11-2215-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARY JO C.,

Plaintiff-Appellant,

v.

NEW YORK STATE AND LOCAL RETIREMENT SYSTEM,
CENTRAL ISLIP PUBLIC LIBRARY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York (Central Islip)

BRIEF FOR DEFENDANT-APPELLEE CENTRAL ISLIP PUBLIC LIBRARY

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PRELIMINARY STATEMENT

In this action commenced pursuant to Title II of the Americans with Disabilities Act (the "ADA"), Defendant-appellee Central Islip Public Library (the "Library") respectfully submits this brief in opposition to the appeal by plaintiff-appellant Mary Jo C. ("plaintiff") seeking the reversal of the judgment of the District Court (Feuerstein, J.), dated May 6, 2011, that granted the Library's motion, pursuant to Fed. R. Civ. Pro. 12 (b) (6), dismissing the complaint as against it.

As demonstrated below, the dismissal of plaintiff's action must be affirmed. Plaintiff, who had been an employee of the Library, alleged that the Library failed to provide her with reasonable accommodations by refusing to file a disability retirement application on her behalf and by denying her request to reclassify the termination of her employment as a leave of absence. These claims of purported employment-based discrimination are only cognizable under Title I of the ADA. Plaintiff, however, commenced her action pursuant to Title II of the ADA, requiring dismissal of her complaint.

Although neither the Supreme Court nor this Court have squarely addressed this issue, recent decisions, as well as the language, text and structure of the ADA, all demonstrate that plaintiff's exclusive remedy lies within Title I of the ADA. As a result, the District Court properly dismissed the complaint as against the Library.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT PROPERLY CONCLUDED THAT, BASED ON THE TEXT AND STRUCTURE OF THE ADA, AS WELL AS WELL-REASONED PRECEDENT, PLAINTIFF'S TITLE II EMPLOYMENT CLAIMS REQUIRE DISMISSAL INASMUCH AS SUCH CLAIMS MAY ONLY BE ASSERTED UNDER TITLE I?

This question should be answered in the affirmative.

STATEMENT OF THE CASE

Following the termination of her employment with the Library, plaintiff untimely filed an application for disability retirement benefits with defendant-appellee New York State and Local Retirement System (the "State Retirement System"). After the State Retirement System denied her request to waive the filing deadline, plaintiff commenced the instant action pursuant to Title II of the ADA against the Library and against the State Retirement System. Plaintiff also asserted claims against the Library premised on New York State Executive Law § 296.

As against the Library, plaintiff alleged that it failed to provide her with a requested reasonable accommodation by refusing to file a disability retirement application on her behalf and by denying her request to reclassify the termination of her employment as a leave of absence. As against the State Retirement System, plaintiff alleged that, despite the fact that her disability retirement application was

statutorily late, it should have provided her a reasonable accommodation by waiving the statutory deadline.

Both the Library and the State Retirement System moved to dismiss plaintiff's complaint. The District Court granted the motions, resulting in a judgment dismissing the complaint. Plaintiff appeals.

STATEMENT OF FACTS

A. Plaintiff's Complaint

On December 23, 2009, plaintiff commenced this action pursuant to Title II of the ADA against the Library and against the State Retirement System (A35-A46).[1] Plaintiff also asserted state law claims against the Library premised on New York State Executive Law § 296.

As alleged in her complaint, plaintiff has suffered from mental illness since adolescence (A38). Between 1986 and November 2006, plaintiff worked intermittently for various libraries on Long Island (A38). Beginning in January 1988, plaintiff became a member of the State Retirement System (A38). According to her complaint, an application for disability retirement benefits may be made by an employee who is eligible to receive such benefits and the

[1] Numbers in parentheses preceded by "A" refer to pages in the Joint Appendix.

application must be made within three months of the last date of employment (A38).[2]

Plaintiff alleged that, "[a]s a result of behaviors that were symptomatic of her mental illness, the [Library] fired [her] in November 2006" and that her last date of work was on or about November 12, 2006 (A38-A39). She further alleged that, under New York State law, she would have been eligible for disability retirement benefits upon timely filing an application within three months from her last day of work (A39). According to her complaint, plaintiff, because of her mental illness, "failed to recognize that state law required her to file her retirement benefits application within three months of her last day of employment" (A39).

Plaintiff further alleged that, during the three-month period of time during which an application for disability benefits could be filed, her brother attempted to assist her in obtaining the benefits (A39). In particular, she alleged that her brother spoke to the director of the State Retirement System who advised that the Library could file an application for disability retirement benefits on plaintiff's behalf (A39). Plaintiff alleged that her brother asked the Library to file an application for retirement benefits on plaintiff's behalf and that the Library denied the request

[2] New York Retirement and Social Security Law ("NYRSSL") § 605 (b) (2) requires that the application for benefits be filed "within three months from the last date the member was being paid on the payroll…."

(A40). Plaintiff's brother asked the Library, in the alternative, to reclassify her termination as an unpaid leave of absence and that request, too, was denied (A40).

Plaintiff alleged that her condition improved in November 2007 and that, at that point, she applied for disability retirement benefits (A40). The State Retirement System denied the application on the ground that plaintiff failed to timely file her application within three months of her last date of employment (A40). On July 28, 2008, plaintiff requested an accommodation under the ADA from the State Retirement System, seeking a waiver of the filing deadline (A41).

According to plaintiff's complaint, the State Retirement System never formally responded to her request for an accommodation (A41). Plaintiff administratively appealed the denial of her retirement claim and the denial of her disability retirement claim was affirmed (A41).

Plaintiff alleged that the failures of the State Retirement System and the Library to provide her with the requested accommodations resulted in the loss of substantial amounts of retirement benefits to which she otherwise would have been entitled (A42).

Based on these factual allegations, plaintiff alleged that the Library failed to provide requested reasonable accommodations to her and violated the ADA by: (i) failing to file a disability retirement application on her behalf; and (ii) failing to reclassify her termination as a leave of absence (A42-43). Plaintiff further alleged

that the Library violated New York Executive Law § 296 by failing to provide the alleged requested accommodations (A43-A44). As against the State Retirement System, plaintiff alleged that it violated the ADA by failing to waive the statutory timeframe for the filing of disability retirement benefits (A42). Plaintiff sought declaratory and injunctive relief. She also sought monetary damages against the Library, but only if the court determined that the waiver of the filing deadline would constitute an undue burden for the State Retirement System (A44-A46).

B. <u>The Library's Motion To Dismiss</u>

By notice of motion dated May 28, 2010, the Library moved, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, to dismiss plaintiff's complaint based on her failure to state a claim upon which relief could be granted (A66-67, A68-84).[3] In particular, the Library argued that, in order to state a claim under Title II of the ADA, a plaintiff is required to, among other things, establish that she is being excluded from participation in, or being denied the benefits of some service, program or activity by reason of her disability (A77-A79). Stated otherwise, the Library maintained that the alleged actions in refusing to file a

[3] By separate notice of motion dated April 20, 2010, the State Retirement System moved, pursuant to Rule 12 (b) (1) and Rule 12 (b) (6), to dismiss plaintiff's complaint (A47-A48). The State Retirement System maintained that the court lacked subject matter jurisdiction over this action since plaintiff lacked standing to sue and because the Eleventh Amendment bars plaintiff's claims (A55-A60). The State Retirement System further argued that plaintiff's ADA Title II claim failed to state a claim because the State Retirement System had no discretion to waive a statutory filing deadline (A60-A64).

disability retirement application on plaintiff's behalf and in refusing to classify plaintiff's termination as a leave of absence were not services that the Library offered to the public at large but, rather, were benefits that she received as a result of her employment with the Library (A77-A79). Thus, the Library argued that plaintiff's alleged entitlement to retirement disability benefits can only be asserted in her capacity as a prior employee and not in her capacity as a member of the general public as is required to state a claim under Title II of the ADA.

In this regard, the Library argued that plaintiff failed to state a claim pursuant to Title II of the ADA because Title I is the exclusive remedy for a claim of disability discrimination in the employment context (A79-A82). The Library addressed four reasons why a Title II claim could not be recognized in the employment context. The Library argued that: (i) Title I of the ADA is the only title in the Act that specifically addresses employment (A79-A80); (ii) Title I and Title II offer different definitions for a "qualified individual" and for an "entity" (A80); (iii) the procedural requirements of Title I, which place a time limitation on claims, would be eviscerated by the application of Title II to employment discrimination (A81-A82); and (iv) Congress delegated regulatory authority for Title I and Title II to different agencies (A82).

For the same reasons warranting dismissal of plaintiff's ADA claims, the Library argued that plaintiff failed to state a claim under New York Executive Law § 296 (A82-A83).

C. Plaintiff's Opposition

Plaintiff opposed the Library's motion and maintained that Title II of the ADA protects individuals from discriminatory conduct by state and local governments in the employment setting (A105-09). Plaintiff maintained that a split in case law authority exists on this issue and, despite the fact that Title I deals exclusively with employment-related claims, argued that her employment-related ADA claim could fall within the parameters of Title II of the ADA. Plaintiff further argued that the Library failed to provide a reasonable accommodation by denying her request to file the application for disability retirement benefits on her behalf (A109-11).[4] Plaintiff agreed with the Library's position that the standards governing discrimination under New York Executive Law § 296 do not differ from the standards under the ADA (A89 n. 1).

D. The Library's Reply

In reply, the Library maintained that plaintiff's claims relate to her prior employment with the Library and should have been asserted in an employment-related claim under Title I of the ADA and not Title II of the ADA (A126-A139).

[4] In the same memorandum of law, plaintiff opposed the State Retirement System's motion to dismiss.

In particular, the Library argued that plaintiff failed to refute the fact that she has not been denied access to a public service program or activity offered by the Library and, therefore, cannot state a claim under Title II of the ADA (A131-A132). In addition, the Library argued that plaintiff never filed an administrative complaint with the Equal Employment Opportunity Commission ("EEOC") or any other state or local agency, as would be required in order to bring a claim for employment discrimination under Title I of the ADA (A132). The Library further maintained that, unlike Title I, Title II does not require plaintiff to exhaust her administrative remedies and, therefore, her employment discrimination claim should have been brought pursuant to Title I, requiring dismissal of her Title II claims (A133).

The Library also acknowledged the split in authority on the issue of whether an employment-related ADA claim could be stated under Title II, but maintained that the more recent and persuasive authority from the courts within this Circuit holds that a Title II claim cannot be stated under such circumstances (A132-A138).

The Library reiterated its position that the state claims likewise require dismissal since, as even plaintiff acknowledged, they are governed by the same legal standards (A138).

E. The District Court's Opinion And Order

By opinion and order dated May 5, 2011, the District Court granted both the Library's and the State Retirement System's respective motions and dismissed plaintiff's complaint (A9-A34). In the first instance, the District Court found that plaintiff's complaint failed to sufficiently allege that she has a "disability" within the meaning of the ADA and, as a result, her complaint failed to state a cognizable claim under Title II of the ADA (A22, A29 n.7). Recognizing that it would be possible for plaintiff to amend her Title II claims to sufficiently allege this element and also acknowledging that the Library assumed that she was disabled for purposes of this motion, the District Court addressed the merits of the motion and analyzed the issue substantively (A29-A33).

After analyzing the issue and reviewing relevant case law, including case law from the Supreme Court, and acknowledging the split in authority, the District Court determined that Title I of the ADA is the exclusive remedy for plaintiff's claims of discrimination against the Library (A32). In particular, the court held that:

> Based upon the well-reasoned decisions of the most recent district court cases in this Circuit, as well as the aforementioned language in the Supreme Court cases, I find that Title I of the ADA is the exclusive remedy for plaintiff's claims of discrimination against the Library, all of which relate to the "terms, conditions, and privileges of [her] employment" with that entity. 42 USC §

> 12112 (a). Accordingly, plaintiff's Title II ADA claims against the Library (second and third causes of action) are dismissed with prejudice pursuant to Rule 12 (b) (6) for failure to state a claim.

(A32-A33).

Regarding the state law claims, the District Court declined to exercise supplemental jurisdiction over them and dismissed them (A33-A34).

Judgment dismissing the complaint followed (A8). Plaintiff appeals (A7).

SUMMARY OF ARGUMENT

The District Court properly granted the Library's motion to dismiss. The structure and text of the ADA establish that employment-related claims must be brought under Title I. The ADA is compartmentalized with each Title addressing a particular area of discrimination. Title I, for example, is entitled "employment" and addresses discrimination in the employment context. Title II, entitled "public services," addresses access to "services, programs, or activities." The Supreme Court has likewise noted the compartmentalized nature in which the ADA is organized, noting that it forbids discrimination against persons with disabilities in particular areas of public life, with employment falling within Title I.

In addition, the text of the ADA underscores that only Title I of the ADA addresses employment discrimination. Both in its general rule forbidding discrimination and its definition of a qualified individual, Title I of the ADA speaks specifically to the issue of employment. Neither Title II nor any other Title

of the ADA addresses employment. While the Supreme Court has not squarely addressed this issue, its discussion of the issue in a recent case suggests that Title I of the ADA would be the exclusive remedy for an employment-related claim.

As it relates specifically to Title II, this Court has held that it prohibits discrimination against persons with disabilities in connection with access to public services. Plaintiff's complaint in this action recounts alleged discrimination for the Library's failure to provide her with a reasonable accommodation in connection with her employment. It does not allege that she was denied access to the Library's services as a member of the general public. In short, her complaint does not state a claim under Title II of the ADA.

Although this Court has not addressed this issue, there currently exists a split between various Circuit Courts of Appeals. Within this Circuit, the overwhelming majority of the district courts have held that a plaintiff cannot state an employment-related ADA claim within Title II.

Accordingly, as will be discussed more fully below, the District Court properly dismissed plaintiff's complaint for failure to state a claim.

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT AGAINST THE LIBRARY BECAUSE HER EMPLOYMENT-RELATED DISCRIMINATION CLAIMS ARE NOT COGNIZABLE UNDER TITLE II OF THE ADA

A. General Legal Principles

A motion to dismiss for failure to state a claim pursuant to Rule 12 (b) (6) tests the legal facial sufficiency of the complaint. This Court conducts de novo review of the District Court's dismissal of a complaint pursuant to Rule 12 (b) (6). See, Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008); Chapman v. New York State Div. for Youth, 546 F.3d 230, 235 (2d Cir. 2008), cert. denied sub. nom, Handle With Care Behavior Mgmt. Sys. v. New York State Div. for Youth, 130 S. Ct. 552 (2009). In this context, this Court accepts all factual allegations in the complaint as true, and draws reasonable inferences in the light most favorable to the plaintiff. See, e.g., Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104, 115 (2d Cir. 2008), cert. denied, 555 U.S. 1218 (2009). Although the allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). In order to survive a motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the

speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Chapman, 546 F.3d at 235.

Title II of the ADA provides, in part, that:

> No qualified 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.

42 U.S.C. § 12132.

In order to state a claim under Title II of the ADA, a plaintiff must demonstrate that: (i) he or she is a qualified individual with a disability; (ii) he or she is being excluded from participation in, or being denied the benefits of some public service, program or activity; and (iii) the exclusion or discrimination was due to his or her disability. See, Fulton v. Commissioner Glen S. Goord, 591 F.3d 37, 43 (2d Cir. 2009); Hargrave v. State of Vermont, 340 F.3d 27, 34-35 (2d Cir. 2003); see also, Nartelli v. VESID Office, 420 Fed. Appx. 53, 54-55 (2d Cir. 2011) (summary order).

As will be demonstrated below, plaintiff cannot state a claim under Title II of the ADA because she cannot demonstrate that the benefit to which she was allegedly entitled was a service, program or activity that the Library provides to the

general public.[5] Stated otherwise, inasmuch as the alleged denial of benefits owed by the Library arose out of plaintiff's prior employment with the Library, and not out of her use and enjoyment of the Library as a member of the general public, plaintiff cannot state a viable claim under Title II of the ADA. Rather, as will be addressed below, plaintiff's exclusive remedy is found within Title I of the ADA.

B. Plaintiff's Exclusive Remedy For Her Employment-Related Discrimination Claims Lies Within Title I Of The ADA

Plaintiff's complaint against the Library requires dismissal since the exclusive remedy for her employment-related discrimination claims lies within Title I of the ADA. Title II of the ADA, under which she brought suit, only proscribes discrimination in connection with access to public services and, therefore, the District Court properly dismissed her complaint. Several reasons compel this result, including: (i) an overview of the structure of the ADA; (ii) Title I of the ADA is the only Title within the Act to discuss the subject of employment-related discrimination; and (iii) Title II of the ADA address the general public's

[5] The Library conceded for purposes of the motion that plaintiff qualifies as an individual with a disability within the meaning of the ADA and further conceded that the Library is a public entity that provides services, programs and activities to the public. Despite these concessions, the District Court, among other reasons for dismissing plaintiff's complaint, found that her complaint failed to allege facts sufficient to establish that she was an individual with a disability (A13-A14, A29 n. 7). Nevertheless, because it would be possible for plaintiff to amend her complaint to sufficiently plead this element, the District Court determined that any such amendment would be futile because plaintiff's claims could only be stated under Title I of the ADA.

access to public services, not employment. In addition, although there is a circuit-split on this issue, the overwhelming majority of district courts in this Circuit have concluded that Title I is the exclusive avenue to redress employment-related claims. Each of these arguments will be addressed below.

1. Overview Of The ADA

When Congress enacted the ADA, it recognized that discrimination against persons with disabilities is evident in many areas. In particular, in outlining its findings, Congress noted that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalism, health services, voting and access to public services." 42 U.S.C. § 12101.

To redress the various categories of discrimination against individuals with disabilities, Congress enacted separate subchapters or Titles prohibiting discrimination in particular areas. For example, Title I of the ADA is entitled "Employment;" Title II of the ADA is entitled "Public Services;" and Title III of the ADA is entitled "Public Accommodations and Services Operated by Private Entities."

The Supreme Court has likewise noted the compartmentalized manner in which the ADA is organized. In particular, the Supreme Court characterized the ADA as "forbid[ing] discrimination against persons with disabilities in three major

areas of public life: employment, which is covered by Title I of the statute; public services, programs and activities, which are the subject of Title II; and public accommodations, which are the subject of Title III." State of Tennessee v. Lane, 541 U.S. 509, 516-17 (2004); see also, PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (holding that "[t]o effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)"). This Court, too, has recognized the separate categories of discrimination proscribed by the ADA. See, Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003), cert. denied, 541 U.S. 936 (2004) (noting that the ADA in "[i]ts first three titles proscribe discrimination against individuals with disabilities in employment and hiring (Title I), access to public services (Title II), and public accommodations (Title III)").

Given the overview of the ADA and the manner in which each of the types of discrimination are classified, it is clear that plaintiff's claims against the Library - - her former employer - - fall within Title I of the ADA, entitled "Employment."

2. Only Title I of the ADA Addresses Employment Discrimination Claims

Pursuant to Title I, "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job

training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112 (a). Likewise, as defined in Title I, a "qualified individual" means an individual who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111 (8). In a similar vein, Congress charged the EEOC with regulating Title I (42 U.S.C. § 12116), while the Attorney General is charged with regulating Title II (42 U.S.C. § 12134).[6] No other Title of the ADA addresses employment-related discrimination issues.

Although not squarely addressed by the Supreme Court, language in its case law suggests that employment-related discrimination claims can only be stated under Title I of the ADA. While not directly addressing the issue, the Supreme Court noted that Title I of the ADA "expressly deals with the subject." Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 360 n.1 (2001). In so noting, the Supreme Court referenced the axiom that, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

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[6] In addition, as will be addressed in more detail later in this brief, if public employees could pursue their employment claims under Title II, it would render Congress' efforts to include protections for employees in Title I superfluous and would permit them to avoid Title I's procedural requirements, such as exhaustion of administrative remedies. See, Zimmerman v. State of Oregon Department of Justice, 170 F.3d 1169, 1177 (9th Cir. 1999), cert. denied, 531 U.S. 1189 (2001). These circumstances further evidence that Title I was designed to exclusively redress employment-related ADA claims.

in the disparate inclusion or exclusion.'" Id., quoting Russello v. United States, 464 U.S. 16, 23 (1983).

Thus, because Congress chose to specifically include employment-related disability discrimination claims in Title I, but omitted such claims in other sections of the same Act, it can be presumed that Title I, and only Title I, is the appropriate avenue in which to seek redress for such claims of discrimination.

3. Title II of the ADA Redresses Access To Public Services, Not Employment

As it relates to Title II of the ADA, this Court has held that, "Title II of the Act proscribes discrimination against the disabled in access to public services." Harris v. Mills, 572 F.3d 66, 73 (2d Cir. 2009); Powell v. National Board of Medical Examiners, 364 F.3d 79, 84 (2d Cir. 2004). Title II of the ADA prohibits "discrimination against qualified disabled individuals by requiring that they receive 'reasonable accommodations' that permit them to have access to and take a meaningful part in public services and public accommodations." Powell, 364 F.3d at 85. As the "paradigmatic example" of a Title II ADA claim, this Court refers to "a person who must use a wheelchair to access the courts - - a citizen is entitled to access the court system irrespective of whether he or she can walk." Harris, 572 F.3d at 74.

Here, a review of plaintiff's allegations against the Library demonstrate that they arise not out of the public services that the Library provides to members

of the general public but, instead, arise out of the employee-employer relationship that existed between them. Notably, in asserting her claims, plaintiff alleged that, under New York law, an application for disability retirement benefits may be made by an employee who is eligible for benefits, or by the head of the department at which the employee is employed (A38). She further alleged that the application for disability retirement benefits must be made from the last date of employment (A38). Plaintiff alleged that the Library failed to provide requested reasonable accommodations to her and violated the ADA by: (i) by failing to file a disability retirement application on her behalf; and (ii) failing to reclassify her termination as a leave of absence (A42-43).

These allegations do not amount to "services, programs, or activities" within the meaning of Title II of the ADA of which plaintiff was deprived access. Rather, plaintiff's purported ADA claims fall within the category of alleged discrimination against individuals with disabilities in employment, falling within the category of Title I of the ADA. As a result, plaintiff has failed to state a claim pursuant to Title II of the ADA.

4. Despite A Split in Authority, The Overwhelming Majority of Courts Within this Circuit Have Concluded That Claims, Such As Those Asserted By Plaintiff, Can Only Be Asserted under Title I

At least two Circuit Courts of Appeals have squarely addressed this issue and have reached opposite conclusions. Compare, Zimmerman v. State of Oregon

Department of Justice, 170 F.3d 1169 (9th Cir. 1999), cert. denied 531 U.S. 1189 (2001) (holding that Title II of the ADA does not apply to claims of employment discrimination); with, Bledsoe v. Palm Beach County Soil and Water Conservation District, 133 F.3d 816 (11th Cir.), cert. denied, 525 U.S. 826 (1998) (holding that Title II of the ADA does state a claim for employment discrimination). This Court has not squarely addressed the issue.

In Zimmerman, the Ninth Circuit held that Title II of the ADA does not apply to claims of employment discrimination. In reaching that conclusion, the court reviewed the text and structure of the ADA and concluded that employment-related claims fall exclusively within the ambit of Title I.

This Court has never addressed the issue.[7] The district courts within this Circuit have reached divergent results. However, since the time that the Supreme Court decided Garrett with its commentary that Title I expressly deals with employment-related claims, the district courts within this Circuit have

[7] Other circuits, too, have declined to reach the issue. See, e.g., Currie v. Group Ins. Commission, 290 F.3d 1 (1st Cir. 2002) (noting divergent results, but declining to decide the issue); Lavia v. Commonwealth of Pennsylvania, 224 F.3d 190, 195 n.2 (3d Cir. 2000) (noting split in authority, but declining to address issue); Whitfield v. State of Tennessee, 639 F.3d 253, 258 (6th Cir. 2011) (noting that the court had never decided whether Title II of the ADA applies to employment cases and declining to do so in this case); Staats v. County of Sawyer, 220 F.3d 511, 518 (7th Cir. 2000) (noting that the court had never addressed the issue and declining to do so without it being squarely presented); Davoll v. Webb, 194 F.3d 1116, 1128-29 (10th Cir. 1999) (declining to address whether Title II covers employment actions).

overwhelmingly held that claims of discrimination in employment are not cognizable under Title II of the ADA. See, e.g., Reddick v. Southern Connecticut State University, 2011 U.S. Dist. LEXIS 50728 (D. Conn. May 12, 2011); Brown v. State of Connecticut, 2010 U.S. Dist. LEXIS 52871 (D. Conn. May 27, 2010); Scherman v. New York State Banking Dep't, 2010 U.S. Dist. LEXIS 26288 (S.D.N.Y. March 19, 2010); Melrose v. New York State Department of Health Office of Professional Medical Conduct, 2008 U.S. Dist. LEXIS 123180 (S.D.N.Y. Dec. 12, 2008); Fleming v. State University of New York, 502 F. Supp.2d 324 (E.D.N.Y. 2007); Cormier v. City of Meriden, 2004 U.S. Dist. LEXIS 21104 (D. Conn. Sept. 30, 2004); Sworn v. Western New York Children's Psychiatric Center, 269 F. Supp.2d 152 (W.D.N.Y. 2003); Filush v. Town of Weston, 266 F. Supp.2d 322 (D. Conn. 2003); Syken v. State of New York, Executive Department, Division Of Housing And Community Renewal, 2003 U.S. Dist. LEXIS 5358 (S.D.N.Y. April 2, 2003); but see, Olson v. State of New York, 2005 U.S. Dist. LEXIS 44929 (E.D.N.Y. March 9, 2005); Transportation Workers Union of America, Local 100, AFL-CIO v. New York City Transit Auth., 342 F. Supp.2d 160 (S.D.N.Y. 2004); Bloom v. New York City Board of Education, 2003 U.S. Dist. LEXIS 5290 (S.D.N.Y. April 2, 2003); Winokur v. Office of Court Administration, 190 F. Supp.2d 444 (E.D.N.Y. 2002).

The courts that have held that Title I is the exclusive avenue to redress employment-related discrimination claims focused on the text and structure of the ADA and generally followed the Ninth Circuit in Zimmerman. The District Court in this case agreed. In particular, the court held that:

> Based upon the well-reasoned decisions of the most recent district court cases in this Circuit, as well as the aforementioned language in the Supreme Court cases, I find that Title I of the ADA is the exclusive remedy for plaintiff's claims of discrimination against the Library, all of which relate to the "terms, conditions, and privileges of [her] employment" with that entity. 42 USC § 12112 (a). Accordingly, plaintiff's Title II ADA claims against the Library (second and third causes of action) are dismissed with prejudice pursuant to Rule 12 (b) (6) for failure to state a claim.

(A32-A33).

Given the foregoing, plaintiff's Title II claims were properly dismissed.

C. Plaintiff's Arguments Do Not Compel A Different Result

Plaintiff raises two arguments in support of her position that Title II encompasses employment-related claims.[8] Plaintiff's arguments rest primarily on the reasoning employed by the Eleventh Circuit in Bledsoe. First, plaintiff maintains that Title II of the ADA should be broadly construed to encompass all discrimination-related claims and relies on this Court's decision in Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37 (2d Cir. 1997) to support

[8] Similar arguments are raised by amici curiae and for the reasons addressed in this brief, those arguments are unavailing.

her argument. Second, plaintiff argues that the existence of regulations promulgated by the Department of Justice ("DOJ") support the existence of employment-discrimination claims in the context of Title II of the ADA. Both arguments are easily rejected.

1. Plaintiff Construes The Language in Innovative Health Systems Too Broadly

In Innovative Health Systems, this Court characterized Title II as a "catch-all" that prohibits all types of discrimination by a public entity regardless of context. Id., at 45. Innovative Health Systems is inapposite for several reasons. Initially, that case had nothing to do with claims of employment discrimination. Rather, it concerned a challenge to an allegedly discriminatory zoning decision and the issue was whether the zoning decisions were "programs, services, or activities" that would be covered by Title II.

In addition, Innovative Health Systems pre-dates the Supreme Court's decision in Garrett. As highlighted earlier, Garrett suggests that Title I is the exclusive avenue to redress ADA employment discrimination claims. In that same vein, the more recent cases from this Court likewise suggest that Title II is much narrower than Innovative Health portrays it to be. Notably, this Court has described Title II of the ADA as prohibiting "discrimination against qualified disabled individuals by requiring that they receive 'reasonable accommodations' that permit them to have access to and take a meaningful part in public services

and public accommodations." Powell, 364 F.3d at 85. As a classic example of a Title II claim, this Court refers to "a person who must use a wheelchair to access the courts - - a citizen is entitled to access the court system irrespective of whether he or she can walk." Harris, 572 F.3d at 74.

Thus, upon analysis, Innovative Health Systems, despite its seemingly broad language, does not support a conclusion that an employment-related claim can be stated pursuant to Title II of the ADA.

2. The DOJ's Regulations Do Not Withstand a Chevron Analysis

Plaintiff's second argument is likewise unavailing. The DOJ has promulgated regulations suggesting that an employment discrimination claim can be stated within the context of Title II of the ADA. See, 28 C.F.R. § 35.140 (a) (stating that "[n]o qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity"). Applying the Supreme Court's analysis in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the DOJ's regulation is contrary to the plain wording and structure of the ADA and is not entitled to deference.

Pursuant to Chevron, the first question is always whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to

the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43; see, Li v. Renaud, 654 F.3d 376 (2d Cir. 2011). In determining whether Congress has directly spoken to the issue, "a reviewing court must first exhaust 'the traditional tools of statutory construction…. If, in light of its text, legislative history, structure, and purpose, a statute is found to be plain in its meaning, then Congress has expressed its intention as to the question, and deference is not appropriate.'" Li, 654 F.3d, quoting Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1287 (D.C. Cir. 2000), cert. denied, 532 U.S. 970 (2001).

Here, as addressed earlier, upon a review of the plain text and structure of the ADA, it is clear that Congress has expressed its intent that Title II of the ADA is not the proper forum to redress claims of employment discrimination and that Title I is the exclusive avenue for relief. In Zimmerman, for example, the court reviewed the plain language of Title II and concluded that "employment by a public entity is not commonly thought of as a 'service, program, or activity of a public entity.'" Zimmerman, 170 F.3d at 1174. To reach that logical conclusion, the court presented an analogy and questioned how a public entity and a member of the public would describe the services of that public entity:

> Consider, for example, how a Parks Department would answer the question, "What are the services, programs, and activities of the Parks Department?" It might answer, "We operate a swimming pool; we lead nature walks; we maintain playgrounds." It would not answer, "We buy lawnmowers and hire people to operate them." The latter

> is a means to deliver the services, programs, and activities of the hypothetical Parks Department, but it is not itself a service, program, or activity of the Parks Department.
>
> Similarly, consider how a member of the public would answer the question, "What are the services, programs, and activities of the Parks Department in which you want to participate, or whose benefits you seek to receive?" The individual might answer, "I want to participate in the Wednesday night basketball league, or find out about the free children's programs for the summer months." The individual would not logically answer, "I want to go to work for the Parks Department."

Id.

Thus, as the court in Zimmerman concluded, the wording of Title II of the ADA does nothing to suggest that it would apply to employment. As stated by that court, "[o]btaining or retaining a job is not 'the receipt of services,' nor is employment a 'program[] or activity provided by a public entity." Id., at 1176. To be sure, this Court, in its description of Title II likewise suggests that Title II's application is limited to preventing discrimination against the disabled "in access to public services." Harris v. Mills, 572 F.3d 66, 73 (2d Cir. 2009); Powell v. National Board of Medical Examiners, 364 F.3d 79, 84 (2d Cir. 2004). Employment discrimination claims, therefore, are simply not part of the text or meaning of Title II.

The text, structure and procedure of the various Titles of the ADA further highlight that employment related claims can only be heard in the context of Title

I. For example, "only Title I specifically addresses employment, while Title II is 'devoid of any employment provisions.'" Fleming, 502 F. Supp.2d at 331, quoting Zimmerman, 170 F.3d at 1176. Critically, in defining the term "qualified individual with a disability," Title I specifically makes reference to a disabled person's ability to perform the functions of an employment position, while Title II makes no reference at all to employment. Compare, 42 U.S.C. § 12111 (8); with, 42 U.S.C. § 12131 (2).

In addition, Congress charged different agencies with implementing the various Titles of the ADA. Notably, the Equal Employment Opportunity Commission is charged with regulating Title I (42 U.S.C. § 12116), while the Attorney General is charged with regulating Title II (42 U.S.C. § 12134).

Likewise, if public employees could pursue their employment claims under Title II, it would render Congress' efforts to include protections for employees in Title I superfluous. See, Zimmerman, 170 F.3d at 1177. Similarly, allowing public employees to seek redress under Title II would permit them to avoid Title I's procedural requirements, such as exhaustion of administrative remedies. Id. Moreover, Congress linked the Rehabilitation Act of 1973, which governs employment, with Title I of the ADA, rather than linking it with Title II. Id., at 1178; Fleming, 502 F. Supp.2d at 331.

Given the foregoing, the text and structure of the ADA reveals that employment related discrimination claims fall exclusively within the ambit of Title I of the ADA. Accordingly, the District Court properly dismissed plaintiff's claims as against the Library, as they were all based on Title II of the ADA.[9]

[9] For similar reasons, the District Court properly declined to exercise supplemental jurisdiction over the state law claims and dismissed them.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court (Feuerstein, J.), dated May 6, 2011, should be affirmed, with costs.

Dated: Uniondale, New York
November 18, 2011

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,800 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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