

Emotionally Spent: High Court Curtails Emotional Distress Damages Under Spending Clause Legislation, *New Jersey Law Journal*, authors Iram Valentin, Esq., & Allison Levinson, Esq., June 9, 2022

It is clear that the conservative majority will continue to construe the available remedies narrowly and strictly in private suits commenced to enforce provisions under Spending Clause legislation.

By Iram Valentin and Allison Levinson

The recent U.S. Supreme Court decision of *Cummings v. Premier Rehab Keller*, 142 S.Ct. 1562 (2022), resolved a split among the circuits, on the issue of whether emotional distress damages are available in a private action to enforce federal Spending Clause antidiscrimination statutes. The court, divided 6-3 along conservative/liberal lines, held that such damages are not recoverable under such legislation, particularly the Rehabilitation Act of 1973, which authorizes federal grants to states for vocational rehabilitation services, or under the Patient Protection and Affordable Care Act (ACA), which authorizes the distribution of federal monies to health-care entities.

In October 2016, Jane Cummings, a deaf and legally blind individual who communicates primarily using American Sign Language, sought physical therapy services from respondent, Premier Rehab Keller, a small business located near Dallas, Texas, that receives federal financial assistance pursuant to the Rehabilitation Act and the ACA. Cummings requested that Premier Rehab Keller provide her with an ASL interpreter at her appointments. Premier Rehab Keller declined, advising Cummings that she could communicate with the therapist using written notes, lip reading or gesturing. Cummings declined the suggestion and chose to obtain care from another provider.

Represented by private counsel, Cummings thereafter filed a lawsuit against Premier Rehab Keller in the U.S. District Court for the Northern District of Texas. In her complaint, Cummings alleged that Premier Rehab Keller's refusal to provide her with an ASL interpreter constituted discrimination on the basis of her disability, which violated Title III of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, Section 1557 of the ACA, and Section 121.003 of the Texas Human Resources Code. The nature of Cummings' purported damages were solely emotional, as she only alleged that the discrimination caused her to "suffer humiliation, frustration, and emotional distress." As a means of relief, she sought, inter alia, a declaratory judgment "stating that Defendant's policies, procedures, and practices have subjected [her] to discrimination" under the above-referenced laws; an injunction that prohibited Premier Rehab Keller from implementing any policy that discriminates against deaf and blind individuals; and compensatory damages.

Premier Rehab Keller moved to dismiss the complaint for, among other reasons, failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). District Court Judge John H. McBryde granted the motion, holding that damages for emotional distress are unrecoverable in private actions brought pursuant to Spending Clause antidiscrimination statutes. (Cummings withdrew her state law discrimination claim in response to the motion to dismiss, and, in its opinion, the court held that damages are simply not recoverable under Title III to the ADA). Judge McBryde's reasoning for dismissal rested on precedent arising out of the Northern District of Texas, as well as on persuasive caselaw from the Middle District of Florida and the District of New Mexico.

On appeal, the Court of Appeals for the Fifth Circuit affirmed the District Court's ruling. The Fifth Circuit relied heavily on the reasoning of *Barnes v. Gorman*, 536 U.S. 181 (2002), a Supreme Court decision penned by the late Justice Antonin Scalia, which held that punitive damages were not available under the ADA and the Rehabilitation Act, likening Spending Clause legislation to contract law. In particular, Justice Scalia wrote in *Barnes* that, "when a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and the wrong is 'made good' when the recipient compensates the Federal Government or a third-party beneficiary ... for the loss caused by that failure." Based on this rationale, the *Barnes* court determined that it was "doubtful" that funding recipients would have agreed to exposure to "an unorthodox and indeterminate liability" like punitive damages. Thus, as reasoned by the District Court and the Fifth Circuit, since emotional distress damages are unforeseeable at the time recipients accept federal funds, they are not available as a remedy for violations of antidiscrimination Spending Clause statutes.

The Fifth Circuit's decision in *Cummings* highlighted a split in the Circuits as, in 2007, the Eleventh Circuit in *Sheely v. MRI Radiology Network*, 505 F.3d 1173 (11th Cir. 2007), unequivocally held that emotional distress damages are available under the Rehabilitation Act. In light of this split, the U.S. Supreme Court granted certiorari on July 2, 2021, to resolve the issue.

Notably, the majority and the dissent in *Cummings* start with the exact same question: Would a prospective funding recipient, at the time it engaged in the process of deciding whether to accept federal dollars, have been aware that it would face liability for emotional distress damages? By answering in the negative, Justice John Roberts, writing for the majority, noted throughout the opinion that a funding recipient is only aware of contract remedies that are "usual" or "traditionally," "generally," or "normally available." When referencing *Barnes*, Justice Roberts wrote that since emotional distress damages are generally not compensable in contract, federal funding recipients cannot be treated as having consented to being subject to damages for emotional distress. The court proceeded to summarily reject *Cummings*' argument that the "breach" by Premier Rehab Keller was of such a serious kind that emotional damage was likely to result, concluding that the award of damages for emotional harm was a more "fine-grained" rule, and that funding recipients should not be required to face both usual and unusual remedies.

Conversely, Justice Stephen Breyer, writing for the dissent, answered the primary question in the affirmative, finding that contract law traditionally awards damages for emotional distress "where other than pecuniary benefits were contracted for," or where the breach "was particularly likely to result in serious emotional disturbance." Finding that breach of a promise not to discriminate based on race, color, national origin, sex or disability falls into such a category, emotional distress damages "make good the wrong done." Justice Breyer also wrote that it was difficult to believe that prospective funding recipients would not be aware that intentional discrimination of this ilk would be particularly likely to cause emotional suffering.

While the conservative majority and the liberal dissent ultimately diverged on the answer to the same question, it is notable that both only apply the "contract law" analogy to the extent that it supports their respective arguments. For example, the majority first writes that, "the legitimacy of Congress' power to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on 'whether the [recipient] voluntarily and knowingly accepts the terms of that 'contract'.'" However, when asked to consider *Cummings*' argument that emotional damages are "traditional" in analogous breach of contract lawsuits, the court, perhaps contrarily, states that "our cases do not treat suits under Spending Clause legislation as literal 'suits in contract,' subjecting funding recipients to whatever 'governing rules' some general federal law of contracts would supply." (Emphasis added.)

The dissent attempts to distinguish emotional distress damages from punitive damages. In particular, in order to bolster its conclusion that such damages should be available to *Cummings*, it attempts to dispel the notion that punitive damages have ever been contemplated as a remedy in contract, noting that, "the punitive damages exception cited by the Court does not rely on contract law principles at all, but rather, on tort law ... [u]nlike punitive damages, emotional distress damages can, and do serve contract law's central purpose of compensating the injured party for their expected losses."

The bar on damages for emotional distress is limited to Spending Clause antidiscrimination statutes, including the Rehabilitation Act; the Affordable Care Act; Title VI of the Civil Rights Act (which broadly prohibits discrimination on the basis of race, color or national origin in any program or activity receiving federal financial assistance); and Title IX of the Education Amendments of 1972. It does not affect federal antidiscrimination statutes that were not promulgated pursuant to Spending Clause legislation, including Title VII of the Civil Rights Act of 1964; nor does it affect state or local antidiscrimination laws, including the comprehensive New Jersey Law Against Discrimination (LAD).

In fact, Section 10:5-3 of the LAD specifically includes emotional distress as a foreseeable harm:

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma ... or other irreparable harm resulting from the strain of employment controversies

The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State. (Emphasis added).

Under appropriate circumstances, New Jersey case law even allows for the pursuit of “garden variety” emotional distress, in that “[under the LAD], the Legislature intended victims of discrimination to obtain redress for mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments.” *Cuevas v. Wentworth Group*, 226 N.J. 480, 494-95 (2016), quoting *Tarr v. Ciasulli*, 181 N.J. 70, 81 (2004).

Despite the tug of war on the high court, it is clear that the conservative majority will continue to construe the available remedies narrowly and strictly in private suits commenced to enforce provisions under Spending Clause legislation. Practically, *Cummings* and its rationale may considerably impact remedies in suits arising in the educational context, such as in universities and public school districts, and in the health-care sector, such as in hospitals and rehabilitation facilities. These establishments are often the beneficiaries of Spending Clause legislation. Students, patients and others are enrolled in or receiving services from those institutions and facilities may not be able to recover emotional distress damages in discrimination suits, as their remedies may be limited to those usual, traditionally, generally, and/or normally available in contract actions.

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