

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

TONY GOODMAN,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 6:99-cv-012-JEG
)	
JAMES E. DONALD, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

**INTERVENOR UNITED STATES' RESPONSE TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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**INTERVENOR UNITED STATES' RESPONSE TO DEFENDANTS' MOTION FOR
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The relevant factual and procedural history in this case is presented in the plaintiff's and defendants' papers regarding the defendants' motion for summary judgment. The United States previously intervened in this case to defend the constitutionality of the federal statutory provisions that abrogate States' sovereign immunity against claims pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* We now continue as an intervenor in defense of the constitutionality of the abrogation of sovereign immunity effected by the ADA's retaliation provision, 42 U.S.C. 12203. This brief is filed in response to defendants' motion for summary judgment, Docket No. 392.

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ARGUMENT

I. THIS COURT SHOULD NOT REACH THE QUESTION WHETHER THE ADA'S RETALIATION PROVISION VALIDLY ABROGATES SOVEREIGN IMMUNITY

As an initial matter, this Court should not decide whether the ADA's retaliation provision validly abrogates the defendants' sovereign immunity. Nothing turns on that question in this case, because plaintiff can recover the same relief pursuant to his substantively identical claims under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

Just as the ADA bans retaliation against those who avail themselves of their ADA rights, Section 504 bans retaliation against an individual who complains of a failure to comply with the Rehabilitation Act's requirements. See, e.g., *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 48 (1st Cir. 2000); see also *Hiler v. Brown*, 177 F.3d 542, 545 (6th Cir. 1999) (Rehabilitation Act "incorporates by reference" the ADA's retaliation ban), cited with approval by *Shotz v. City of Plantation*, 344 F.3d 1161, 1174 n.20 (11th Cir. 2003). The standards for retaliation claims under the ADA and the Rehabilitation Act are identical. See, e.g., *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1131 (10th Cir. 2010); *Regional Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35, 54 (2d Cir. 2002). And while the ADA permits retaliation suits against a wider range of defendants, here plaintiff seeks damages only from recipients of federal funds. By accepting federal funding, those defendants have waived their sovereign immunity against claims for damages under the Rehabilitation Act. See 42 U.S.C. 2000d-7; *Garrett v. University of Ala. at Birmingham Bd. of Trustees*, 507 F.3d 1306, 1310 (11th Cir. 2007).

Because plaintiff thus can recover from the defendants pursuant to his substantively identical Rehabilitation Act claims, it is immaterial whether he additionally can recover damages under the ADA. See, e.g., *Konikov v. Orange County*, 410 F.3d 1317, 1319 n.1 (11th Cir. 2005)

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(per curiam) (declining to reach plaintiff's constitutional claims after determining that plaintiff was entitled to "full relief" on statutory claim). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). This Court should decline to decide whether the ADA's retaliation provision validly abrogates the States' sovereign immunity, because the plaintiff can obtain his full measure of relief regardless of the outcome of that question.

II. THE ADA'S RETALIATION PROVISION VALIDLY ABROGATES THE STATES' SOVEREIGN IMMUNITY IN THE PRISON CONTEXT

In any event, the ADA's retaliation provision is a proper exercise of Congress's Fourteenth Amendment power and so validly abrogates the States' sovereign immunity in the prison context, for two reasons. First, the ADA's prohibition on retaliation for the exercise of ADA rights helps enforce the substantive requirements of Title II, which in turn validly enforces the protections of the Fourteenth Amendment in the prison context.¹ The ADA, like other civil rights laws, prohibits retaliation to ensure that the rights it promises are, in fact, realized in practice. As the Supreme Court has recognized, without a ban on retaliation, a civil rights law's "enforcement scheme would unravel * * * and the underlying discrimination would go unremedied." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180-181 (2005); accord *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (the "primary purpose of antiretaliation provisions" is ensuring "unfettered access to statutory remedial mechanisms"). Indeed, so close is the connection between discrimination itself and retaliating against someone who complains about discrimination that the

¹ The United States recognizes that this Court has held that Title II is not valid Fourteenth Amendment legislation in this context. This argument therefore is made for the purpose of preserving it on appeal.

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Supreme Court has consistently read civil rights statutes that explicitly bar only the former to ban the latter as well. See, e.g., *Gomez-Perez v. Potter*, 553 U.S. 474, 128 S. Ct. 1931, 1943 (2008).

Accordingly, in drafting the ADA, Congress reasonably determined that, in order to ensure the effectiveness of its prohibitions against disability discrimination, it must also prohibit retaliation that interferes with the enforcement of those rights. Since Congress had the Fourteenth Amendment power to prohibit discrimination on the basis of disability in the prison context in Title II, it also had the power to make that prohibition meaningful by prohibiting retaliation that interferes with those rights. Cf. *Maher v. Gagne*, 448 U.S. 122, 133 (1980) (providing for attorney's fees for successful civil rights plaintiffs is "an appropriate means of enforcing substantive rights under the Fourteenth Amendment").

Second, regardless of whether it had the Fourteenth Amendment authority to prohibit discrimination on the basis of disability, Congress had the authority to prohibit retaliation against those who oppose such discrimination. In the prison context, the ADA's ban on retaliation prohibits conduct that violates the First Amendment, as incorporated against the States by the Fourteenth Amendment. Congress may, pursuant to its Fourteenth Amendment authority, prohibit conduct that violates the First Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Accordingly, to the extent that the ADA remedies constitutional violations, it necessarily is valid Fourteenth Amendment legislation. *United States v. Georgia*, 546 U.S. 151, 158-159 (2006). Defendants do not appear to take issue with this settled law. But they assume, incorrectly, that the ADA's retaliation provision does not remedy constitutional violations. See Docket No. 392-3, at 46.

The First Amendment "forbids prison officials from retaliating against prisoners for exercising the right of free speech." *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003). In

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particular, it bars prison officials from retaliating against prisoners for complaining about the conditions of their confinement, regardless of whether those conditions constitute an independent constitutional violation. *Ibid.*; accord *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008). Additionally, retaliating against a prisoner for filing a complaint violates that prisoner's right of access to the courts. See, e.g., *Wildberger v. Bracknell*, 869 F.2d 1467, 1468 (11th Cir. 1989) (per curiam); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986).

The elements of a First Amendment retaliation claim and an ADA retaliation claim are, in this context, essentially identical. To make out a First Amendment retaliation claim, a prisoner must show that (1) he or she engaged in protected speech (such as complaining about conditions of confinement), (2) the defendant took retaliatory action as a result, and (3) the retaliatory action "would likely deter a person of ordinary firmness from engaging in such speech." *Smith*, 532 F.3d at 1276. Similarly, the ADA's retaliation provision bars a prison official (or anyone else) from discriminating against an individual (1) "because such individual has opposed any act or practice made unlawful by [the ADA]"; or (2) "because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. 12203(a). Thus, both claims require the same causal relationship between protected activity and retaliatory action. Cf. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) (applying same analysis with respect to First Amendment and Rehabilitation Act retaliation claims).

Additionally, while the ADA's retaliation provision does not by its terms require the defendant's action to cause any particular injury, a plaintiff claiming retaliation in the provision of public services must demonstrate an "adverse action" that rises to the same "threshold level of substantiality" as is required to prevail on other retaliation claims in that context. See *Higdon v.*

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Jackson, 393 F.3d 1211, 1219-1220 (11th Cir. 2004); see also *Stewart v. Happy Herman's Cheshire Bridge*, 117 F.3d 1278, 1287 (11th Cir. 1997) (in employment context, plaintiff must show same adverse employment action as would be required for Title VII retaliation claim).

Accordingly, an ADA retaliation claim, like any other retaliation claim, requires a showing that the retaliatory action would have dissuaded a reasonable person "from making or supporting a charge of discrimination." *Luna v. Walgreen Co.*, 347 F. App'x 469, 472 (11th Cir. 2008) (quoting *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

Thus, where a plaintiff's complaining of ADA violations is activity protected by both the First Amendment and the ADA (as is the case here), the ADA retaliation provision does little more than provide a statutory remedy for violations of the First Amendment. To the extent that it prohibits the same conduct as does the First Amendment, the ADA's retaliation provision is valid Fourteenth Amendment legislation that abrogates a State's sovereign immunity. *Roberts v. Pennsylvania Dep't of Pub. Welfare*, 199 F. Supp. 2d 249, 254 (E.D. Pa. 2002).²

Moreover, even if the retaliation provision's requirements extended beyond those of the First Amendment, it would still be permissible Fourteenth Amendment legislation. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Tennessee v. Lane*, 541 U.S. 509, 520 n.4 (2004) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455

² In a pre-*Georgia* case, the Ninth Circuit found that the ADA's retaliation provision failed to abrogate the States' sovereign immunity because Congress had failed to compile a record of such retaliation. *Demshki v. Monteith*, 255 F.3d 986, 988-989 (9th Cir. 2001). *Georgia*, however, has made clear that the ADA validly abrogates sovereign immunity to redress actual constitutional violations, without regard to legislative findings. See *Georgia*, 546 U.S. at 158. Such legislative findings only are material to the extent that Congress attempts to pass "prophylactic" legislation that goes beyond the requirements of the Fourteenth Amendment itself.

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(1976)). Such legislation is a valid exercise of Fourteenth Amendment authority so long as it “exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” *Id.* at 520 (quoting *City of Boerne*, 521 U.S. at 520).

In the prison context, the ADA’s retaliation provision, like other bans on retaliation for a prisoner’s exercise of legal rights, directly protects an inmate’s right of access to the courts. See *Wildberger*, 869 F.2d at 1468 (First Amendment retaliation claim protects this right); *Wright*, 795 F.2d at 968 (same). As the Supreme Court found in *Tennessee v. Lane*, Congress compiled an extensive record of official discrimination that effectively excluded individuals with disabilities from exercising this right. 541 U.S. at 527. Accordingly, Congress was entitled to pass that much of Title II that protects the fundamental right of access to the courts by imposing an “affirmative obligation to accommodate persons with disabilities in the administration of justice.” *Id.* at 533. The ADA’s retaliation provision protects the same right, and its requirements are congruent and proportional to the constitutional injuries it remedies. It is therefore proper Fourteenth Amendment legislation that validly abrogates the States’ sovereign immunity.

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CONCLUSION

The defendants' motion for summary judgment should be denied to the extent that it asks this Court to hold that the ADA's retaliation provision does not validly abrogate the States' sovereign immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 27, 2010, the foregoing “Intervenor United States’ Response To Defendants’ Motion For Summary Judgment” was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

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