

**SEVENTH CIRCUIT HOLDS ADA RETALIATION CASE CANNOT BE
TRIED TO JURY BECAUSE NO “LEGAL DAMAGES” ARE AVAILABLE –
COMPENSATORY AND PUNITIVE DAMAGES**

In *Kramer v. Banc of American Securities*, 355 F.3d 961 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit, in a case of first impression in the Circuit, , involving whether compensatory and punitive damages are available for retaliation claims under the Americans with Disabilities Act (ADA) affirmed the district court’s dismissal of the compensatory and punitive damages, and therefore held that the employee did not have a statutory right to a jury trial. The case was tried before the bench, and the court ruled for the defendant. Plaintiff appealed.

The plaintiff, Kramer, worked in the Chicago office for the company Banc of American Securities (BOA) from October 1995 until October 1999. She headed a team responsible for structuring of loans for middle market companies so that loans could be syndicated to other financial institutions. BOA and the NationsBank merged, and as result the plaintiff began reporting to a new supervisor. In May 1999, the new supervisor demoted the plaintiff, but she retained her salary and title as managing director, and was placed on a 90-day probationary period. The plaintiff hired a lawyer who responded to the demotion and demanded that she be reinstated as team leader and revealed to the company for the first that she suffered from multiple sclerosis. On September 1, 1999, after receipt of the lawyer’s letter, the supervisor wrote the plaintiff another letter directing her to improve her job performance within 30 days or face termination. On September 24, 1999, the plaintiff filed a charge of disability discrimination and retaliation with the EEOC and four days later, the plaintiff advised her supervisor by e-mail that she had filed the charge. On September 30, 1999, the EEOC issued a right to sue letter. On

October 7, 1999, the supervisor advised Kramer that she was terminated. A week later the lawsuit was filed in federal court alleging disability discrimination and retaliation under the ADA, and a state law claim of intentional infliction of emotional distress. The plaintiff sought back and front pay, compensatory and punitive damages, reinstatement, and attorney's fees and costs.

On May 23, 2000, the plaintiff filed a second charge of discrimination with the EEOC alleging retaliatory discharge. She received a second notice of right to sue, and amended her complaint and dropped the state charge. Plaintiff demanded a jury trial on all issues. Later the defendant filed a motion for summary judgment on all claims, and the district court granted summary judgment on the disability claims, but denied summary judgment on the retaliatory discharge claim, and trial was scheduled on May 13, 2002.

Prior to trial, the defendant filed a motion to exclude compensatory and punitive damages and to strike the plaintiff's jury demand. The defendant argued that compensatory and punitive damages are not recoverable on a retaliation claim under the ADA, and because no "legal relief" was available for recovery, the plaintiff had no right to a trial by jury. The district court agreed with the defendant's motion in all respects and proceeded with a six day bench trial on the retaliation claim where the court ruled in favor of the company.

On appeal, the plaintiff argued that the district court erred in striking the compensatory and punitive damages claim, and also argued that the plaintiff was entitled to a jury trial independent of her claim for compensatory and punitive damages because the company had consented to a jury trial.

To establish a prima face case of retaliation under the Title VII or the ADA, the employee must demonstrate that: (1) he or she engaged in protected activity; (2) an adverse

employment decision occurred; and, (3) there was a causal connection between the protected act and the adverse decision. Once the prima face of retaliation is established, the burden of producing some non-discriminatory reason for the adverse employment decision falls upon the employer. If the employer demonstrates non-discriminatory reasons for the adverse employment decision, the employee assumes the burden of showing that the reasons given by the employer were a pretext for retaliation in violation of Title VII or the ADA. *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997); *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987); *DiCarlo v. Potter*, 258 F.3d 408 (6th Cir. 2003).

On a retaliation claim under Title VII or the ADA, the underlying discrimination claim need not be proven to win a retaliation claim. All that is required is that the plaintiff reasonably believed in good faith that the practice she opposed violated Title VII or the ADA, and it is illegal to retaliate against anyone for filing a claim or engaging in protected activity unless the claim is completely groundless. *Fine v. Ryan International Airlines*, 305 F.3d 746 (7th Cir. 2002).

An employee may prevail on a claim for retaliation under the Americans with Disabilities Act and the Rehabilitation Act even when the underlying conduct complained of was not in fact unlawful so long as the plaintiff can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated the law. *Treglia v. Town of Manlius*, 313 F.3d 713 (2nd Cir. 2002).

The plaintiff in the case at bar contended that she was entitled to compensatory and punitive damages for her retaliation claim because the ADA, 42 U.S.C. § 12117, applied the same remedies as those provided under Title VII., 42 U.S.C. § 2000e-5(g)(1), which provides that "... in an action brought by a complaining party ... against an respondent who engaged in

unlawful intentional discrimination ... under ... § 102 of the ADA or committed a violation of § 102(b)(5) of the ADA against an individual the complaining party may recover compensatory and punitive damages through the enabling statute.” 42 U.S.C. § 1981a(a)(2) which provided for compensatory and punitive damages for Title VII and the ADA. The plaintiff argued that the Title VII language under § 1981a(a)(2) permits a plaintiff making a retaliation claim against the employer under the ADA to recover compensatory and punitive damages. The Court of Appeals for the Seventh Circuit noted that no other circuit had addressed this issue, although the Second, Eighth and Tenth Circuits affirmed jury verdicts where compensatory and punitive damages had been awarded on ADA retaliation claims. See *Salitros v. Chrysler Corp.*, 306 F.3d 562, 570 (CA 8 2002); *Muller v. Costell*, 187 F.3d 298, 314 (CA 2 1999); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (CA 10 1999). The appellate court reviewed those decisions and found that they focused on whether there was sufficient evidence to award to compensatory and punitive damages, but never examined the legal question of whether such damages were authorized on a retaliation claim. There were district court cases, however, that are split on this issue. In *Sink v. Wal-Mart Stores, Inc.*, 147 F.Supp. 2d 1085, 1100-01 (2001), the court held that compensatory and punitive damages are not available for a retaliatory discharge claim. See also *Boe v. Allied Signal, Inc.*, 131 F.Supp. 2d 1197, 1202-03 (2001) and *Brown v. City of Lee’s Summit*, 1999 W.L. 827768 (W.D.Mo. 1999) with *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp. 2d 236, 240-41 (W.D.N.Y. 2003) which held that compensatory and punitive damages are available; see also *Rhoads v. FDIC*, 2002 W.L. 31755427 (D.Md. 2002); and *Ostrach v. Regents of the University of California*, 957 F.Supp. 196, 200-01 (E.D.Cal. 1997).

In *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp. 2d 236 (W.D.N.Y. 2003), the district court in a disability discrimination and retaliation case where the plaintiff had epilepsy,

entertained several pre-trial motions including defendant's motion that the employee was not entitled to a jury trial on the retaliation claim under the ADA because the statute did not provide for compensatory and punitive damages, and thus no jury trial mandated. The case was also brought under the New York Human Rights Statute which the defendant conceded at trial that the plaintiff was entitled to a jury trial and punitive damages under the New York statute. The defendant relied upon the decision in *Brown v. City of Lee's Summit, Mo.*, 1999 W.L. 827768 (W.D.Mo. June 1, 1999) which held that § 12203 of the ADA did not permit recovery of compensatory and punitive damages as remedies. The *Lovejoy* court, however, pointed to several Eighth Circuit cases which recognized the appropriateness of having a jury consider an ADA retaliation case claim including *Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189 (8th Cir. 2001) and *Stafne v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001)(affirming jury verdict in favor of employer on claims of disability discrimination and retaliation for filing an EEOC complaint). The *Lovejoy* court also pointed out that courts in Second Circuit have routinely allowed juries to decide ADA retaliation claims. See *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999); and the remand of the *Lovejoy-Wilson* case from the Eighth Circuit, 263 F.3d at 223-24 where the court stated that a "jury could reasonably find retaliation."

In *Ostrach v. Regents of the University of California*, 957 F.Supp. 196, 200-01 (E.D.Cal. 1997) the district court discussed briefly the intricacies of the competing statutory provisions regarding remedies under 42 U.S.C. § 12203(c) and 42 U.S.C. §1981a(d)(1)(B) stated as follows:

"The ... statutory analysis, as complex and circular as any this court has previously encountered, suggests that plaintiff may seek full recovery. This conclusion is buttressed by the established principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946). As the Supreme Court has recently explained, where Congress provides a cause of action, a federal court must "presume the availability of all appropriate

remedies unless Congress has expressly indicated otherwise.” *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66, 112 S.Ct. 1028, 1032, 117 L.Ed.2d 208 (1992). Indeed, *Franklin* has led one district court to conclude that general damages are available under the ADA’s anti-retaliation provisions. See *Niece v. Fitzner*, 922 F.Supp. 1208, 1219 (E.D.Mich.1996). For all the above reasons, the court determines that plaintiff here can seek general damages under the retaliation provision of the ADA.”

The court adopted in *Kramer*, however, the rationale in *Brown v. City of Lee’s Summit* and agreed that there is no basis for plaintiff’s claim of compensatory and punitive damages in his ADA and retaliation claim. Thus, the Court concluded that the 1991 Civil Rights Act did not expand the remedies available to a party bringing the ADA retaliation claim because §1981a(a)(2) does not contemplate compensatory and punitive damages for a retaliation claim under the ADA. Damages are only available with respect to the actual disability discrimination claims brought by a plaintiff not the retaliation claims. Therefore, according to *Kramer*, the ADA retaliation claim against an employer is limited to the remedies set forth in 42 U.S.C. §2000e-5(g)(1) which does not provide for such remedies. See *National R.R. Passenger Corp. v. National Association of R.R. Passengers*, 414 U.S. 453, 458 (1974).

The Court discussed the district court cases holding that such damages are available in *Lovejoy-Wilson* and *Rhoads* but neither case analyzed §1981a(a)(2). *Lovejoy-Wilson* relied upon the fact that “Courts within the Second Circuit have routinely allowed juries to decide ADA retaliation claims.” 242 F.Supp. 2d at 240. And the decision in *Rhoads* relied on legislative history of the ADA. *Kramer* refused to rely upon the ADA legislative history because the legislative intent and the statute are specific, and as such, they need not consider legislative history when interpreting an unambiguous statute.

§ 1981a: Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 7-6(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000d-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12117(a)], and section 749a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Section 1981a(a)(2) does not include §203 of the ADA (42 U.S.C. §12203) (the retaliation claim) as a section where compensatory and punitive damages are permitted. The statute only addresses §§ 201 and 202.

As a result, according to *Kramer*, the plaintiff is not entitled to recover legal damages like compensatory and punitive damages and, therefore, has no statutory or constitutional right to a jury trial. The only remedies the plaintiff's entitled to are equitable in nature and include an injunction, reinstatement, back pay or front award, and "any other equitable relief as the Court

deems appropriate.” There is no right to a jury trial when equitable remedies are sought.

Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 648 (CA 7 2002).

Finally, the Court addressed the plaintiff’s argument that even if she is not entitled to compensatory and punitive damages, she was entitled to a jury trial because the company consented as evidenced by its demand for a jury trial in its Answer to the Complaint and the Amended Complaint. The Court, however, held that the company withdrew its consent when it filed its motion to strike the plaintiff’s jury demand a few weeks prior to trial and the district court determined that this was not too late in the litigation process. In addition, the plaintiff provided no reason why she was prejudiced by a bench trial rather than a jury trial. The Court also said that under Rule 39(c), the Court may decide that a jury is not required even if both parties requested a jury trial. Thus, the Court held that when compensatory and punitive damages are not available to a plaintiff bringing a claim of retaliation under the ADA, they have no right to a jury trial.

Finality on this issue is far from certain. Of all the claims that can be made in an ADA case, none of the claims are more deserving of compensatory and punitive damages than illegal retaliatory conduct. Only if the relief is significant will retaliatory conduct cease; otherwise, there will be a chilling effect upon victims of discrimination to claim violations of their rights. The decision in the *Rhoads* case relied upon the legislative history of the ADA to find that compensatory and punitive damages are available. 2002 W.L. 31755427 at fn 1. But the statute appears “unambiguous,” according to *Kramer*, and the court rejected it.