

**A Right Without a Remedy: An Analysis of the  
Decisions by the District Court and Eleventh Circuit  
in *Sheely v. MRI Radiology Network, P.A.*, and the  
Implication for Disabled Americans’ Ability to  
Receive Emotional Damages Under the Rehabilitation  
Act and the Americans with Disabilities Act**

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## I. INTRODUCTION

In the case of *Annette Sheely v. MRI Radiology Network, P.A.*,<sup>1</sup> the Eleventh Circuit recently determined that a person who suffers emotional injury due to a violation of the Rehabilitation Act or the Americans with Disabilities Act (“ADA”) may obtain damages for her injury. Until 2001, the law was fairly settled that emotional damages were available for such violations. But in *Barnes v. Gorman*<sup>2</sup> the Supreme Court departed from precedent and applied contract law to determine whether punitive damages are available for violations of acts passed pursuant to the Spending Clause.<sup>3</sup> The Court in *Barnes* held that punitive damages were not available as emotional damages and are not generally available when a party breaches a contract.<sup>4</sup> A handful of district courts, including the Southern District of Florida,<sup>5</sup> subsequently held that emotional damages were not available as compensatory damages for violations of the Rehabilitation Act<sup>6</sup> and the Americans with Disabilities Act.<sup>7</sup>

This was the first time a circuit court faced this question post-*Barnes* and given the precedential authority this decision is likely to have, the stakes were enormous. If the Eleventh Circuit had affirmed the lower court’s decision, denying emotional damages suffered as a result of a violation of the Rehabilitation Act, victims would have been left without the ability to seek any redress other than injunctive relief. The right to relief can be traced as far back as *Marbury v. Madison*, where Chief Justice Marshall declared that the “very essence of civil liberty . . . consists in the right of every individual to claim the protection of the

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<sup>1</sup> *Sheely v. MRI Radiology Network, P.A.*, 2007 WL 3087215, at \*18 (11th Cir. Oct. 24, 2007).

<sup>2</sup> 536 U.S. 181 (2002).

<sup>3</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>4</sup> 536 U.S. at 181 (2002).

<sup>5</sup> *Sheely v. MRI Radiology Network P.A.*, No. 05-61240-Civ-Cohn (S.D. Fla. June 9, 2006) (on file with author).

<sup>6</sup> 29 U.S.C. § 701 (2000).

<sup>7</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1990).

laws, whenever he receives an injury.”<sup>8</sup> The Eleventh Circuit’s decision will resonate far beyond victims of Rehabilitation Act violations to victims of violations of any federal act passed pursuant to the Spending Clause.<sup>9</sup>

According to 1990 congressional findings, approximately forty-three million Americans had at least “one or more physical or mental disabilities.”<sup>10</sup> Almost one-half of the total disabled population—24.1 million Americans—was classified as having severe disabilities.<sup>11</sup> Congress enacted the Rehabilitation Act and the ADA to provide expansive protection against discrimination for individuals with physical and mental disabilities in the United States.<sup>12</sup> For many of these people, the Rehabilitation Act and the ADA are the only legal guarantees that they will not face discrimination.<sup>13</sup> Thus, if the Eleventh Circuit had

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<sup>8</sup> 5 U.S. 137, 163 (1803).

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>10</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(1) (1990). Congress noted this number was increasing as the population grew older. *Id.* Statistics from the Department of Commerce suggest that by 1992 the number of disabled Americans increased to forty-nine million. U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994, at 137 (114th ed. 1994).

<sup>11</sup> LEWIS E. KRAUS, SUSAN STODDARD, & DAVID GILMARTIN, CHARTBOOK ON DISABILITY IN THE UNITED STATES, AN INFOUSE REPORT, National Institute on Disability and Rehabilitation Research (Dep’t of Educ. 1996).

<sup>12</sup> Ronda Cress, J. Neil Grindstaff, & S. Elizabeth Malloy, *Mental Health Courts and Title II of the ADA: Accessibility to State Court Systems for Individuals with Mental Disabilities and the Need for Diversion*, 25 ST. LOUIS U. PUB. L. REV. 307, 310 (2006) (citing 29 U.S.C. § 701(a)-(c); 42 U.S.C. § 12101(a)-(b)).

<sup>13</sup> Other federal civil rights laws protect the rights of disabled persons in highly specific circumstances. *See generally* U.S. Dep’t of Justice, Civil Rights Division, A Guide to Disability Rights Laws (Sept. 2005), <http://www.usdoj.gov/crt/ada/cguide.htm>. Federal laws ensure that people with disabilities are not discriminated against: access to telecommunications, *see* 47 U.S.C. §§ 251(a)(2), 255 (2000) (requiring manufacturers of telecommunications equipment and providers of services to ensure that such equipment and services are accessible to persons with disabilities); fair housing, *see* Fair Hous. Act of 1968, 42 U.S.C. § 3601 (2000) (prohibiting housing discrimination on the basis of race, color, religion, sex, disability, familial status, and national origin); air carriers, *see* Air Carrier Access Act, 49 U.S.C. § 41705 (2000) (prohibiting discrimination in air transportation by domestic and foreign air carriers against qualified individuals with physical or mental impairments); voting places, *see* Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee (2000) (requiring polling places across the United States to be physically accessible to people with disabilities for federal elections), and Nat’l Voter Registration Act, 42 U.S.C. § 1973gg (2000) (requiring all offices of state-funded programs that are primarily engaged in providing services to persons with disabilities to provide all program applicants with voter registration forms, to assist them in completing the forms, and to transmit completed forms to the appropriate state official); public education, *see* The Individuals with Disabilities Educ. Act, 20 U.S.C. § 1400 (2000) (requiring public schools to make available to all eligible children with disabilities a free appropriate public education in the least restrictive environment appropriate to their individual needs); building or facilities designed or altered with

affirmed the lower court decision and limited the ability of the disabled to enforce their rights under these laws, millions of Americans would have suffered a severe, detrimental impact to their quality of life.

## II. THE REHABILITATION ACT AND AMERICANS WITH DISABILITIES ACT

Congress enacted the Rehabilitation Act in 1973 (“the Act”) to enforce “the policy of the United States that all programs, projects, and activities receiving assistance . . . be carried out in a manner consistent with the principles of . . . inclusion, integration, and full participation of the individuals [with disabilities].”<sup>14</sup> To achieve this goal, Congress enacted section 504 of the Act to prevent “discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving Federal financial assistance.”<sup>15</sup> It provided, in pertinent part, that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>16</sup>

To ensure that it protected a wide variety of persons, the Act focused on characteristics likely to lead to discrimination.<sup>17</sup> An “individual with a disability” was any person “who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such an impairment.”<sup>18</sup> Congress also provided wronged individuals a private right of action against wrongdoers, “granting [them] the possibility of damages, injunctive relief, and

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federal funds, *see* The Architectural Barriers Act, 42 U.S.C. § 4151 (2000) (requiring that buildings and facilities that are designed, constructed, or altered with federal funds, or leased by a federal agency, comply with federal standards for physical accessibility); mistreatment in state and local institutions of confinement, *see* The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (2000) (authorizing the U.S. Attorney General to investigate conditions of confinement at state and local government institutions such as prisons and jails).

<sup>14</sup> 29 U.S.C. § 701(c) (2000).

<sup>15</sup> S. Rep. No. 93-318, at § 504 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2076, 2143.

<sup>16</sup> 29 U.S.C. § 794(a) (2000).

<sup>17</sup> According to Sande L. Buhai & Theodore P. Seto, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053, 1065 (2006), this approach marked a new paradigm for disability that broadened the 1935 Social Security Act, which limited its protections to objects of pity and philanthropy.

<sup>18</sup> 29 U.S.C. § 705(20)(B) (2000), Buhai & Seto, *Tax and Disability*, *supra* note 17, at 1065.

attorney's fees, without any requirement that the plaintiff first exhaust administrative remedies."<sup>19</sup>

Section 504 of the Act prohibits recipients of federal funding from discriminating against disabled persons and requires that programs or activities operated by a federally-funded entity be readily accessible to persons with disabilities.<sup>20</sup> "[m]oreover, Section 504 prohibits provision of different or separate assistance to, or retaliation against, people who assert Section 504 rights."<sup>21</sup> The regulations do not require public accommodation facilities to alter inventory to include accessible goods or special goods designed for use by individuals with disabilities.<sup>22</sup> Nor do the regulations require recipients to make every part of a facility or even all existing facilities accessible to people with disabilities.<sup>23</sup> Section 504's regulations generally require that disabled individuals have equal opportunities to achieve the same benefits as non-disabled persons.

Although the Act was enacted to protect against discrimination of disabled individuals solely on the basis of their disability, the Act's scope was limited to cover state and local governments that receive federal funding.<sup>24</sup> But many state and local programs, including many state court systems, do not receive federal assistance. Thus, more expansive antidiscrimination legislation was needed to protect more fully the rights of disabled individuals.<sup>25</sup>

By the early 1990s, Congressional findings indicated that the Rehabilitation Act was insufficient to protect disabled people from discrimination. The Congressional findings of fact in section 12101 of the ADA indicate Congress' realization that society has a tendency "to

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<sup>19</sup> Buhai & Seto, *Tax and Disability*, *supra* note 17, at 1065.

<sup>20</sup> 28 C.F.R. §§ 42.520, 42.521(a) (2006); *see also* Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, HARV. J. L. & GENDER 425, 430 (2006) (citing 29 U.S.C. § 794 (2004)).

<sup>21</sup> Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121, 1127 (2000) (citing 28 C.F.R. § 42.503(b) (1999)).

<sup>22</sup> 28 C.F.R. §§ 36.303(a)-(b), 36.307(a).

<sup>23</sup> 28 C.F.R. §§ 35.150(a), 42.521(a); *see also* Armen H. Merjian, *Bad Decisions Make Bad Decisions: Davis, Arline, and Improper Application of the Undue Financial Burden Defense Under the Rehabilitation Act and the Americans with Disabilities Act*, 65 BROOK. L. REV. 105, 119 (1999).

<sup>24</sup> Ronda Cress, J. Neil Grindstaff, & S. Elizabeth Malloy, *Mental Health Courts and Title II of the ADA: Accessibility to State Court Systems for Individuals with Mental Disabilities and the Need for Diversion*, 25 ST. LOUIS U. PUB. L. REV. 307, 310 (2006) (citing 29 U.S.C. § 701 (2000); 29 U.S.C. § 794(a)-(b) (2000)). *See also* U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 606 (1986) (holding that the scope of § 504 of the Rehabilitation Act is limited to those who actually "receive" federal financial assistance).

<sup>25</sup> Cress et al., *supra* note 24, at 310.

isolate and segregate individuals with disabilities” and that such discrimination “continue[s] to be a serious and pervasive social problem.”<sup>26</sup> According to these findings, society’s actions have relegated individuals with disabilities to “a position of political powerlessness . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .”<sup>27</sup> The findings further indicated that “the continuing existence of . . . discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . .”<sup>28</sup>

Congress enacted the ADA in 1990<sup>29</sup> “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . .”<sup>30</sup> It intended for the ADA to “be broadly construed to effectuate its purpose.”<sup>31</sup> Congress sought to achieve this by furnishing “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . . .”<sup>32</sup>

The goal of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>33</sup> The ADA decrees: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation.”<sup>34</sup> The ADA also extends far beyond private sector employment discrimination, pursuant

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<sup>26</sup> 42 U.S.C. § 12101(a)(2) (2000).

<sup>27</sup> *See id.* § 12101(a)(7).

<sup>28</sup> *See id.* § 12101(a)(9) (concluding that such discrimination “costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity”).

<sup>29</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (2000)).

<sup>30</sup> 42 U.S.C. § 12101(b)(1) (2000).

<sup>31</sup> *Pathways Psychosocial v. Town of Leonardtown*, 133 F. Supp. 2d 772, 780 (D. Md. 2001) (internal citation omitted).

<sup>32</sup> 42 U.S.C. § 12101(b)(2) (2000).

<sup>33</sup> 42 U.S.C. § 12101(b)(1) (2000).

<sup>34</sup> 42 U.S.C. § 12182(a). Section 202 of the ADA states, in part, that “no individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” Thus, while section 504 of the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding, including private organizations, section 202 of the ADA prohibits discrimination against the disabled by public entities. *See also Barnes*, 536 U.S. at 236.

to Congress' power under the Fourteenth Amendment and the Spending Clause.<sup>35</sup>

As it had under the Rehabilitation Act, the legislative history of the ADA indicates that Congress intended to provide wronged individuals with a private right of action against their wrongdoers, and to grant them the possibility of damages, injunctive relief, and attorney's fees, without any requirement that the plaintiff first exhaust administrative remedies.<sup>36</sup> Congress also provided that the remedies for violations of section 202 of the ADA would be co-extensive with the remedies available for a violation of section 504 of the Rehabilitation Act.<sup>37</sup> Thus, as the Eleventh Circuit's decision applies to both ADA and Rehabilitation Act cases, it has wide-ranging implications.

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<sup>35</sup> U.S. CONST. amend. XIV, § 2; U.S. CONST. art. I, § 8, cl. 1; 42 U.S.C. § 12101(b)(4) (2000). Supreme Court decisions enforcing civil rights in the pre-civil rights era were often premised on the Spending Clause, rather than on the Fourteenth Amendment. *See, e.g., Morgan v. Virginia*, 328 U.S. 373, 385-86 (1946) (reversing conviction for violation of a state segregation statute regarding bus transportation based on the Spending Clause).

<sup>36</sup> Cheryl L. Anderson, *Damages for Intentional Discrimination by Public Entities Under Title II of the Americans with Disabilities Act: A Rose by Any Other Name, but Are the Remedies the Same?*, 9 BYU J. PUB. L. 235, 254 (1995) (concluding that Title II incorporates an "appropriate relief" remedial standard under which attorney's fees may be recovered, but punitive damages may not be). Section 12205 provides for fee-shifting under the ADA: "In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual." 42 U.S.C. § 12205. However, "[f]ee shifting under the ADA, like other civil rights statutes, is asymmetric: Fees should be awarded to prevailing plaintiffs as a matter of course, but prevailing defendants should recover only when forced to litigate claims that are frivolous, unreasonable, or pursued in bad faith." *Sanglap v. Lasalle Bank*, F.S.B., 345 F.3d 515, 520 (7th Cir. 2003); *see also Greenier v. Pace*, Local No. 1188, 245 F. Supp. 2d 247, 249 (D. Me. 2003) (holding defendant only permitted attorney's fees under the ADA where plaintiff's suit was "totally unfounded, frivolous, or otherwise unreasonable").

<sup>37</sup> *See Barnes*, 536 U.S. at 181. Section 505(a)(2) of the Rehabilitation Act declares that the "remedies, procedures, and rights set forth in title [sic] VI of the Civil Rights Act of 1964 shall be available" for violations of section 504. *Id.* at 185. Similarly, § 203 of the ADA declares that violations of § 202 shall have the same "remedies, procedures, and rights set forth in § 505(a)(2) of the Rehabilitation Act." *Id.* Thus, the remedies for violations of all three provisions – § 202 of the ADA, § 504 of the Rehabilitation Act, and Title VI – are co-extensive.

III. OVERVIEW OF *SHEELY V. MRI RADIOLOGY NETWORK, P.A.**A. Factual and Procedural Background*

On June 8, 2005, Annette Sheely went to University MRI to obtain an MRI for her sixteen-year-old son.<sup>38</sup> Ms. Sheely is blind and was accompanied by her son and her seeing-eye dog.<sup>39</sup> When her son's name was called, Ms. Sheely rose to go with him, but was told that her seeing-eye dog was not permitted outside of the waiting room.<sup>40</sup> When Ms. Sheely inquired as to why she was not permitted to bring her seeing-eye dog into the examination, the University staff responded with a list of reasons.<sup>41</sup> She was initially told that the restriction would protect her dog's safety and increase Ms. Sheely's comfort.<sup>42</sup> The staff then explained that the restriction would also promote the dog's comfort.<sup>43</sup> Finally, the staff told Ms. Sheely that the metal on the dog's harness would interfere with the procedure.<sup>44</sup> Her son was then led back for the MRI without Ms. Sheely present.<sup>45</sup>

Ms. Sheely's legal action averred that this incident inflicted emotional distress on her, claiming it created fear and tension about going to new places.<sup>46</sup> Furthermore, Ms. Sheely asserted that the incident and resulting anxiety disrupted her ability to sleep.<sup>47</sup> Accordingly, Ms. Sheely sued University MRI for violations of the ADA and section 504 of the Rehabilitation Act.<sup>48</sup> In particular, she claimed that University MRI failed to provide a viable reason for denying a person with a seeing-eye dog access to areas in which others similarly-situated with a service animal would have had access.<sup>49</sup> After an initial discovery period, University MRI moved for summary judgment, arguing, *inter alia*, that Ms. Sheely did not have standing to sue for declaratory and injunctive relief, and that emotional damages were not recoverable under section 504 of the Rehabilitation Act.<sup>50</sup>

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<sup>38</sup> *Sheely v. MRI Radiology Network P.A.*, No. 05-61240-Civ-Cohn (S.D. Fla. June 9, 2006) (on file with author) [hereinafter *Sheely Order*].

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Sheely Order*, *supra* note 38, at 2.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

*B. The District Court's Ruling*

The district court ruled that Ms. Sheely had standing to sue for injunctive relief but that emotional distress damages were not available to a plaintiff under the Rehabilitation Act.<sup>51</sup> The court's analysis began by noting that the Supreme Court's holding in *Franklin v. Gwinnett County Public Schools* allowed "all appropriate relief."<sup>52</sup> However, the court found that the "scope" of "appropriate relief" was subsequently clarified in *Barnes*, where punitive damages could not be allowed in a private suit under the Rehabilitation Act.<sup>53</sup> The court recognized that under *Barnes*, a Rehabilitation Act suit "is actually a contract-like action against an entity that fails to provide the contractual service" and that "only compensatory damages for failing to provide the contractual obligation are recoverable."<sup>54</sup> The court also relied on *Witbeck v. Embry-Riddle Aeronautical Univ., Inc.*<sup>55</sup> which followed *Barnes* and denied claims for mental anguish, damage to reputation, embarrassment and humiliation under the Rehabilitation Act. The *Sheely* court stated that the "*Witbeck* Court's analysis of the competing pre-*Barnes* district court decisions on this issue of whether emotional distress damages are available under the Rehabilitation Act remains accurate."<sup>56</sup> The court relied on *Witbeck* despite acknowledging that *Witbeck* erroneously interpreted *Franklin*: "[T]he *Witbeck* decision mistakenly concludes that the '*Barnes* court found that its decision in *Franklin v. Gwinnett County Public School* did not apply to Rehabilitation Act causes of action."<sup>57</sup>

*C. The Eleventh Circuit's Ruling*

At first blush, the district court's opinion appears to be correct. Emotional damages are rarely available in breach of contract cases.<sup>58</sup> Consequently, if the contract analogy promulgated in *Barnes* applies, the decision seems appropriate. However, when analyzed more closely, the opinion rests on a series of legal propositions that appear fallacious when closely analyzed. First, the district court interpreted *Barnes* as applicable

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<sup>51</sup> *Id.* at 13.

<sup>52</sup> *Id.* at 12 (citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 at 68 (1992)).

<sup>53</sup> *Id.* at 12 (citing *Barnes*, 536 U.S. at 186-87, 189).

<sup>54</sup> *Id.*

<sup>55</sup> 269 F. Supp. 2d 1338 (M.D. Fla. 2003).

<sup>56</sup> *Sheely Order*, *supra* note 38, at 13.

<sup>57</sup> *Id.* at 13 (citing *Witbeck*, 269 F. Supp. 2d at 1340 n.1).

<sup>58</sup> JOHN E. MURRAY, 1-9 MURRAY ON CONTRACTS § 123 (4th ed. 2001). ("Courts have been particularly reluctant to allow damages for emotional distress in contract actions."). See *Picogna v. Bd of Educ. of Cherry Hill*, 143 N.J. 391, 396-97 (N.J. 1996) ("[T]he potential for fabricated claims justifies a requirement of enhanced proof to support an award of such damages.").

to compensatory damages as well as punitive damages. Further, the district court concluded that emotional damages are never available for breach of contract claims. Because both of these propositions misconstrue or misstate the law, the district court's decision stood on questionable legal ground.

On October 24, 2007, the Eleventh Circuit reversed the district court and held that Sheely could obtain damages for emotional harm that she suffered.<sup>59</sup> The court explained that *Barnes* utilized contract law as an analogy to address a concern that federal funding recipients must have fair notice of any liability they might be subjected to by federal courts.<sup>60</sup> The court noted that fair notice was not a concern here; federal funding recipients are on notice that they might pay emotional distress damages because emotional distress is a predictable and thus foreseeable consequence of discrimination.<sup>61</sup> The court also held that even if contract law were directly applicable, emotional distress damages would be available because federal funding recipients agree not to discriminate and cause emotional harm when they accept funds.<sup>62</sup> Finally, the court indicated that emotional damages are a compensatory damage designed to make "good the wrong done."<sup>63</sup>

#### IV. ANALYSIS OF THE DISTRICT COURT'S OPINION AND THE ELEVENTH CIRCUIT'S REVERSAL

##### *A. The District Court Incorrectly Relied Upon and Interpreted Barnes as Applicable to Compensatory Damages as well as Punitive Damages*

The district court held that emotional damages are barred by *Barnes*'s rule that "only compensatory damages for failing to provide the contractual obligation are recoverable."<sup>64</sup> As explained more fully below, *Barnes* addressed only the narrow question of whether punitive damages are recoverable under the Rehabilitation Act and the ADA, and did not consider whether emotional damages are available. In reaching its conclusion, the district court did not address the body of law—precedent that *Barnes* did not disturb—holding that emotional damages may be recoverable. Nor did the district court fully address *Franklin v. Gwinnett*

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<sup>59</sup> *Sheely v. MRI Radiology Network, P.A.*, 2007 WL 3087215, at \*18 (11th Cir. Oct. 24, 2007).

<sup>60</sup> *Id.* at \*18.

<sup>61</sup> *Id.* at \*19.

<sup>62</sup> *Id.* at \*20-21.

<sup>63</sup> *Id.* at \*21.

<sup>64</sup> *See Sheely Order*, supra note 38, at 1.

*County Public School*, the case upon which *Barnes* based its holding,<sup>65</sup> which ruled that a plaintiff may recover compensatory damages.<sup>66</sup> The district court's failure to address *Franklin* and contrary holdings raised a number of red flags because damages for emotional distress are more appropriately considered compensatory damages.

The Eleventh Circuit held that emotional damages are compensatory damages and they are available to plaintiffs who suffer emotional distress for intentional violations of the Rehabilitation Act or the ADA.<sup>67</sup> The court of appeals based its decision on the *Bell v. Hood* presumption, which the *Barnes* Court reaffirmed, that "federal courts may use *any* available remedy to make good the wrong done."<sup>68</sup> The court was not persuaded by the district court's opinion. Instead, the Eleventh Circuit saw "a striking difference" between punitive damages, which were not compensatory, and emotional damages which "are plainly a form of compensatory damages designed to "make good the wrong done."<sup>69</sup> Moreover, the court held that awarding emotional damages is particularly appropriate where emotional distress is the only alleged damage and thus the only available remedy to "make good the wrong done."<sup>70</sup>

#### 1. *Franklin v. Gwinnett County Public School* and Its Progeny Support a Plaintiff's Right to Recover Emotional Damages

The Eleventh Circuit's opinion is in accord with the law that preceded it. Prior to *Franklin*, most but not all courts held that money damages were not recoverable under Title IX of the Education Amendments of 1972.<sup>71</sup> The *Franklin* Court rejected that notion,

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<sup>65</sup> 503 U.S. 60 (1992).

<sup>66</sup> *Id.*

<sup>67</sup> *Sheely*, 2007 WL 3087215, at \*22.

<sup>68</sup> *Barnes*, 536 U.S. at 189 (citing *Bell v. Hood*, 327 U.S. 678 (1946)).

<sup>69</sup> *Sheely*, 2007 WL 3087215, \*21.

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g.*, *Eastman v. Va. Polytechnic Inst. & State Univ.*, 939 F.2d 204, 209 (4th Cir. 1991) (concluding that § 504 permits neither compensatory damages for pain and suffering nor punitive damages); *Rivera Flores v. P.R. Tel. Co.*, 776 F. Supp. 61, 71 (D. P.R.1991) (limiting recovery to equitable remedies, thus, employee could not seek compensatory damages for mental anguish resulting from discrimination), *vacated and remanded by* *Rivera-Flores v. P.R. Tel. Co.*, 64 F.3d 742 (1st Cir. 1995); *Jenkins v. Skinner*, 771 F. Supp. 133, 136 (E.D.Va.1991) (relying on *Eastman* and denying recovery for mental anguish); *Ams. Disabled for Accessible Pub. Transp. v. SkyWest Airlines*, 762 F. Supp. 320, 325 (D. Utah 1991) (holding damages for emotional distress unavailable); *Rhodes v. Charter Hosp.*, 730 F. Supp. 1383, 1385-86 (S.D. Miss. 1989) (damages for emotional distress unavailable); *Shuttleworth v. Broward County*, 649 F. Supp. 35, 37 (S.D. Fla. 1986) (denying compensatory damages, including for mental suffering or humiliation, and limiting damages to reinstatement, back pay and attorneys' fees); *Martin*

unanimously holding that a plaintiff may recover damages.<sup>72</sup> In reaching this result, the *Franklin* Court reaffirmed the longstanding rule, stated in *Bell v. Hood* 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.”<sup>73</sup> Thus “if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief.”<sup>74</sup> The Court explained that a plaintiff’s entitlement to any appropriate relief derives from the plaintiff’s power to enforce his rights:

The power to *enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.<sup>75</sup>

Thus, the Court held that unless explicitly instructed by Congress to do so, courts may not impose any restriction on available remedies: “[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.”<sup>76</sup>

Although *Franklin* is a Title IX case, it also controls both Section 504 and Title VI cases, because Congress intended that the same remedies be available under Title IX, Title VI and the Rehabilitation Act.<sup>77</sup> Similarly, because Title II of the Americans with Disabilities Act

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v. Cardinal Glennon Mem’l Hosp. for Children, 599 F. Supp. 284, 284 (E.D. Mo. 1984) (holding damages for humiliation and embarrassment not recoverable); *Bradford v. Iron Co.*, C-4 Sch. Dist., 1984 U.S. Dist. LEXIS 15924, at \*25 (E.D. Mo. June 13, 1984) (damages for humiliation and embarrassment non-recoverable); cf. *Kling v. County of L.A.*, 769 F.2d 532, 534 (9th Cir. 1985), *rev’d on other grounds*, 474 U.S. 936 (1985) (allowing compensatory damages for pain and suffering); *Recanzone v. Washoe County Sch. Dist.*, 696 F. Supp. 1372, 1378 (D. Nev. 1988) (same).

<sup>72</sup> *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

<sup>73</sup> 327 U.S. 678, 684 (1946).

<sup>74</sup> *Franklin*, 503 U.S. at 69.

<sup>75</sup> *Id.* at 68 (citations omitted).

<sup>76</sup> *Id.* at 70-71.

<sup>77</sup> See *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); see also *Waldrop v. S. Co. Serv. Inc.*, 24 F.3d 152, 157 n.5 (11th Cir. 1994) (finding that section 504 and Title IX were “virtually identical in the scope of their protections, with the principal exception being the class protected. Moreover it is well-established that Congress intended the same remedies be available under Title IX and Title VI. Thus, *Franklin* establishes that damages are available in Title VI cases as well as Title IX cases. Similarly, given that Congress specifically provided that the same remedies be available under section 504 as are available under Title VI, *Franklin* must permit damage awards for discrimination under section 504.”) (internal citation omitted).

of 1990<sup>78</sup> incorporates the remedies provisions of the Rehabilitation Act<sup>79</sup> under Title VI, the remedies available under both statutes must be construed in the same manner.

Thus, a strict application of *Franklin* permits emotional damages. In fact, since *Franklin*, the Sixth and Ninth Circuits have held that emotional distress damages are recoverable as compensatory damages under the Act.<sup>80</sup> Similarly, many district courts have also found that compensatory damages for emotional distress are recoverable.<sup>81</sup>

Not every circuit has had an opportunity to rule specifically on whether a plaintiff may recover emotional damages. These courts have held more generally that a plaintiff has unlimited access to the full panoply of damages under section 504. For example, the Fourth, Eighth, and Eleventh Circuits (and arguably the Third Circuit) have ruled that

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<sup>78</sup> 42 U.S.C. § 12131 (2007).

<sup>79</sup> See 29 U.S.C. § 794 (2007).

<sup>80</sup> See, e.g., *Johnson v. City of Saline*, 151 F.3d 564, 572-73 (6th Cir. 1998) (permitting recovery of compensatory damages for emotional suffering under the ADA); *Ferguson v. City of Phoenix*, 157 F.3d 668, 675 n.4 (9th Cir. 1998) (noting that such damages may be recoverable if they are specific or particularized and intentionally inflicted).

<sup>81</sup> See, e.g., *De La Cruz v. Guilliani* [sic], 2002 U.S. Dist. LEXIS 19922, at \*31 (S.D.N.Y. Aug. 23, 2002) (compensatory damages for pain and suffering are available under Title II of the ADA, which employs the same remedial scheme as the Act); *Dorsey v. City of Detroit*, 157 F. Supp. 2d 729, 731 (E.D. Mich. 2001) (compensatory damages for humiliation, emotional distress, and embarrassment are available under Title II of the ADA); *Smith v. Me. Sch. Admin.* Dist. No. 6, 2001 U.S. Dist. LEXIS 5051, at \*18 (D. Me. Apr. 24, 2001) (holding that plaintiff could seek compensatory damages for non-pecuniary losses under Title II of the ADA and the Rehabilitation Act as a result of her expulsion from a school dance if she could prove evidence of intentional discrimination); *Sumes v. Andres*, 938 F. Supp. 9, 13 (D.D.C. 1996) (“[p]laintiff may recover compensatory damages for humiliation, embarrassment, and emotional pain and suffering” under the Rehabilitation Act); *Coleman v. Zatechka*, 824 F. Supp. 1360, 1373 (D. Neb. 1993) (compensatory damages for the feelings of isolation and segregation experienced by the plaintiff were awarded under the ADA and Rehabilitation Act); *Kuntz v. City of New Haven*, 1993 U.S. Dist. LEXIS 20085, at \*6 (D. Conn. June 18, 1993) (compensatory damages for emotional distress recoverable); *Doe v. District of Columbia*, 796 F. Supp. 559, 573 (D.D.C. 1992) (court awarded damages for emotional pain suffered by the section 504 plaintiff); *Tanberg v. Weld Co. Sheriff*, 787 F. Supp. 970, 972-73 (D. Colo. 1992) (money damages for loss of professional opportunity, mental anguish, and pain and suffering available under the Act); see also *Hopwood v. Tex.*, 999 F. Supp. 872, 906 (W.D. Tex. 1998), *rev’d in part on other grounds*, 236 F.3d 256 (5th Cir. 2000) (“Since *Franklin*, the strong trend among federal courts is to allow plaintiffs to recover for mental injuries under Title VI and similar federal anti-discrimination statutes.”); cf. *Saladin v. Turner*, 936 F. Supp. 1571, 1583 (N.D. Okla. 1996) (awarding compensatory damages for emotional distress in an ADA retaliation claim and holding that punitive damages may be recoverable if employer behaved with reckless indifference).

plaintiffs may recover the “full spectrum” of damages.<sup>82</sup> These courts could potentially find that compensatory damages for emotional harm fall within the “full spectrum” of damages.

Only a handful of district court opinions after *Franklin* have held that emotional damages are not available, but those cases rely largely on pre-*Franklin* cases or fail to consider the *Franklin* proposition that all appropriate remedies are presumptively available. In *United States v. Forest Dale, Inc.*,<sup>83</sup> the court relied on a pre-*Franklin* case to find that monetary damages for emotional suffering are not recoverable. The court found that Section 504 damages were limited to retrospective equitable damages, ignoring the *Franklin* presumption that compensatory damages are available.<sup>84</sup> In *Pool v. Riverside Health Services, Inc.*,<sup>85</sup> the plaintiff suffered humiliation when the hospital staff did not permit her the use of her service dog within the hospital. The court found that the plaintiff’s emotional damages could best be remedied by injunctive relief, rather than by compensatory damages.<sup>86</sup> The court relied primarily on pre-*Franklin* cases which indicated compensatory damages did not include recovery for money damages based on mental anguish and emotional distress.<sup>87</sup> Although the court mentioned *Franklin*, it restricted *Franklin*’s application to only those cases involving intentional violations.<sup>88</sup> As a result, the court in *Pool* limited plaintiff’s remedy to injunctive relief.<sup>89</sup>

## 2. *Barnes v. Gorman*

In addition to ruling that emotional damages are recoverable, many district courts have also ruled that *Franklin*’s expansive language to “order any appropriate relief” permits the recovery of punitive damages as well as compensatory damages.<sup>90</sup> In *Gorman v. Easley*,<sup>91</sup> the Court of

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<sup>82</sup> *Waldrop*, 24 F.3d at 157 (“suits under section 504 provide to plaintiffs the full spectrum of remedies”); *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 831 (4th Cir. 1994) (holding that § 504 provides a “full spectrum” of remedies); *Rodgers v. Magnet Cove Pub. Sch.*, 34 F.3d 642, 644 (8th Cir. 1994) (same); *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995) (citing *Franklin*’s rule that “courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute” and therefore holding that plaintiffs may seek monetary damages under section 504).

<sup>83</sup> 818 F. Supp. 954, 970 (N.D. Tex. 1993).

<sup>84</sup> *Id.* See also *Doe v. Marshall*, 882 F. Supp. 1504, 1508 n.4 (E.D. Pa. 1995) (noting that recovery for compensatory and punitive damages for emotional distress is not available; also relying on *Forest Dale* without addressing *Franklin*).

<sup>85</sup> No. 94-1430, 1995 U.S. Dist. LEXIS 12724, at \*4 (D. Kan. Aug. 25, 1995).

<sup>86</sup> *Id.* at \*15.

<sup>87</sup> *Id.* at \*8.

<sup>88</sup> *Id.* at \*14.

<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., *Kilroy v. Husson Coll.*, 959 F. Supp. 22, 24 (D. Me. 1997) (“The Court is persuaded that a private cause of action to enforce the provisions of § 504 exists by

Appeals for the Eighth Circuit overturned a lower court opinion that held punitive damages were unavailable. Relying on *Franklin*, the Eighth Circuit held that punitive damages are appropriate relief because they are “an integral part of the common law tradition and the judicial arsenal” and Congress did nothing to disturb this tradition in enacting or amending the relevant statutes.<sup>92</sup>

In *Barnes v. Gorman*, the Supreme Court reversed the Eighth Circuit.<sup>93</sup> The Court recognized that *Franklin* upheld “the traditional presumption in favor of *any appropriate relief* for violation of a federal right,” but held that the *Franklin* Court did not describe the scope of “appropriate relief.”<sup>94</sup> To determine whether punitive damages were within the scope of appropriate relief, the Court turned to principles of contract law.<sup>95</sup> The Court reasoned that contract law was applicable because under the Spending Clause of the Constitution, Congress has the power to place conditions on the grant of federal funds, which is contractual in nature.<sup>96</sup> Because the Spending Clause legislation imposes contractual-type obligations on recipients of federal funds, the Court reasoned that contract law can also be used to determine which penalties may be imposed when a party violates the terms underlying acceptance of these funds.<sup>97</sup>

Applying contract law, the Court found that punitive damages are not within the scope of the ADA or Rehabilitation Act because punitive damages are generally not available for breach of contract.<sup>98</sup> The Court also found that a court should only impose reasonably-implied contractual terms; that is, those terms that the parties would have agreed

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implication and that punitive damages are recoverable under section 504”); *Worthington v. City of New Haven*, No. 3:94-CV-00609 (EBB) 1999 WL 958627, at \*16 (D. Conn. Oct. 5, 1999) (“[P]revailing plaintiffs may obtain punitive damages against a private party for a violation of the ADA or Section 504 . . . .”); *Kedra v. Nazareth Hosp.*, 868 F. Supp. 733, 740 (E.D. Pa. 1994) (“[P]unitive damages are appropriate for § 504 violations . . . .”); *Proctor v. Prince George’s Hosp. Ctr.*, 32 F. Supp. 2d 820, 829-30 (D. Md. 1998) (holding punitive damages are recoverable under section 504); *Fitzgerald v. Green Valley Area Educ.*, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984) (interpreting “full panoply” to encompass punitive damages and holding that, while available, assessment was not justified under the facts of the case); *Patricia N. v. Lemahieu*, 141 F. Supp. 2d 1243, 1253 (D. Haw. 2001) (refusing to create blanket prohibition on punitive damage awards under section 504). In allowing punitive damages, these courts overturned previous rulings that held that redress was limited only to physical injuries.

<sup>91</sup> 257 F.3d 738 (8th Cir. 2001).

<sup>92</sup> *Id.* at 745.

<sup>93</sup> 536 U.S. 181 (2002).

<sup>94</sup> *Id.* at 185.

<sup>95</sup> *Id.* at 187.

<sup>96</sup> *Id.* at 185-86.

<sup>97</sup> *Id.* at 186.

<sup>98</sup> *Barnes*, 536 U.S. at 187.

to had they adverted to the matters in question.<sup>99</sup> The Court's final conclusion was that a party who accepts federal aid would not reasonably expect to be subjected to punitive damages, because "a remedy is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature."<sup>100</sup>

Although *Barnes* overturned a long line of cases holding that punitive damages are available, it is not clear that the Court sought to overturn cases where emotional damages were available. Indeed, the Court reaffirmed that compensatory damages are available for violations of the Act.<sup>101</sup> In doing so, the Court set no limits on what compensatory damages are available. Instead, the Court cited favorably to the "well settled" rule in *Franklin* that a court can use any available remedy to "make good the wrong done."<sup>102</sup> Thus, *Barnes* is silent as to whether compensatory damages should be narrowly construed to exclude emotional damages.

### 3. *Barnes*'s Progeny Provides Support for a Plaintiff's Ability to Obtain Emotional Damages as Compensatory Relief

After *Barnes*, courts continued to rely on *Franklin* to hold that damages are available to compensate plaintiffs under section 504 of the Act.<sup>103</sup> In *Ryan v. Shawnee Mission U.S.D. 512*,<sup>104</sup> the district court rejected the defendant's motion to dismiss claims for monetary relief and compensatory damages for emotional distress. Although the court did "not definitively resolv[e] the measure of damages applicable to . . . [the] Rehabilitation Act claim," the court implicitly disavowed the holding in *Pool* that emotional damages could not be recovered.<sup>105</sup> The court found instead that the *Ryan* plaintiff could recover for emotional distress damages because he had alleged *intentional* discrimination.<sup>106</sup>

In addition, a number of post-*Barnes* decisions specifically addressed the issue and ruled that compensatory damages include recovery for emotional distress. In *Norton v. Lakeside Family*

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<sup>99</sup> *Id.* at 188.

<sup>100</sup> *Id.* at 187-88 (citation omitted).

<sup>101</sup> *Id.* at 187.

<sup>102</sup> *Id.* at 189 (citing *Franklin*, 503 U.S. at 66; *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>103</sup> *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 441 F.3d 1287, 1297 (11th Cir. 2006) (citing *Franklin*, 503 U.S. at 65, 75, and noting that money damages are available for Title IX claims); *accord Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279, 1283 (11th Cir. 2005) (same).

<sup>104</sup> 416 F. Supp. 2d 1090 (D. Kan. 2006).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1097.

*Practice*,<sup>107</sup> the Maine District Court awarded compensatory damages under the Rehabilitation Act for “loss of enjoyment of life, loss of self-esteem, emotional distress, pain and suffering, and other pecuniary and non-pecuniary losses.”<sup>108</sup> Similarly, in *N.T. v. Espanola Public Schools*,<sup>109</sup> the New Mexico District Court held that damages for mental anguish or emotional distress caused by discrimination were available under the ADA and the Rehabilitation Act because the statutes function as a contract for personal well-being that “contemplate[s] damages for loss of that well-being in the event of a breach.”<sup>110</sup> A district court in Georgia came to an identical conclusion in *Ortega v. Bibb County School District*, where the plaintiffs’ disabled child was killed in a school playground accident.<sup>111</sup> The court held that the plaintiffs were entitled to seek compensatory damages under the Rehabilitation Act, which would “necessarily parallel those sought in a wrongful death action.”<sup>112</sup>

In contrast, the two post-*Barnes* decisions holding that emotional damages are not redressable under the Act are not well reasoned, and fail to consider *Franklin*’s holding that all appropriate remedies are presumptively available.<sup>113</sup> In *Witbeck*, the court relied on two pre-*Franklin* cases: *Rhodes v. Charter Hospital*<sup>114</sup> and *Shuttleworth v. Broward County*<sup>115</sup> to find that emotional damages are not available under the Rehabilitation Act.<sup>116</sup> Both cases were no longer good law when *Witbeck* was decided because they held that, contrary to *Franklin*, compensatory damages are limited to back pay.<sup>117</sup> *Witbeck* also misinterpreted *Barnes* (as the *Sheely* district court acknowledged) when it found that *Barnes* held *Franklin* did not apply to the Rehabilitation Act.<sup>118</sup>

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<sup>107</sup> 382 F. Supp. 2d 202, 206 (D. Me. 2005).

<sup>108</sup> *Id.* at 206.

<sup>109</sup> No. Civ 04-0415 MCA/DJS, 2005 U.S. Dist. LEXIS 43667, at \*43–44 (D.N.M. May 20, 2005).

<sup>110</sup> *Id.*

<sup>111</sup> *Ortega v. Bibb County Sch. Dist.*, 431 F. Supp. 2d, 1296 (M.D. Ga. 2006).

<sup>112</sup> *Id.*

<sup>113</sup> See *Witbeck v. Embry-Riddle Aeronautical Univ.*, 269 F. Supp. 2d 1338 (M.D. Fla. 2003); *Khan v. Albuquerque Pub. Sch.* (D.N.M. 2003) available at <https://www.nmcourt.fed.us/isys/Q:/ORS/Opinions/BROWNING/03cv00118.1.pdf#xml=http://10.8.216.2:8844/ISYSquery/IRLE86A.tmp/6/hilite>.

<sup>114</sup> 730 F. Supp. 1383 (S.D. Miss. 1989).

<sup>115</sup> 649 F. Supp. 35 (S.D. Fla. 1986).

<sup>116</sup> 269 F. Supp. 2d at 1340.

<sup>117</sup> *Rhodes*, 730 F. Supp. at 1386; *Shuttleworth*, 649 F. Supp. at 37.

<sup>118</sup> See *Sheely Order*, *supra* note 38, at 13. Specifically, the *Witbeck* court mistakenly asserted that “the *Barnes* Court found that its decision in *Franklin v. Gwinnett County Public School* did not apply to Rehabilitation Act causes of action.” 269 F. Supp. 2d at 1340, n.1.

Similarly, in the unpublished opinion *Khan v. Albuquerque Public School*,<sup>119</sup> the United States District Court for the District of New Mexico relied only on *Witbeck* and pre-*Franklin* law. *Khan* cited only two pre-*Franklin* cases: *Americans Disabled for Accessible Public Transportation v. SkyWest Airlines*<sup>120</sup> and *Bradford v. Iron County C-4 School District*,<sup>121</sup> to support the proposition that courts do not award emotional distress damages for Rehabilitation Act violations. The court failed to address the post-*Franklin* decisions holding such damages recoverable.<sup>122</sup>

In addition to relying improperly on pre-*Franklin* cases, both *Witbeck*'s and *Khan*'s contractual analyses were perfunctory. *Witbeck* and *Khan* recognized that compensatory damages are available under *Barnes*, but reasoned that because damages for emotional or mental distress are generally not available for breach of contract, they are also not available to Rehabilitation Act plaintiffs. *Khan* mischaracterized contract law principles by arguing that emotional damages are punitive in nature and erroneously suggested that contracts for which emotional distress damages are recoverable must involve "a life or death issue."<sup>123</sup>

#### *B. The District Court in Sheely Misapplied Barnes's Contract Law Analogy*

The district court based its holding in part on the proposition that *Barnes* directed courts to look to contract law principles to determine what remedies are available to victims of intentional discrimination. In reversing, the Eleventh Circuit held that the district court improperly interpreted *Barnes*. The court of appeals determined that the "*Barnes* Court's central reason for turning to the contract metaphor appears to be its concern that federal funding recipients have fair notice of any liability to which they are subject by federal courts."<sup>124</sup> The court held there was no such concern here. "We think it fairly obvious—and case law support this conclusion—that a frequent consequence of discrimination is that the victim will suffer emotional harm. As a result, emotional distress is a

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<sup>119</sup> *Khan v. Albuquerque Pub. Sch.* (D.N.M. 2003).

<sup>120</sup> 762 F. Supp. 320, (D. Utah 1991).

<sup>121</sup> Case No. 82-303-c(4), 1984 WL 1443, at \*9 (E.D. Mo. June 13, 1984).

<sup>122</sup> A subsequent published decision also from the District Court of New Mexico, held exactly the opposite. See *N.T. v. Espanola Pub. Sch.*, No. CIV 09-0415 MCA/DJS, 2005 U.S. Dist. LEXIS 43667, at \*43-44 (D.N.M. May 20, 2005) (holding that damages for mental anguish or emotional distress caused by discrimination were available under the Rehabilitation Act because the Act functions as a contract for personal well-being that "contemplate[s] damages for loss of that well-being in the event of a breach . . .").

<sup>123</sup> *Khan*, at \*11.

<sup>124</sup> *Sheely*, 2007 WL 3087215, *supra* note 59, at \*45.

foreseeable consequence of funding recipients' 'breach' of their 'contract' with the federal government."<sup>125</sup>

We agree with the Eleventh Circuit that *Barnes* only meant to apply contract law as a metaphor. In reasoning that Spending Clause legislation imposes contractual-type obligations on recipients of federal funds, Justice Scalia acknowledged that contract law is not conclusive in addressing all issues arising in Spending Clause cases:

Our decision merely applies a principle expressed and applied many times before: that the "contractual nature" of Spending Clause legislation "has *implications* for our construction of the scope of available remedies." We do not imply, for example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.<sup>126</sup>

Moreover, the question in *Barnes*, whether punitive damages are available, raises issues that are entirely distinct from whether compensatory damages for emotional or mental distress are available. Punitive damages are designed to advance overarching social policy goals, while compensatory damages simply "make good" to a plaintiff any harms inflicted by a defendant. This difference, ignored by the district court, was noted by the *Barnes* Court, which stated that "punitive damages are not compensatory."<sup>127</sup>

Even if the analogy were applicable, *Barnes* used it to illustrate that a party who accepts federal aid would not reasonably expect to be subjected to punitive damages.<sup>128</sup> But as the Eleventh Circuit pointed out, federal funding recipients should reasonably expect to pay damages for emotional or mental distress because such damages have historically been awarded in Section 504 cases and in other civil rights contexts.<sup>129</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *Barnes*, 536 U.S. at 188, n.2 (citation omitted); *see also, id.* at 186 ("[W]e have been careful not to imply that all contract-law rules apply to Spending Clause legislation . . .") (emphasis omitted).

<sup>127</sup> *Id.* at 189.

<sup>128</sup> *Id.* at 187-88 ("[a] remedy is 'appropriate relief' only if the funding recipient is on notice that by accepting federal funding it exposes itself to liability of that nature.") (emphasis omitted) (citation omitted)).

<sup>129</sup> *See, e.g., Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (in context of § 1983 claim, "compensates awarded in § 1983 context"); *Wright v. Sheppard*, 919 F.2d 665, 669 (11th Cir. 1990) (same in § 1982 context); *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985) (damages for emotional distress were recoverable under both § 1981 and § 1983); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 629 F.2d 993, 1005 (5th Cir. 1980) (emotional damages awarded in § 1981 context); *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991) (emotional damages awarded in § 1981 context); *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978) (same).

### 1. Emotional Damages Are Available for Breach of Contract Claims

The district court reasoned that if contract law determines the scope of available remedies, then Sheely would not have the right to recover damages for emotional injury because emotional damages are not available for breach of contract.<sup>130</sup> However, the court also permitted Sheely to obtain injunctive relief.<sup>131</sup>

The Eleventh Circuit rejected the district court's presumption that emotional damages are never attainable when a party breaches a contract, holding instead that emotional damages are available when the nature of the contract is such that emotional distress is foreseeable.<sup>132</sup> The Eleventh Circuit explained that the exception allowing emotional damages is a "notable and longstanding" one, thereby drawing a clear distinction between the compensatory damages for emotional injuries that Sheely sought and the punitive damages the Supreme Court refused to award in *Barnes*.<sup>133</sup> Thus, the court held that even if contract law were applicable, emotional damages would be available, because "where one of the benefits the government has bargained for is the funding recipient's promise not to discriminate, the recipient cannot claim to lack fair notice that it may be liable for emotional damages when it intentionally breaches that promise."<sup>134</sup>

We believe that the district court's holding contradicts principles of contract law that emphasize how appropriate relief should be available when contracts are breached. As E. Allan Farnsworth explains: "Our system of contract remedies is not directed at *compulsion of promisors to prevent* breach; it is aimed, instead at *relief to promisees to redress* breach."<sup>135</sup> These principles are firm that the injunctive relief, that the district court ordered is not appropriate. Injunctive relief, or specific performance, is a disfavored remedy except in rare circumstances, such as the sale of land, that are not applicable here.<sup>136</sup> Damages, which "place

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<sup>130</sup> *Sheely Order*, *supra* note 38, at 12-13.

<sup>131</sup> *Id.*

<sup>132</sup> *Sheely*, 2007 WL 3087215, *supra* note 59, at \*20.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 22.

<sup>135</sup> E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.1 (3d ed. 2004).

<sup>136</sup> See RICHARD A. LORD, WILLISTON ON CONTRACTS § 64:1 (4th ed. 1992) ("The primary if not the only remedy for injuries caused by the nonperformance of most contracts is an action for a damages for the breach, and except in those rare instances where only equitable relief is available, as in the case of an oral contract of the sale of an interest in land that is enforceable only through a decree of specific performance, a judgment for damages will be given for any breach of any contract."); JOHN E. MURRAY, MURRAY ON CONTRACTS §117 (4th ed. 2001) (specific performance is "generally considered an exceptional remedy"); FARNSWORTH, *supra* note 135, §12.4 at 162 ("The

the injured promisee in the position she would have occupied had the promise been performed . . . or . . . restore her [to] the position she was in before the promise was made,” are preferred.<sup>137</sup> The *Barnes* Court appeared to endorse this view: “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 that wrong is ‘made good’ when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure.”<sup>138</sup>

Significantly, all of the sources the *Barnes* Court cited in support of its contract analysis<sup>139</sup> state that emotional damages are available in certain breach of contract cases where the damages are not incidental to the breach, but rather where their prevention is the point of the contract.<sup>140</sup>

Although the district court is correct that damages for emotional or mental distress are generally not available for breach of contract,<sup>141</sup> emotional damages are available when their prevention is the express object of the contract, when benefits other than pecuniary benefits are contracted for, or when they would reasonably or foreseeably result from the breach.<sup>142</sup>

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common law courts did not generally grant specific relief for breach of contract.”). The RESTATEMENT (SECOND) OF CONTRACTS in section 353 adopts the general rule prohibiting recovery of non-economic damages in contract cases unless the breach also caused bodily disturbance or the contract of the breach “is of such a kind that serious emotional disturbance was particularly likely to result.”

<sup>137</sup> MURRAY, *supra* note 136, at § 117.

<sup>138</sup> *Barnes*, 536 U.S. at 189.

<sup>139</sup> WILLISTON ON CONTRACTS § 64.7 (1922); RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981); FARNSWORTH ON CONTRACTS § 12.17 (2001).

<sup>140</sup> *See, e.g.*, WILLISTON § 64.7 (“Numerous cases allowing the recovery of emotional distress damages for breach of contract exist, invariably dealing with what might be called peculiarly sensitive subject matter, or noncommercial undertakings or both.”).

<sup>141</sup> Some courts hold that contract actions for mental anguish are not available. *See, e.g.*, *Keltner v. Washington County*, 800 P.2d 752 (Or. 1990).

<sup>142</sup> *See Huskey v. Nat’l Broad Co.*, 632 F. Supp. 1282, 1293 (N.D. Ill. 1986) (denying motion to dismiss contract claim alleging emotional damages because breach of a contract to engage only in consensual filming of prisoners would reasonably be expected to cause emotional disturbance); *Ocean v. Marriott Corp.*, 631 N.E.2d 80 (Mass App. Ct. 1994) (holding emotional harm from breach of an agreement that settled an employment discrimination claim “was certainly foreseeable”); *Decker v. Browning-Ferris Indus.*, 931 P.2d 436, 448 (Colo. 1997) (allowing recovery of emotional damages for breach of express covenant of good faith and fair dealing because such damages a “natural and proximate consequence” of willful breach); *See also* RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) (“Recovery for emotional disturbance will be excluded unless . . . the breach is of such a kind that serious emotional disturbance was a particularly likely result.”); WILLISTON ON CONTRACTS § 64.7 (1922) (“It has also been stated that where other than pecuniary benefits are contracted for, damages have been allowed for injury to

Courts in many states have found that mental distress damages are recoverable where a contract was of a non-pecuniary nature made “to secure [the] protection of personal interests.”<sup>143</sup> Rather than defining narrow categorical exceptions, these courts have attempted to “formulate a broader doctrine, allowing recovery for mental distress resulting from breach of contract in a wide range of non-tortious breach situations.”<sup>144</sup> The contracts at stake have a personal rather than pecuniary purpose, and that purpose “is utterly frustrated until mental damages are awarded for the breach.”<sup>145</sup>

Finally, the district court implicitly recognized that Sheely’s injuries are cognizable, and that by passing the Rehabilitation Act, Congress sought to protect disabled people from suffering emotional or mental distress due to discrimination based on their disability. If this harm was incidental, these injuries would not be cognizable and the plaintiffs would not have standing to sue.<sup>146</sup>

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a person’s feelings”); FARNSWORTH ON CONTRACTS § 12.17 (2001) (“Some courts have looked to the nature of the contract and made exceptions where breach was particularly likely to result in serious emotional disturbance. Other courts have looked to the nature of the breach and allowed damages for emotional disturbance on the ground that the breach of contract was reprehensible. . . .”).

<sup>143</sup> See *Stanback v. Stanback*, 254 S.E.2d 611, 620 (N.C. 1979) (mental damages recoverable if the contract did not involve trade and commerce, benefits contracted for non-pecuniary and benefits related “directly to matters of dignity, moral concern or solicitude”); *Stewart v. Rudner*, 84 N.W.2d 816, 824-25 (Mich. 1957) (mental damages recoverable for breach of contract for a Caesarean operation when child died because contract involved “matters of mental concern and solicitude”); *Lamm v. Shingelton*, 55 S.E.2d 810, 813 (N.C. 1949) (compensatory damages recoverable for breach of failure to deliver a watertight casket and to lock the casket because contractual duty “so coupled with matters of mental concern”); *Frewen v. Page*, 131 N.E. 475, 476 (Mass. 1921) (mental distress damages for humiliation recoverable for breach of contract between innkeeper and guest because contract contained an implied obligation that “neither the innkeeper or the servant will abuse or insult the guest, or engage in any conduct or speech which may unreasonably subject him to physical discomfort or distress of mind or imperil his safety.”); *Hill v. Sereneck*, 355 So. 2d 1129 (Ala. Civ. App. 1978) (mental distress damages recoverable for breach of a home construction contract where breach affected habitability); *Windeler v. Scheers Jewelers*, 8 Cal. App. 3d 844, (Cal. Ct. App. 1970) (mental anguish damages recoverable for breach of contract to have family rings made into an heirloom). Even state courts generally reluctant to award emotional damages have found exceptions in certain circumstances. See, e.g., *Guerin v. New Hampshire Catholic Charities, Inc.*, 418 A.2d 224, 227 (N.H. 1980) (mental distress damages claim viable for eviction from a nursing home). See also, *Kewin v. Mass. Mutual Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) (finding insurance contracts for disability income protection did not involve protection of personal interests because contracts were commercial in nature).

<sup>144</sup> *Stanback v. Stanback*, 254 S.E.2d 611, 618 (N.C. 1979) (citing D. DOBBS, REMEDIES §12.4, 819).

<sup>145</sup> *Id.*

<sup>146</sup> Plaintiffs suffering emotional harm from sexual harassment, as in *Franklin*, or from feeling rejected, isolated, and discriminated against because of their HIV status, as

V. THE RECOVERY OF EMOTIONAL DAMAGES IS NECESSARY TO ENSURE  
OPTIMAL DETERRENCE

We believe that the Eleventh Circuit's decision is not only in accord with precedent, but also ensures that plaintiffs have the proper incentive to sue. In passing section 1988 providing for attorneys fees in eight civil rights statutes, including Title VI and Title IX, "Congress was aware that '[the] effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens,'<sup>147</sup> and that 'a vast majority of the victims of civil rights violations cannot afford legal counsel [and] are unable to present their cases to the courts.'"<sup>148</sup> Providing victims with the proper ability to sue is essential because victims need "private [attorneys] generals advancing the rights of the public at large, and not merely some narrow parochial interest."<sup>149</sup> Thus, when Congress passed the Rehabilitation Act and the ADA,<sup>150</sup> it provided that successful plaintiffs would be able to recover attorney's fees.<sup>151</sup>

Simply providing plaintiffs with injunctive relief does not provide plaintiffs with the proper incentive to sue. A plaintiff who sues has a probability, "p"<sup>152</sup> that he will prevail and a probability "1-p" that he will lose and not collect attorneys' fees. If a winning plaintiff does not receive any monetary reward, then the only monetary benefit a plaintiff receives are attorney's fees. But in this case, the expected monetary outcome is less than the fees spent on the attorneys. That is:

$$\begin{aligned} \text{Expected monetary outcome} &= p (\text{attorney's fees}) + (1-p) (0) \\ &= p (\text{attorney's fees}) \\ &< \text{attorney's fees because } p < 1. \end{aligned}$$

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in *Doe v. District of Columbia*, 796 F.Supp. 559, 573 (D.D.C. 1992), certainly had cognizable emotional harm.

<sup>147</sup> H. R. REP. NO. 94-1558, at 1 (1976).

<sup>148</sup> *Long v. Bonnes*, 455 U.S. 961, 967 (1982) (Rehnquist, J., dissenting) (citing H.R. REP. NO. 94-1558, at 1 (1976)) (citation omitted).

<sup>149</sup> *Long*, 455 U.S. at 967, (Rehnquist, J., dissenting) (citing 122 CONG. REC. 35122 (1976) (statement of Rep. Drinan)).

<sup>150</sup> 42 U.S.C. § 794a(b) (2007) ("In any action or proceeding to enforce or charge a violation of a provision of this title [29 USCS §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

<sup>151</sup> 42 U.S.C. § 12205 (2007) ("In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . . .")

<sup>152</sup> A plaintiff never has a 100% probability it will prevail, regardless of the merits of the case. Thus,  $p < 1$ .

Simply put, if a plaintiff receives only injunctive relief, he will not have the proper incentive to sue.

In mandating that successful plaintiffs recover attorney's fees, Congress plainly demonstrated an intention for plaintiffs to have the proper incentive to sue.<sup>153</sup> Thus, only providing for injunctive relief manifestly contradicts Congressional intent because victims will no longer be encouraged to enforce their rights and the rights of others similarly-situated. Accordingly, society will be harmed because many plaintiffs will not bring legal actions to obtain injunctive relief. The reduction in suits, including injunctive relief, would eviscerate the Act's attempt to deter discrimination and ensure equal treatment.

## VI. CONCLUSION

The Eleventh Circuit concluded that *Franklin* did not address the issue of the scope of compensatory damages and looked to *Barnes* to determine what is "appropriate." A central purpose of the implied contract here is to protect the emotional well-being of persons with disabilities. A federal recipient's failure to do so should permit the third party beneficiary to sue for damages caused by the breach.

Concededly, there is the danger that permitting the recovery of emotional damages will undermine disability rights. This could occur if private entities that face severe penalties engage in overly defensive behavior, such as removing any access currently enjoyed. Private entities might also decide that the benefits of receiving federal aid do not outweigh the costs associated with facing suits from plaintiffs claiming to suffer from emotional damages.

Although we recognize these possibilities, we think they are unlikely. A plaintiff will only be able to obtain damages if he can prove he actually suffered emotional harm. We suspect the cost of proving emotional damages is fairly high, yet the potential recovery is fairly low. Courts understand that emotional injuries are difficult to assess; consequently, courts may look to previous discrimination cases granting damages for emotional distress, try to relate damages to injury, or exercise discretionary control over the jury's award.<sup>154</sup> Moreover, there is

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<sup>153</sup> See *Robbins v. Chronister*, 435 F.3d 1238, 1244 (10th Cir. 2006) (An award of attorney's fees is a departure from general practice that the losing party is not required to reimburse the prevailing party's attorney's fees and is "designed as an incentive to plaintiffs to engage in litigation to vindicate civil rights.") (citing 42 U.S.C. § 1988 (2006) (providing a fee-shifting provision granting courts the discretion to award reasonable attorney's fees to the prevailing party in Title IX, Title VI, and six other statutes).

<sup>154</sup> See, e.g., *Baumgardner v. HUD*, 960 F.2d 572 (6th Cir. 1992) (upholding \$500 award for emotional distress after plaintiff was denied housing because of his gender

no possibility for punitive damages. Thus, providing for emotional damages is unlikely to result in a slew of merit-less lawsuits brought by “ambulance chasing” attorneys. In short, any costs associated with the possibility of vexatious litigation that may result from the right to sue for emotional damages does not outweigh the costs associated with the loss of optimal deterrence that could have occurred if the right to sue for emotional damages was denied.

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where distress was ephemeral); *Rodriguez v. Comas*, 888 F.2d 899 (1st Cir. 1989) (upholding \$75,000 to a victim of false arrest after psychiatrist testified plaintiff suffered from post-traumatic stress disorder); *Wade v. Orange County Sheriff’s Office*, 844 F.2d 951 (2d Cir. 1988) (upholding Title VII plaintiff’s award for \$50,000 compensatory damages for emotional distress where evidence demonstrated plaintiff suffered from repeated humiliation at work and racially motivated harassment); *Portee v. Hastava*, 853 F. Supp. 597, 615 (E.D.N.Y. 1994) (looking at twenty-one cases since 1988 in which some form of discrimination resulted in emotional distress where damages ranged from \$500 to \$75,000 to support the court’s determination that the jury’s award of \$280,000 was excessive); *Coleman v. Zatechka*, 824 F. Supp. 1360 (D. Neb. 1993) (awarding ADA plaintiff \$1,000 for her feelings of isolation, segregation and stigmatization after not being assigned a roommate).