court.

What can we do if we would like to bring a case?

The Congressional intent of placing private enforcement provisions in all civil rights laws is to encourage victims to come forward to assert their rights and deem their attorneys as "private attorney generals" to litigate compliance with these laws. Over the past twenty years, procedural and substantive limitations have eliminated all but the most ardent advocates to assert the rights for over sixty million people with disabilities. Congress must restore their original intent when it enacted the law. In sighing the law, George H.W. Bush was clear in the power that the ADA was intended to have –

> And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America…. I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down. God bless you all.

In enacting a restoration of civil rights statute, Congress must clearly enumerate the remedies for private enforcement of the ADA and other civil rights laws, in line with the intent of Congress not to tolerate discrimination in America.

Until that time, victims of discrimination should continue to complain about problems that they have. Not only on Twitter or TikTok, but also by filing a formal complaint with any local or state human rights agencies, with the Department of Justice, and with the Office of Civil Rights of a particular federal agency if an entity receives money or services from the federal government. There also need to be more attorneys who can handle these cases without depending on the fees generated if these cases are deemed to be moot as well as training private advocates to be able to file cases in federal court without a lawyer to ensure that there will be societal change.

---

[i] Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173 (11th Cir. 2007)

[ii] Adams v. Cleveland Clinic Florida, 2022 WL 278955 (S.D.Fla. 2022); Higgins v. Inch, 2020 WL 8085373 (N.D. Fla. 2020); Silva v. Baptist Health South Florida, 838 Fed.Appx. 376 (11th Cir. 2020); Freyre v. Chronister, 910 F.3d 1371 (11th Cir. 2018); Crane v. Lifemark Hospitals, 898 F.3d 1130 (11th Cir. 2018); Hobbs v. Florida Board of Bar Examiners, 2018 WL 5905467 (N.D. Fla. 2018); McClain v. Fla. Dept. of Highway Safety and Motor Vehicles, 2018 WL 1935885 (11th Cir. 2018); Soto v. City of North Miami, 2017 WL 4685301 (S.D. Fla. 2017); Daniel Rivera v. Everglades College, 2017 WL 5197949 (S.D. Fla. 2017); Sunderland v. Bethesda Hosp., Inc., 686 Fed. Appx. 807 (11th Cir 2017); Freyre v. Gee, 2017 WL 1017837 (M.D. Fla. 2017); Martin v. Halifax Healthcare Sys., Inc., 621 Fed.Appx. 594 (11th Cir. 2015); Alboniga v. School Bd. Of Broward Cty., Fla. , 87 F. Supp.3d 1319 (S.D. Fla. 2015); McCullum v. Orlando Regional Healthcare Sys., Inc., 768 F.3d 1135 (11th Cir. 2014); Gervazes v. City of Port Orange, Fla., 579 Fed. Appx. 957 (11th Cir. 2014); Liese v. Indian River Cty. Hosp., Dist., 701 F.3d 334 (11th Cir. 2012); Lee v. Michel Habashy, 210 WL 11626789 (M.D. 2010); Hull v. West Boca Med. Ctr., 2010 WL 11597978 (S.D. Fla. 2010); Connors v. Orlando Regional Healthcare Sys., 2009 WL 2524568 (M.D. Fla. 2009); Nash v. Medina, 2009 WL 1513525 (M.D. Fla., 2009); Fuller v. Universal Health Care, 2009 WL 10669060 (S.D.Fla. 2009).