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# E-BULLETIN

## Remedies under the ADA

The Americans with Disabilities Act (ADA) is a complex civil rights law that may award different remedies depending on the discrimination that occurred. Some remedies are spelled out in the Act explicitly while others are established by case law interpreting the ADA and its sister law, Section 504 of the Rehabilitation Act. For a potential plaintiff, the available remedies must be considered before filing suit. For the potential defendants, the potential liability discourages violations of the ADA. This e-bulletin will discuss what remedies are available under the ADA.

Glossary of terms used in this e-bulletin:

- Damages** are what people normally think of when they think about lawsuits. Damages are the money paid to the plaintiff (the person who filed the lawsuit) if the plaintiff wins the lawsuit. There are several types of damages.

- Compensatory damages**, sometimes called actual damages, are the money paid to the plaintiff to make up for any loss, harm, or injury. The purpose of this type of remedy is to make the plaintiff whole -- that is, to restore the plaintiff to where s/he was before the loss, harm, or

injury. Compensatory damages may include actual money losses as well as money paid to make up for non-monetary injuries such as pain and suffering or loss of reputation.

- Punitive damages** are the money paid to punish the losing defendant. The purpose is to reform or deter the defendant and others in similar situations from committing future discriminatory acts. Punitive damages are not always available as a remedy in a case and should not be overly excessive.

- Equitable remedies** are orders given at the discretion of the court that direct parties to do or not do something. They include such things as injunctive relief.

- Injunctive relief**, or an injunction, is a court order requiring the party to either do something or refrain from doing something. In the context of the ADA, a court could order a defendant to modify a discriminatory policy or end its discriminatory practices.

- Attorneys' fees** are when the losing side has to pay the winning side's legal bills. Normally, each party is responsible for paying its own attorneys. The calculation of the fee often includes litigation expenses

such as travel and expert witness expenses.

- **Court costs** are the administrative costs of the court to handle the case.

- A **statute of limitation** is a law that sets the maximum amount of time after certain events that a person may file a lawsuit. With the Americans with Disabilities Act, the triggering event is when the plaintiff learns about the discriminatory conduct or has reason to know about the conduct.<sup>1</sup>

- If the alleged discrimination is not an isolated incident but is part of an ongoing and continuous violation with multiple incidents, then only one of the incidents has to occur during this time period for the plaintiff to be able to sue on the basis of the continuing violation.

### **Remedies for employment discrimination**

Title I of the ADA prohibits discrimination on the basis of disability in employment.<sup>2</sup> A person must exhaust all administrative remedies available before being able to sue under Title I. The person must first file a charge with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act. This deadline may be extended to 300 days if there is a state or local fair employment practices agency that also has jurisdiction over this matter.<sup>3</sup> The EEOC may choose to investigate the matter or have willing parties go through its mediation program. If there is no resolution to the charges, the EEOC will issue a right-to-sue letter to the charging party. The plaintiff then has 90 days to file a lawsuit after receiving the right to sue.<sup>4</sup>

The remedies available in a lawsuit under Title I of the ADA are derived from Title II of the Civil Rights Act which prohibits discrimination in employment on the basis of race, color,

religion, sex, and national origin. The remedies may include both compensatory and punitive damages, injunctive relief, attorneys' fees, and court costs.

Compensatory damages may include monetary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-monetary losses. Punitive damages are only awarded if the plaintiff can show that the defendant discriminated with malice or with reckless indifference to the federally protected rights of the plaintiff.<sup>5</sup> Injunctive relief may include a court ordering an employer to hire, reinstate with or without back pay, or promote someone. The relief may also include requiring an employer to provide reasonable accommodation, front pay instead of reinstatement, and any interest accrued. It may also be a simple order requiring the employer to stop its discrimination.

Both compensatory and punitive damages are available under Title I in cases where the employer intentionally discriminated, but the award of damages combined is capped depending on the size of the employer.<sup>6</sup>

If seeking damages, the plaintiff has the right to a jury trial, and the court does not inform the jury of the cap in damages.<sup>7</sup> If the jury awards damages in excess of the cap, the court will reduce the amount accordingly. Plaintiffs who seek only equitable relief are only entitled to a bench trial (trial by judge).

In calculating damages that involve monetary loss for the purpose of the cap, this amount does not include back pay or interest on the back pay.<sup>8</sup> Specifically, this means that the amount of back pay awarded is not subject to the damages cap. However, back pay liability is limited to two years accrued before the filing

<sup>1</sup> *Chisholm v. United of Omaha Life Ins. Co.*, 514 F. Supp. 2d 318 (D. Conn. 2007).

<sup>2</sup> 42 U.S.C. 12112(a).

<sup>3</sup> 42 U.S.C. § 12117(a); 42 U.S.C. §2000e-5(e)(1).

<sup>4</sup> 29 C.F.R. § 1601.28(b)(1).

<sup>5</sup> *Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir. 1998); *Otting v. J.C. Penney Co.*, 223 F.3d 704 (8th Cir. 2000).

<sup>6</sup> 42 U.S.C. § 1981a(b).

<sup>7</sup> 42 U.S.C. § 1981a(c).

<sup>8</sup> 42 U.S.C. § 1981a(b)(2).

Size of employer	Combined damages capped at
15-100 employees	\$50,000
101-200 employees	\$100,000
201-500 employees	\$200,000
Over 500 employees	\$300,000

of the charge. Back pay liability is usually the time between termination and reinstatement.<sup>9</sup> To calculate back pay, a court will consider the difference between the employee's former salary and current lower salary which could be zero for the unemployed.<sup>10</sup> This amount may be reduced by the amount of interim earnings that the employee should have earned with due diligence.

Front pay is also excluded from these damages calculations as courts consider it an equitable remedy in some cases where courts determined reinstatement is not an appropriate or practical remedy.<sup>11</sup> Front pay is the amount of money that the employee would have earned in the future had he remained on the job. Just how far into the future is determined at the discretion of the court.

In cases that involve the provision, or lack of provision, of reasonable accommodation, damages are not available if the employer made a good faith effort, in consultation with the employee, to identify and provide a reasonable accommodation.<sup>12</sup>

Three federal courts of appeal have ruled

that damages are not available for claims of retaliation in the workplace. A plaintiff affected by these rulings is only entitled to equitable relief and is not entitled to a jury trial for these types of claims.<sup>13</sup> Lower federal courts not bound by these rulings have disagreed over this issue.<sup>14</sup>

Due to the Supreme Court decision in *Board of Trustees of University of Alabama v. Garrett*, monetary awards are not available against state employers due to their constitutional immunity.<sup>15</sup> That means if the employer is a state government or its agencies/institutions, a plaintiff's only recourse in a private lawsuit is injunctive relief that does not involve money. Compensatory damages are still available in employment claims against local government entities but not punitive damages.<sup>16</sup>

### Remedies for discrimination by state or local government

Title II of the ADA prohibits discrimination on the basis of disability in state and local government programs and services. Title II incorporates the remedies available under the analogous federal law, Section 504 of the Rehabilitation Act, which prohibits disability discrimination by federal agencies and federally-funded programs.<sup>17</sup>

A person may file an administrative complaint with the U.S. Department of Justice (DOJ) or another appropriate federal agency like the Department of Education or Depart-

<sup>9</sup> 42 U.S.C. § 2000e-5(g).

<sup>10</sup> *McDaniel v. Mississippi Baptist Medical Center*, 877 F. Supp. 321 (S.D. Miss. 1994).

<sup>11</sup> *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000); *Bizelli v. Parker Amchem*, 17 F. Supp. 2d 949 (E.D. Mo. 1998).

<sup>12</sup> 42 U.S.C. § 1981a(a)(3).

<sup>13</sup> *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009); *Kramer v. Banc of America Securities, LLC* 355 F.3d 961 (7th Cir. 2004); *Bowles v. Carolina Cargo, Inc.*, 100 Fed.Appx. 889, 890 (4th Cir.2004).

<sup>14</sup> Compare *Edwards v. Brookhaven Sci. Assocs., LLC*, 390 F.Supp.2d 225, 236 (E.D.N.Y.2005), *Rumler v. Dept. of Corrs.*, 546 F.Supp.2d 1334, 1342-43 (M.D.Fla.2008), *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp.2d 236, 240-41 (W.D.N.Y.2003) (compensatory and punitive damages are available under retaliation claims); with *Sink v. Wal-Mart Stores*, 147 F.Supp.2d 1085, 1100-01 (D.Kan. 2001), and *Brown v. City of Lee's Summit*, 1999 WL 827768, \*2-\*4 (W.D.Mo.1999) (damages are not available).

<sup>15</sup> 531 U.S. 356 (2001).

<sup>16</sup> See 42 U.S.C. § 1981a(b)(1) (A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision)).

ment of Transportation.<sup>18</sup> The complaint must be filed within 180 days of the alleged discriminatory act, unless the deadline is extended for good cause shown.<sup>19</sup> The agency will investigate the claim or refer the complaint to a more appropriate designated federal agency. The designated agency will attempt an informal resolution to the matter based on its investigation.<sup>20</sup> If there is no resolution, the agency will issue a letter of findings to the parties.<sup>21</sup> If the designated agency finds a violation, it will attempt a voluntary compliance agreement with the violating public entity<sup>22</sup> or refer the case back to the DOJ with appropriate recommendations.<sup>23</sup> However, the complainant does not have to go through this administrative process under Title II and can instead directly file a lawsuit in federal court.<sup>24</sup>

Title II does not have a statute of limitations for private lawsuits so federal courts usually adopt the most analogous statute of limitations under state law.<sup>25</sup> Therefore, the statute of limitations may be different in every state and a potential litigant should check with an attorney to determine the applicable time limit on filing suit. The importance of when a statute of limitation starts running has been highlighted by recent Title II construction cases. Two federal circuit courts have ruled that the time limit is derived from the date of the completed inaccessible construction, not when the plaintiff encounters or discovers the barrier.<sup>26</sup> This means that in certain areas of the country, if the plaintiff does not discover a construction barrier within a certain time after construction by a

public entity, he can not sue to have it corrected!

Compensatory damages and injunctive relief are traditional remedies available in a lawsuit under Title II and Section 504. Punitive damages are not available though, no matter how deliberate and malicious the conduct.<sup>27</sup> Attorneys' fees awards are at the discretion of the court.

Compensatory damages are available only if a plaintiff can prove that the discrimination by the public entity was intentional. Intentional discrimination means conduct that results from deliberate indifference to the rights of the individual or actual malice.<sup>28</sup> This is a very high evidentiary threshold to meet.

Complicating matters even further is that state government entities may attempt to assert their constitutional immunity under the Eleventh Amendment against a private Title II lawsuit. Depending on the alleged violation, the state may be immune to monetary awards.<sup>29</sup> This immunity does not apply to cases brought by the federal government.<sup>30</sup> Local government entities like counties and cities do not have this immunity.

#### **Remedies for discrimination by public accommodations**

Title III of the ADA prohibits discrimination on the basis of disability by places of public accommodation.<sup>31</sup> A person may file a Title III complaint with the Department of Justice or file a lawsuit in federal court. The complainant does not have to file a complaint before suing in court. In circumstances in which the court

<sup>18</sup> 28 C.F.R. § 35.170(c).

<sup>19</sup> 28 C.F.R. § 35.170(b).

<sup>20</sup> ~~28~~ 48 U.S.C. § 12153(a).

<sup>21</sup> 28 C.F.R. § 35.172(b).

<sup>22</sup> 28 C.F.R. § 35.173.

<sup>23</sup> 28 C.F.R. § 35.174.

<sup>24</sup> 28 C.F.R. § 35.172(b).

<sup>25</sup> *Everett v. Cobb County School Dist.*, 138 F.3d 1407 (11th Cir. 1998).

<sup>26</sup> *Frame v. City of Arlington*, 575 F.3d 432 (5th Cir. 2009); *Disabled in Action of Penn. v. Southeastern Penn. Transp.*, 539 F.3d 199 (3d Cir.2008).

<sup>27</sup> *Barnes v. Gorman*, 536 U.S. 181 (2002).

<sup>28</sup> *Duwall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001); *Center v. City of West Carrollton*, 227 F. Supp. 2d 863 (S.D. Ohio 2002); *Svenson v. Lincoln County School Dist. No. 2*, 260 F. Supp. 2d 1136 (D. Wyo. 2003); *Fetto v. Sergi*, 181 F. Supp. 2d 53 (D. Conn. 2001).

<sup>29</sup> See *Tennessee v. Lane*, 541 U.S. 509 (2004) and *United States v. Georgia*, 546 U.S. 151 (2005).

<sup>30</sup> See *Garrett*, footnote 9.

<sup>31</sup> 42 U.S.C. § 12182(a).

believes it would be just, an attorney may be appointed for the complainant.<sup>32</sup> The Department of Justice may also file suit on behalf of the complainants if the defendant has engaged in a pattern or practice of discrimination or if the case raises an issue of general public importance.<sup>33</sup>

The traditional remedy in a private Title III lawsuit is injunctive relief. Injunctive relief may include an order to make a facility accessible, to provide auxiliary aids or services, modify an existing policy or practice, or whatever else the court feels would be appropriate to enable to full use and enjoyment of a place of public accommodation for people with disabilities.<sup>34</sup>

The court may also choose to award attorneys' fees at its discretion.<sup>35</sup> This discretion is limited and ordinarily a prevailing plaintiff should recover attorney fees unless special circumstances would make such an award unjust.<sup>36</sup> The rationale is that if successful plaintiffs were forced to bear their own attorneys cost, few parties would be able to afford to advance the public interest using only court-ordered injunctions.<sup>37</sup> Prevailing defendants may be entitled to attorneys fees if the lawsuit was frivolous, unreasonable, or brought in bad faith.<sup>38</sup>

In Title III cases brought by the Department of Justice, the court may award injunctive relief, compensatory damages, and other relief that the court believes is appropriate, like attorneys' fees and court cost. In cases that are to vindicate the public interest, the Department of Justice may also seek civil penalties of up to \$50,000 for the first violation and up to \$100,000 for each subsequent violation.

The lack of money damages in private lawsuits may seem like a disincentive to a potential plaintiff, but there may be analogous state dis-

crimination laws that do provide damages. A plaintiff may also combine other remedies available under state law with the ADA.

For example, suppose a wheelchair user is physically injured from going down a steep ramp that does not meet ADA guidelines. In this scenario, a plaintiff may be able to receive compensatory damages under state personal injury and negligence laws using the lack of ADA compliance as evidence against the defendant.

Like Title II, Title III is also silent with respect to statutes of limitations. Federal courts will use the most analogous statute of limitations under state law.<sup>39</sup> Therefore, the statute of limitations may be different in every state and a potential litigant should check with an attorney to determine the applicable time limitation.

<sup>32</sup> 42 U.S.C. § 12188(a)(1); 42 U.S.C. § 2000a-3(a).

<sup>33</sup> 42 U.S.C. § 12188(b)(1)(B).

<sup>34</sup> 42 U.S.C. § 12188(a)(2).

<sup>35</sup> 42 U.S.C. § 12205.

<sup>36</sup> *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir.2002).

<sup>37</sup> *Id.*

<sup>38</sup> *Sanglap v. LaSalle Bank*, FSB, 345 F.3d 515 (7th Cir. 2003).

<sup>39</sup> *Doukas v. Metropolitan Life Ins. Co.*, 882 F. Supp. 1197 (D.N.H. 1995); *Lewis v. Aetna Life Ins. Co.*, 993 F. Supp. 382 (E.D. Va. 1998).

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