

***Cummings v. Premier Rehab Keller PLLC:  
Implications and Avenues for Reform***



**National Council on Disability**

**January 19, 2023**



## National Council on Disability

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An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

### Letter of Transmittal

January 19, 2023

The President  
The White House  
Washington, DC 20500

Dear Mr. President:

On behalf of the National Council on Disability (NCD), I submit the report, *Cummings v. Premier Rehab Keller PLLC: Implications and Avenues for Reform*.

On April 28, 2022, the U.S. Supreme Court held that a plaintiff bringing suit to enforce the antidiscrimination provisions of Section 504 of the Rehabilitation Act of 1973 (Section 504), or Section 1557 of the Patient Protection and Affordable Care Act (Section 1557) cannot recover damages for emotional distress resulting from intentional disability-based discrimination. The *Cummings* decision has significant implications for people with disabilities who experience intentional discrimination by public and private entities who receive federal financial assistance (FFA). Entities such as public and private colleges and universities, hospitals, group homes, physical therapist offices, and others who receive FFA, including federal grants, loans, or other forms of FFA will no longer need to remedy intentional discrimination based on disability when the resulting harm is anxiety, stress, depression, marital strain, humiliation, or other similar emotional pain. Compensation for economic losses is now the only remedy available. However, outside of the employment context, people who experience disability-based discrimination by such entities primarily suffer emotional distress from the discrimination, not economic loss. The decision also leaves people who experience emotional distress from disability-based discrimination by public or private entities wholly reliant on state law for redress, and state laws vary widely.

This report analyzes the Supreme Court's decision, discusses the challenge of securing injunctive relief when emotional distress damages are not available, describes the impacts of *Cummings* on people with disabilities, including immediate impacts already experienced, and the availability of emotional distress damages under state laws.

NCD concludes that the most effective manner to respond to the *Cummings* decision is enactment of legislation which restores the ability of people with disabilities to seek redress for emotional distress damages for disability-based discrimination. The legislation should also instruct federal courts not to use contract law analogy in analyzing discrimination cases under Congress's Spending Clause authority. NCD also recommends that federal agencies notify FFA recipients of the specific damages that recipients may be liable for if they violate Section 504, Section 1557, or other federal antidiscrimination laws based on the Spending Clause.

Appropriate and adequate remedies must continue to be available to people with disabilities who experience intentional discrimination at the hands of recipients of FFA. Without the availability of emotional distress damages under these statutes, victims of disability-based discrimination cannot be made whole.

NCD strongly believes that action must be taken to restore the remedy that *Cummings* eliminated. Implementation of the recommendations in this report will restore the availability of emotional distress damages and provide recipients of FFA with notice of their responsibilities regarding non-discrimination.

Federal funds should not be used to perpetuate discrimination. Without a legislative fix to Section 504 and Section 1557, that is what is now occurring.

Respectfully,

A handwritten signature in black ink, appearing to read "Andrés J. Gallegos". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Andrés J. Gallegos, J.D.  
Chairman

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The National Council on Disability (NCD) thanks David Hutt and Philip Fornaci with the National Disability Rights Network (NDRN) for their work developing this brief.

## **Summary of NCD Brief on *Cummings v. Premier Rehab Keller***

The National Council on Disability (NCD), in this brief analysis discusses the holding and implications of the U.S. Supreme Court decision in *Cummings v. Premier Rehab Keller P.L.L.C.* handed down in April 2022. The *Cummings* decision eliminated the ability of people who experience disability-based intentional discrimination to obtain emotional distress damages from public and private entities who receive federal financial assistance (FFA) from the federal government under Section 504 of the Rehabilitation Act of 1973 or Section 1557 of the Patient Protection and Affordable Care Act. Entities such as public and private colleges and universities, hospitals, group homes, physical therapist offices, and others who receive FFA, including federal grants, loans, or other forms of FFA will no longer need to remedy discrimination based on disability when the only harm of the discrimination results in anxiety, stress, depression, marital strain, humiliation, or other similar emotional pain.

The *Cummings* decision leaves people with a disability who experience emotional distress from discrimination in public accommodations reliant on state law, which vary widely. The decision is currently limited to violations of Section 504 of the Rehabilitation Act of 1973 and Section 1557 of the Patient Protection and Affordable Care Act, however, it is possible a future court will prohibit emotional distress damages for other civil rights violations by FFA recipients under Title VI of the Civil Rights Act of 1964, as amended, or Title IX of the Education Act of 1972.

NCD concludes that the most effective way to address the *Cummings* decision is through enactment of legislation which restores the ability of people with disabilities to seek redress for emotional distress damages because of a disability-based discrimination, and which instructs the federal courts not to use contract law analogy in deciding discrimination cases under Congress's Spending Clause authority. NCD also recommends that federal agencies clearly state in all applicable notices, or by other means as appropriate, the specific damages an FFA recipient may be liable to compensate if the recipient violates Section 504, Section 1557, and other similar federal antidiscrimination laws based on the Spending Clause.

## I. Introduction

In April 2022 the U.S. Supreme Court issued a decision in *Cummings v. Premier Rehab Keller P.L.L.C*<sup>i</sup> with significant implications for people with disabilities seeking to obtain redress for disability-based discrimination. In *Cummings*, the Court held that a plaintiff bringing suit to enforce the antidiscrimination provisions of Section 504 of the Rehabilitation Act of 1973 (RA or Section 504) or Section 1557 of the Patient Protection and Affordable Care Act (ACA or Section 1557) cannot recover damages for emotional distress which resulted from intentional discrimination. Although the Court reaffirmed the right of individuals to sue for other kinds of damages under these statutes, it rejected efforts to allow suits for compensation for emotional harm or injury caused by unlawful discrimination under either statute. With limited relief available, the decision now restricts people with disabilities seeking to enforce their rights under these federal antidiscrimination laws.<sup>ii</sup>

Often, people who experience disability-based discrimination at the hands of a public or private entity which provides a service primarily suffer “emotional distress” damages for the pain and humiliation which results from the discrimination. Typically outside of the employment context, when disability-based discrimination occurs the person does not suffer significant economic losses, such as additional medical costs or other expenses, lost income, or lost property.

After *Cummings*, only compensation for economic losses is now available under Section 504, Section 1557, and other civil rights statutes enacted through Congress’s authority under the Spending Clause of the U.S. Constitution.<sup>iii</sup> While the Americans with Disabilities Act (ADA) is not Spending Clause legislation,<sup>iv</sup> the *Cummings* decision creates an additional concern that the Supreme Court may apply a similar limitation on remedies when a private person subject to disability-based discrimination brings suit, known as a private right of action, under Title II of the ADA. Title II, unlike Title III of the ADA, provides for monetary damages. This brief analyzes the Court’s approach in *Cummings*, including a critique of the Court’s interpretation of compensatory damages; the potential application of its holdings to private rights of action under Title II of the ADA; the immediate implications for people with disabilities; and policy recommendations.



## II. Emotional Distress Damages and the *Cummings* Decision

### A. Analysis of the Decision

The Supreme Court's decision and analysis in *Cummings* involving emotional distress damages is based on its 2002 decision in *Barnes v. Gorman*,<sup>v</sup> where the Court similarly limited the scope of remedies under Section 504. The *Barnes* Court held that compensatory damages, but not punitive damages, were available under Section 504. Compensatory damages, also called "actual damages," under antidiscrimination laws cover the loss a person incurred as a result of the another's discriminatory conduct. Some examples of compensatory damages are medical expenses, mental health counseling expenses, lost wages and costs associated with hiring sign language interpreters and other quantifiable out-of-pocket expenses reasonably incurred as a result of the discriminatory conduct. The monetary amount awarded under compensatory damages is intended to make good or replace the loss caused by the discriminatory conduct. Emotional distress damages, while more difficult to quantify, are also considered to be type of compensatory damages.

Punitive damages, also called "exemplary damages," are awarded to punish or make an example of a wrongdoer who has acted willfully, maliciously or fraudulently. Unlike compensatory damages that are intended to cover actual loss, punitive damages are intended to punish the wrongdoer for egregious behavior and to deter others from acting in a similar manner. Where available, punitive damages are awarded in addition to compensatory damages.<sup>vi</sup>

While both *Barnes* and *Cummings* involved Congressional authority under the Spending Clause of the U.S. Constitution,<sup>vii</sup> *Barnes* went further and prohibited punitive damages under Title II of the ADA. Congress enacted the ADA under authority through the Fourteenth Amendment of the U.S. Constitution and not the Spending Clause. *Cummings*, however, did not extend its holding to the ADA or other non-spending clause legislation.

The *Barnes* Court however, on which the *Cummings* Court relied heavily, did extend its holding regarding punitive damages under Section 504 to those available under Title II of the ADA by looking to Title VI of the Civil Rights Act of 1964, as amended<sup>viii</sup>:

The Rehabilitation Act, in turn, declares that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 ... shall be available" for violations of § 504... Thus, the remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which prohibits racial discrimination in federally funded programs and activities.<sup>ix</sup>

The *Barnes* Court analyzed Title VI of the Civil Rights Act and held that punitive damages are not permitted for violations of that Title.<sup>x</sup> "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>xi</sup> The *Barnes* Court noted again that punitive damages are not compensatory, leaving in place the traditional view that compensatory emotional distress damages remained available under Spending Clause statutes like Section 504. Because it disallowed punitive damages under Title VI, *Barnes* similarly barred such damages in suits brought under Title II of the ADA and Section 504. The *Barnes* Court did not directly address other compensatory damages but implied they are available under the RA.

Most immediately after the *Cummings* decision, people with disabilities who seek damages for harm caused by recipients of federal financial assistance (FFA) for intentional discrimination are limited to direct economic harm. They are now unable to secure damages for the broad category of compensatory emotional distress damages, that is, for non-economic harms. Emotional distress does not typically involve economic injury. It more often manifests itself through sleeplessness, anxiety, stress, depression, marital strain, humiliation, loss of self-esteem, excessive fatigue, nervous breakdown, ulcers, gastrointestinal disorders, hair loss, or headaches. While damages for emotional distress cannot be assumed because discrimination occurred, in the majority of jurisdictions prior to *Cummings*, a plaintiff’s testimony, standing alone, could support an award of compensatory damages for emotional distress.

Emotional distress damages have traditionally been available for breaches of contract since at least as early as 1902. For example, in *Louisville & N. R. Co. v Hull* (1902) errors by railroad personnel delayed delivery of the corpse of Hull’s wife to a funeral by one day. The court ruled that “[D]amages for mental suffering are allowed because these are the natural result of the defendant’s wrong, and in no other way can proper compensation for it be had.”<sup>xii</sup> Emotional distress damages were considered to be the only appropriate compensation for this kind of case, where there was no monetary loss to the plaintiff, but the non-monetary harm suffered is undeniable. Because emotional distress damages are now unavailable under Section 504 after *Cummings*, financial incentives for potential plaintiffs to pursue litigation that can address intentional discrimination are limited. Potential plaintiffs can sue only to prevent future discriminatory practices, assuming the strict requirements for bringing suit in federal court (“standing”) are met (see section E, below, “The Challenge of Securing Injunctive Relief When Emotional Distress Damages are Not Available,” for a discussion of standing issues). Such plaintiff’s now will not be personally compensated for the non-economic harm they have suffered. Similarly, although attorneys’ fees remain available under Section 504, the limitation on damages provides smaller financial incentives for legal representation. This now results in a situation as exists under Title III of the ADA, which bars discrimination in public accommodations. Title III allows for injunctive and declaratory relief, but unlike Title II of the ADA, it does not permit recovery for economic or non-economic damages for successful litigants challenging discriminatory acts or practices.

In approximately half of U.S. states and the District of Columbia, however, discrimination in public accommodations barred by Title III of the ADA is also barred

under state laws, and provide potential damages in successful cases (see also Appendix A for state laws on emotional damages).<sup>xiii</sup> There are no similar options for alternative state law filings for Section 504 claims which allege violations by entities receiving FFA. After *Cummings*, many claims of intentional discrimination will go wholly unaddressed for lack of meaningful damages available to potential plaintiffs.

Notably, places of religious worship (churches, synagogues), as well as other places or programs controlled by religious entities (such as schools, hospitals, day care centers, adoption agencies, thrift shops, shelters, and food banks) which are also considered religious entities, are excluded from Title III of the ADA (which covers public accommodations). However, places or programs controlled by religious entities, in particular faith-based hospitals, that receive FFA are covered under Section 504.<sup>xiv</sup> Unlike Title III of the ADA, there is no *per se* exclusion for religious entities under Section 504.

It is also important to recognize the high bar for proving intentional discrimination, which is required as a predicate to seeking monetary damages under Section 504 and Section 1557. Proving intentional discrimination requires a showing of “deliberate indifference.”<sup>xv</sup> The United States Court of Appeals for the Eleventh Circuit summarized the deliberate indifference standard by contrasting it with negligence:

Deliberate indifference requires knowledge that a federally protected right is likely to be harmed and a failure to act upon that likelihood. Negligence, even if gross, cannot constitute deliberate indifference. For conduct to be deliberately indifferent, there must be both knowledge of likely harm and failure to act on the part of a policymaker, that is, someone capable of making an “official decision” on behalf of the organization.<sup>xvi</sup>

For example, “Circuit Courts have held that when a hospital maintains a policy to accommodate deaf patients, the hospital staff knows about the policy and the availability of auxiliary aids, and the hospital staff attempts to accommodate the deaf patient, the hospital does not act with deliberate indifference to a patient’s RA rights, even if the requested accommodation is not quickly, or ever, supplied.”<sup>xvii</sup> “However, a hospital that simply has a policy and auxiliary aids, however, but ignores deaf patients’ requests for accommodation or withholds access to auxiliary aids, acts with deliberate indifference to a patient’s rights under the [RA].”<sup>xviii</sup>

Another possible consequence of *Cummings* is that it may be extended to private rights of action under Title II of the ADA following the prior holding in *Barnes* that “remedies for violations of § 202 of the ADA and § 504 of the [RA] are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964.”<sup>xix</sup> Justice Breyer noted in his dissent in *Cummings*, “[T]he Court’s decision today will affect the remedies available under all four of these statutes [including Section 1557], impacting victims of race, sex, disability, and age discrimination alike.”<sup>xx</sup> Because the ADA is not Spending Clause legislation like Section 504, however, the contract law analogy used to limit available remedies under *Barnes* and *Cummings* should not be extended to Title II of the ADA.

*Barnes* held that the prohibition on punitive damages under Section 504 are “coextensive” with remedies under Title VI of the Civil Rights Act and therefore under Title II of the ADA. In other words, the prohibition on Section 504 can be applied to the ADA. After *Cummings*, there is a potential that the prohibition on emotional distress damages may be extended to Title II despite the irrelevance of the contract law analogy employed in *Cummings* to legislation based on the Fourteenth Amendment such as the ADA. The extension of *Cummings*’ ban on emotional distress damages to the ADA could be supported by the text of the ADA itself, which specifies that remedies available under the RA are the same for Title II of the ADA.<sup>xxi</sup> Absent legislation action, federal court interpretations of *Cummings* in future cases will determine if such an extension to Title II is made.

The decision in *Cummings* addressed the issue of emotional distress damages in the context of lawsuits brought under Section 504 and Section 1557, but there is significant concern that its reasoning in *Cummings* could also foreclose the availability of these damages under other federal antidiscrimination statutes. Justice Breyer noted in his dissent in *Cummings*:

The Rehabilitation Act (prohibiting disability discrimination) and the Affordable Care Act (prohibiting race, sex, disability, and age discrimination) expressly incorporate the rights and remedies available under Title VI. 29 U. S. C. §794a(a)(2); 42 U. S. C. §18116(a). We have treated these statutes as providing “coextensive” remedies. *Barnes*, 536 U. S., at 185. Thus, the Court’s decision today will affect the remedies available under all four of these statutes, impacting victims of race, sex, disability, and age discrimination alike.<sup>xxii</sup>

Therefore, *Cummings* raises the possibility that damages could be similarly limited under these other civil rights statutes, with particular concern for Title VI of the Civil Rights Act. At present, the statutory text in Section 504, Section 1557, Title VI, and Title IX of the Education Act of 1972,<sup>xxiii</sup> do not specify the availability of compensatory relief for emotional harm, for punitive damages, or any other relief apart from attorney’s fees. Nor does the text of these statutes explicitly foreclose certain types of relief. The Age Discrimination Act also lacks text addressing relief in a private suit. The Supreme Court’s *Barnes* and *Cummings* decisions are efforts to fill in the blanks in civil rights statutes because Section 504, Section 1557, the ADA and also Title VI are silent on the scope of available damages for violations of those laws. This silence enables the Court to utilize a strained contract law analogy that reduces people who endure intentional discrimination to simply third-party beneficiaries of federal antidiscrimination laws, rather than direct beneficiaries, for whom federal antidiscrimination protection is directed.

## **B. Damages for Breach of Contract**

In *Barnes*, the Court was “filling in the blanks” in an antidiscrimination statute – Section 504 - that did not explicitly include guidance about the kinds of damages available. This was also the goal in *Cummings*, where the statutes involved do not explicitly articulate the types of damages available in lawsuits brought by private plaintiffs asserting violations of those laws. To fill in the blanks in the statutes, the Court’s analysis in the

earlier *Barnes* case first determined what damages should be available under Spending Clause statutes like Section 504 and looked to contract law for an analogous situation.<sup>xxiv</sup> In effect, the Court treated federal fund disbursements under the Spending Clause as a “contract” between the government and recipients of government funds by which the recipient agrees to abide by the antidiscrimination provisions in return for the receipt of the FFA. Some of the terms of this “contract” were unspecified in the underlying legislation, in particular the remedies that should be made available to people harmed by breaches of this “contract” between the government and recipients of FFA. Instances of discrimination against people with disabilities under Section 504 are “breaches” of this contract.

Applying the analogy from contract law, the *Barnes* Court determined that a recipient of federal funds which violates the antidiscrimination provisions should pay certain monetary damages to the person subject to the discrimination. Such person who is protected against discrimination is known as an indirect or “third-party beneficiary” of the Spending Clause “contract” between the federal government and the FFA recipient. Treating Spending Clause statutes as analogous to a contract between the government and the funded entity, the Court carried the contract law analogy a step further to analyze what specific types of damages should be available to people or entities when FFA recipients failed to follow the rules of their “contract,” that is, when they discriminate against people with disabilities. This contract rules analysis adopted by the Court also apply to other antidiscrimination statutes based on receipt of federal funds, notably Title VI of the Civil Rights Act and Title IX of the Education Act, also enacted under Spending Clause authority.

In *Barnes*, the issue at stake was whether punitive damages should be available under Section 504, and in that case by extension to Title II of the ADA. Following previous Supreme Court cases, the *Barnes* Court used the contract analogy to determine whether the recipient of federal funds would have agreed to accept the funds if the recipient had known it would be subject to punitive damages. The Court concluded that, because punitive damages are not “compensatory” for a breach of a contract provision, they are not “traditionally available” under breach of contract claims. Punitive damages go beyond merely compensating contract recipients for damages incurred by a breach of the contract, imposing additional penalties as punishment for the breach. The Court claimed that, “Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have accepted the funding if punitive damages liability was a required condition.”<sup>xxv</sup> In the *Barnes*’ Court’s view, punitive damages are wholly unanticipated penalties for a contract breach. “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>xxvi</sup>

In *Cummings*, the Court stretched the *Barnes* contract law analogy. In *Cummings*, the Court looked at what it considered to be the “usual contract remedies” in a breach of contract case to determine whether emotional injuries could be available under the RA

and the ACA. This is a somewhat subtle shift from the *Barnes* “traditionally available” contract remedies approach. The language “usual contract remedies” is not found in *Barnes*, but the *Cummings* Court repeatedly cited to *Barnes* for support of the proposition that an analysis of the “usual contract remedies” standard utilized in *Cummings* is essentially synonymous with the term “traditionally available” used in *Barnes*. It appears likely that the *Cummings* Court needed to use slightly different language (“usual contract remedies”) to exclude emotional damages because the *Barnes* “traditionally available” language would not necessarily have supported the *Cummings* holding. In fact, emotional distress damages are “traditionally available” compensatory damages in many non-commercial contract cases. The use of the term “usual contract remedies” indicates that the Court is further limiting available damages beyond the *Barnes* holding, which barred only punitive damages.

In *Barnes*, punitive damages were ruled as unavailable under the Spending Clause because punitive damages are not considered to be compensatory damages, stating that “punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract.”<sup>xxvii</sup> But “emotional distress” damages are compensatory damages of the sort that are available in certain breach of contract cases, those in which “serious emotional disturbance was a particularly likely result.”<sup>xxviii</sup> *Cummings* holds that, even though emotional damages are compensatory, they are not the “usual” compensatory damages available under contract law.

The shift from “traditionally available” in *Barnes* to “usual contract remedies” in *Cummings* allows the *Cummings* Court to both distinguish and expand the holding from *Barnes* that compensatory damages are in fact “traditionally available” under Spending Clause statutes while maintaining the contract analogy analysis. The *Cummings* Court then had to argue that, although the earlier *Barnes* precedent established that compensatory damages are traditionally available in contract cases, certain compensatory damages (those awarded as compensation for emotional distress) are not “usual.” This analysis complicates the contract analysis for people with disabilities seeking to determine what redress is possible after experiencing intentional discrimination.

### **C. Notice to Federal Funds Recipients of Potential Liability**

The Supreme Court stated in *Barnes*, using the Spending Clause contract analogy, that a remedy for a breach of the antidiscrimination provisions is an “appropriate remedy . . . only if the funding recipient is on notice that by accepting federal funding, it exposes itself to liability of that nature.”<sup>xxix</sup>

The *Barnes* Court noted:

We have acknowledged that compensatory damages alone “might well exceed a recipient’s level of federal funding,” [citations omitted] . . . ; punitive damages on top of that could well be disastrous. Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it

is doubtful whether they would even have accepted the funding if punitive damages liability was a required condition.<sup>xxx</sup>

But the *Cummings* decision asserts that not all compensatory damages are “usual”:

Hornbook law states that emotional distress is generally not compensable in contract. Under *Barnes*, the Court cannot treat federal funding recipients as having consented to be subject to damages for emotional distress, and such damages are accordingly not recoverable.”

But are emotional distress damages “usual contract remedies,” even if the *Cummings* Court held they are not? The Court cites “the adverbs *Barnes* repeatedly used, requiring that a remedy be “traditionally available,” “generally ... available,” or “normally available for contract actions.”<sup>xxxix</sup> The Court finds these terms to be synonymous with “usual contract remedies” and that emotional distress damages are not “usual” for breaches of contract.

Emotional distress damages clearly are traditionally available in certain situations for breaches of contract, but these matters are typically non-commercial contract cases. In 2007 the Eleventh Circuit in *Sheely v. MRI Radiology Network, P.A.*,<sup>xxxix</sup> considering emotional distress damages under Section 504 decision, cited to a 1957 Michigan state supreme court decision in *Stewart v. Rudner*<sup>xxxix</sup> to distinguish between remedies in commercial contract versus non-commercial contract cases:

*It is true, in the ordinary commercial contract, damages are not recoverable for disappointment, even amounting to alleged anguish, because of breach. Such damages are ... too remote. But these are contracts entered into for the accomplishment of a commercial purpose. Pecuniary interests are paramount .... [I]t has long been settled that recovery therefor was not contemplated by the parties as the natural and probable result of the breach. **Yet not all contracts are purely commercial in their nature. Some involve rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal. In such cases the award of damages for mental distress and suffering is a commonplace ....***

The Michigan *Stewart* court addressed directly the then-developing trend toward awarding emotional distress damages in contract cases:

We are therefore left to determine the question here presented according to the rules of the common law applicable to actions for damages for breach of contract. In such actions, can damages be recovered for mental suffering resulting from a breach of the contract? ... Although the law in this field is in a state of marked transition and fluidity, is is [sic] [it] not too early to state that there is a marked trend towards recovery. There was a day, as we noted above, when the prevention of ‘private warfare’ fulfilled the highest function of the court, when a visibly cracked skull was a *sine qua non* for recovery, but the precedents of that era no longer control. We have come to realize, slowly

it is true, that the law protects interests of personality, as well as the physical integrity of the person, and that emotional damage is just as real (and as compensable) as physical damage.<sup>xxxiv</sup>

The Eleventh Circuit in *Sheely* goes on to cite numerous federal appellate and district cases to support its holding that “As a matter of both common sense and case law, emotional distress is a predictable, and thus foreseeable, consequence of discrimination. Certainly, federal courts have long found that violations of the RA and other antidiscrimination statutes frequently and palpably result in emotional distress to the victims.”<sup>xxxv</sup> Of particular note, the Eleventh Circuit mentioned:

- *Bogle v. McClure* (11th Cir.):<sup>xxxvi</sup> affirming award of emotional damages for race discrimination in violation of 42 U.S.C. § 1983, where plaintiffs testified to having felt “embarrassed, humiliated, stunned, confused, angry, frightened, discouraged, and betrayed,” with one testifying, “I can’t begin to tell you what a toll it has taken on me. To be an active and producing person and then to suddenly be just put on the shelf and made to sit there through no purpose of my own or no doing of my own, I could not help that I was hurt.”
- *Stallworth v. Shuler* (11th Cir.):<sup>xxxvii</sup> upholding award of emotional damages under §§ 1981 and 1983 of the Civil Rights Act, noting that “[t]he injury in civil rights cases may be intangible as here. It need not be financial or physical but may include damages for humiliation and emotional distress.”
- *Odom v. East Ave. Corp* (N.Y. Supreme Court):<sup>xxxviii</sup> awarding emotional damages to African–American hotel guests denied service at hotel restaurant because of their race.

In the Fifth Circuit decision rejecting emotional damages in *Cummings*, the holding affirmed by the Supreme Court’s subsequent review of that decision, the court rejected the *Sheely* analysis. The Fifth Circuit argued that *Sheely* was premised on the “foreseeability” of emotional distress damages, supported by the Restatement (Second) of Contracts § 351 “that [d]amages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”<sup>xxxix</sup> The Fifth Circuit in *Cummings* goes on to note:

[W]hether funding recipients can foresee a consequence of a particular “breach” of a Spending Clause “contract” is not the same as whether they are “on notice” that, when they accepted funding, they agreed to be liable for damages of this kind. *Barnes* addressed the “on notice” issue, finding that federal funding recipients couldn’t “foresee” their liability for punitive damages for a breach of Spending Clause “contract,” because such damages are generally unavailable under contract law. Nowhere in *Barnes* does the Court condone *Sheely*’s strand of “foreseeability.”

Yet *Barnes* stated that compensatory damages are available under Title IX and implied they are available under the RA, arguably utilizing “*Sheely*’s strand of ‘foreseeability.’”<sup>xl</sup>



Following prior decisions, the *Barnes* Court stated that compensatory damages (in contrast to punitive damages) were “foreseeable” to recipients of federal funds and they were therefore “on notice” that they would be liable for compensatory damages, but not punitive damages. In *Cummings*, both the Fifth Circuit and the Supreme Court assert that recipients of federal funds lack “notice” of their liability for certain compensatory damages (emotional distress) even though such damages are foreseeable outcomes of their violations of the RA and on that basis are frequently awarded in other breach of contract cases.<sup>xli</sup>

What is the meaningful distinction between an ability to “foresee that a patient might suffer an emotional injury as a result of its actions” and an entity being “on notice” that it will be held liable for such injuries? The Michigan Court in *Stewart* and the Eleventh Circuit in *Sheely* understood that, in non-commercial contracts, “the award of damages for mental distress and suffering is commonplace.”<sup>xlii</sup> But under the Supreme Court’s *Cummings* holding, such damages are not considered to be among the “usual contract remedies” and are not “commonplace.” Although the Fifth Circuit rejected the *Sheely* holding in *Cummings*, the distinction between recognizing that there could be foreseeable damages caused by a breach of an agreement to comply with antidiscrimination laws and denying that the entity was “on notice” that such damages would be awarded is strained from an equity perspective. The holding that a recipient of FFA commits itself to nondiscriminatory practices as a condition of receiving federal funds would later claim it was in fact not “on notice” it could be held liable for damages for violation of federal antidiscrimination laws is contradictory on its face. This is particularly true for institutional enrollees<sup>xliii</sup> of the Medicare program who, as a condition of Medicare Part A enrollment and continued participation in the Medicare program, are required to obtain a civil rights clearance from the U.S. Department of Health and Human Services Office of Civil Rights by submitting an assurance of compliance with civil rights requirements, among them Section 504 and Section 1557.<sup>xliv</sup>

#### **D. State Courts Commonly Allow for Emotional Distress Damages in Contract Cases**

The Supreme Court in *Cummings* asserted that recovery for emotional distress damages is not among the “usual contract remedies” for breach of contract. Most contract disputes are litigated in state courts, which is where the *Cummings* Court presumably looked to determine which contract remedies are “usual.”<sup>xlv</sup> There has been a split among state courts regarding whether compensatory damages for reasonably foreseeable mental anguish or emotional distress are recoverable for breach of contract, but certainly emotional distress remedies are available in a large number of states.<sup>xlvi</sup> The American Law Reports (ALR) compendium includes two categories of cases under separate “Rules”:

Section § 3 “Rule that compensatory damages for mental anguish or emotional distress are generally not recoverable for breach of contract” and

Section § 4 “Rule that compensatory damages for reasonably foreseeable mental anguish or emotional distress are recoverable for breach of contract.”<sup>xlvii</sup>

There are numerous examples, some dating back more than a century, supporting Section 4 in a wide range of contract scenarios:

- In *Louisville & N. R. Co. v Hull* (1902),<sup>xlviii</sup> although overturning on other grounds, the court issued a judgment for the plaintiff widower who sued the defendant railroad for the negligent breach of a contract to ship his dead wife's corpse, indicating that damages for mental anguish may be recovered for the breach of a contract where such damages naturally resulted from a wrongful act and were fairly within the reasonable contemplation of the contracting parties.
- In *Kismarton v. William Bailey Construction* (2001), the Ohio Supreme Court held that emotional distress damages are even available in a building contract:

Though proof of emotional distress damages in these cases will be difficult, we are convinced that wronged parties are constitutionally entitled to an opportunity to recover for emotional distress damages.<sup>xlix</sup>

- In *Matherne v. Barnum* (2012),<sup>i</sup> upholding application of a Louisiana Code statute, Damages for nonpecuniary loss:

Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss. Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.<sup>ii</sup>

*Cummings* does not implicate state laws regarding contract interpretation in the context of emotional distress damages or state anti-discrimination statutes. The Supreme Court however, seems to have disregarded that breach of contract can result in emotional distress damages.

#### **E. The Challenge of Securing Injunctive Relief When Emotional Distress Damages are Not Available**

In the wake of the *Cummings* decision, many potential plaintiffs may pursue injunctive relief as a means to challenge discriminatory practices under Section 504 or Section 1557, even without the prospect of securing money damages. Unfortunately, these potential plaintiffs will face significant challenges in establishing standing to file and maintain a suit under the standard established under *Lujan v. Defenders of Wildlife*<sup>lii</sup>:

First, the plaintiff must have suffered an “injury in fact”— an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical’... Second, there must be a causal connection between the injury and the conduct complained of ... Third, it must be

“likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Plaintiffs must establish a likelihood of future harm from a discriminatory practice -- beyond experiencing prior discrimination -- to establish standing in federal court under Article III of the U.S. Constitution for injunctive relief purposes. This issue arises frequently in the ADA Title III context, where damages are unavailable but where people with disabilities often seek prospective injunctive relief in the face of inaccessible facilities or discriminatory practices. In cases similar to *Cummings* that involved access to interpreting services in a medical setting, plaintiffs unsuccessfully sought injunctive relief under Title III of the ADA:

- A Deaf plaintiff did not have standing to seek injunctive relief against a hospital, that failed to provide effective communication to plaintiff, who arrived in emergency room because of husband's fatal cardiac arrest.<sup>liii</sup>
- A Deaf plaintiff who sought injunctive relief after she had visited a hospital where no sign language interpretation was provided was denied relief: “A plaintiff's intention to return to defendant's place of public accommodation ‘some day’ ... without any description of concrete plans, or indeed even any specification of when the some day will be - do not support a finding of the requisite actual or imminent injury.” (citing *Lujan*, 504 U.S. at 564 [112 S. Ct. 2130]) The court further noted, “[T]he substantive standards for determining liability under the Rehabilitation Act and the ADA are the same.”<sup>liv</sup>

People with other kinds of disabilities face the same dilemma when seeking prospective injunctive relief after experiencing intentional discrimination. For example, a person with a serious mental illness who is turned away from a medical care facility due to perceived generalized concerns over potential behavioral issues is unlikely to return to that facility. Similarly, a person with an intellectual disability is unlikely to return to a facility where she has been demeaned or mistreated by medical staff. But even a history of discrimination in a particular location or setting will not confer a plaintiff standing for injunctive relief under either Section 504 or Title III of the ADA to challenge likely discrimination in the future without proof of the likelihood the person will return to the same location under similar circumstances. This is a challenging standard for most plaintiffs seeking to prevent future acts of discrimination.

### III. Impact of the *Cummings* Decision on People with Disabilities

Through the *Cummings* decision the Court removed an important tool available to remedy and ultimately deter discrimination against people with disabilities by entities which receive federal funds. The decision sets-up differing standards based on state-law, which will create additional obstacles to addressing systemic and intentional disability-based discrimination by entities only covered under Section 504 or Section 1557, and will ultimately reduce the impact of these laws in reducing incidents of discrimination based on disability.

#### A. Immediate Impact

Following the *Cummings* decision, disability advocates have learned of cases in which attorneys declined representation since potential plaintiffs lacked damages other than emotional distress or have had to dismiss cases where emotional distress damages were the sole remedy sought. As with *Cummings* itself, the decision will have a particularly negative impact on deaf persons, especially in interaction with law enforcement. In one case a deaf mother was having problems with her son was arrested when police arrived without an American Sign Language interpreter to communicate with her. The mother mistakenly thought the police were there to assist her with the son when in fact they were investigating possible abuse. An attorney declined to represent the woman after *Cummings* because there were no other damages. Similarly, a deaf man was arrested and remained in jail for 5 days without communication and without police informing him they had an interpreting service available. Again, an attorney declined representation since the lack of communication caused emotional distress but no other damages.

Other examples of past Section 504 claims involving emotional distress claims that would likely now be foreclosed by the *Cummings* decision include several Colorado cases involving deaf individuals encounters with law enforcement that were settled with damages awards for the emotional distress caused by the discriminatory actions of police in failing to provide interpreters. In *Ulibarri v. City and County of Denver*,<sup>lv</sup> two clients who received a damages settlement that might be imperiled by the *Cummings* decision:

- Plaintiff Sarah Burke was Deaf mother with a very minor warrant, cooking dinner at home with kids. The police showed up to enforce the warrant. Ms. Burke asked for a sign language interpreter. Even though there was no urgency, resistance, or danger, the police refused and asked her 8-year-old child to interpret. They then arrested Ms. Burke and took her away cuffed behind her back. One of the things she was trying to communicate was that she needed medication for diabetes, which she was ultimately not able to bring with her.
- Plaintiff Roger Krebs was a Deaf man traveling by bus through Denver on his way to his home in Utah. He was arrested as a result of an altercation in the bus stop and denied an interpreter during his arraignment.

Defendants in similar cases, where economic compensatory damages are small, will now likely not settle because of the limited potential damages available, which will not include recovery for emotional distress.

Other cases from Colorado involve failures to provide interpreters by hospitals and rehabilitation and behavioral health facilities:

- Client in a confidential case was a Deaf man whose daughter was in a traumatic car accident. From before he arrived at the hospital, he began to request a sign language interpreter, but the hospital would not provide one, excluding him from discussions concerning his daughter's care. He received a confidential damages settlement.
- Client in a confidential case was a Deaf woman who spent two months in a rehabilitation facility without any access to a sign language interpreter. Her reams of written notes reveal extensive and frustrating miscommunications concerning everything from physical therapy and medication to meal planning and recreation. She received a confidential damages settlement.
- Client in a confidential case was a Deaf woman admitted to an inpatient behavioral health facility and denied access to a sign language interpreter for most of her nine-day stay. She had interpreters for approximately one hour each day, which was not timed to include such activities as meetings with her psychiatrist, group therapy, and occupational therapy. She received a confidential damages settlement.

In Arkansas, in a recently resolved case, Disability Rights Arkansas, the state's Protection and Advocacy agency and private counsel represented a secondary school-aged individual who attended a specialty public school. Prior to his enrollment, he informed the school of his significant allergies to certain foods. In response, the school assured him that they would adhere to his specific dietary needs and offer alternatives to foods that caused him to experience an anaphylactic reaction.

Within days of being on campus, he was served a meal that contained the specific allergens he cannot have. As a result, he was sent by ambulance to the hospital for treatment due to his anaphylactic reaction. Over the course of a year, the individual had to be rushed to the hospital three more times, with each instance resulting in a response from the school promising it would not happen again. The student constantly experienced a nagging fear that everything he ate, three meals per day, would cause him to be hospitalized. His fears were justified because it happened repeatedly. His emotional distress was not truly quantitative, he did not experience increased costs for mental health services, but the school's actions and inactions caused him emotional harm. The case ultimately settled for out-of-pocket damages and policy changes the regarding school's food preparation practices to accommodate students with food allergies.

The *Cummings* decision was issued while this case was in litigation, leaving it likely an Arkansas jury would only be able to consider reimbursing out-of-pocket medical expenses and not damages from the emotional distress he experienced from reliance on school staff who repeatedly served him foods that caused anaphylactic reactions. The case ultimately settled for out-of-pocket damages and policy changes regarding the school's food preparation practices to accommodate students with food allergies. Because the client sustained significant medical bills there was still a viable compensatory damages claim but the lack of the potential emotional distress damage award significantly reduces the ability of the case to effect systemic change at the school. Fortunately, prior to the Supreme Court's *Cummings* decision, the Disability Rights Arkansas and private co-counsel were able to secure a strong expert analysis and set of recommendations, paid for by the school, to ensure it adheres to best practices regarding food preparation and allergies.

## **B. Remedies Remaining for Emotional Distress Damages under State Law**

As detailed in an NCD review of state human and civil rights laws on compensatory damages for emotional distress (see Appendix A), state antidiscrimination laws for non-employment disability claims include a patchwork of potential remedies. Twenty-five states provide for a potential emotional distress damages claims, while eighteen do not provide for such damages. Nine states have somewhat ambiguous statutes. It is notable that the states that do provide for potential emotional distress damages include some of the most populous states, California, New York and Florida, among them.

State antidiscrimination laws can provide important remedies for people who experience discrimination trying to secure medical care or access to other public accommodations. These laws can also potentially serve to encourage legal challenges to discriminatory practices by providing real incentives for potential plaintiffs, and equally important, potential deterrence for covered entities. Unfortunately, even antidiscrimination laws in states that provide for emotional distress damages cannot effectively address the gap in such damages created under the *Cummings* decision. Not only are these state statutes limited to specific states, but they will not be applicable to securing remedies under federal antidiscrimination laws.

## IV. Recommendations

### 1. Congress should enact legislation to address *Cummings* Decision

Congress should enact and the President should sign legislation which restores emotional distress damages as a remedy under Section 504, Section 1557 and other civil rights statutes enacted under the Spending Clause, and which instructs the federal courts not to use the contract law analogy when analyzing remedies for discrimination under any federal anti-discrimination statute as the most effective way to address the *Cummings* decision. The legislation should ensure that recipients of federal financial assistance are put on notice of all potential damages they may be subject to for violation of federal antidiscrimination laws against persons with disabilities and others.

The Court's contract law analogy in these cases relies on subjective assumptions about whether recipients would have agreed to accept federal funds had they known they would be potentially liable for punitive damages and emotional distress compensatory damages to victims of intentional discrimination. In *Barnes*, the Court claimed it is "doubtful whether they [federal funds recipients] would have agreed to exposure to such unorthodox and indeterminate liability."<sup>lvi</sup> In *Cummings*, the Court asserts that recipients "lacked notice" of their liability for emotional distress. The emphasis in *Cummings* and *Barnes* is on fairness for funds recipients rather than for people subjected to discrimination, who presumed that they would not be discriminated against by such entities. They also believed that if discrimination occurred they would be appropriately compensated for violations of their civil rights. The simplest way to reverse these decisions would be to legislatively fill in the blanks that the Court took upon itself to complete.

The *Cummings* Court cites *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*,<sup>lvii</sup> a 2006 Supreme Court decision on the issue of state liability for expert fees in Individuals with Disabilities Education Act (IDEA) cases, as precedent for its analysis of the "clear notice" notice requirement in Spending Clause cases. In *Arlington*, the Court held that "Congress has broad power to set the terms on which it disburses federal money to the States ... but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'"<sup>lviii</sup> Congress failed to specify whether damages are available at all in each of these statutes, much less the types of remedies that can be awarded for violations of the statutes. This has left the Supreme Court in the position of filling in the blanks, leading to negative results for plaintiffs under *Barnes*, *Cummings* and *Arlington*. As Justice Kavanaugh noted in his concurring opinion in *Cummings*, "Congress, not this Court, creates new causes of action."<sup>lix</sup>

Legislative reforms should address the issue of available remedies in all four of these statutes (Section 504, Section 1557, Title VI, and Title IX) in one piece of legislation. That legislation should articulate the nature of available remedies in unambiguous terms. Arguably, an amendment to Title VI of the Civil Rights Act alone would alter the availability of remedies in the other three statutes, given that their remedies "expressly incorporate the rights and remedies available under Title VI."<sup>lx</sup>

**2. Federal agencies should include notice in grant awards that recipients are subject to specific damages for violations of Section 504**

The *Cummings* decision highlights the importance the Supreme Court places on notice to recipients when interpreting federal antidiscrimination statutes enacted pursuant to Congressional Spending Clause legislation. The Court has frequently emphasized that a recipient of federal funds must be on notice about the potential liability the recipient faces by accepting federal aid.<sup>xi</sup> The *Cummings* Court emphasized that the recipients lacked “clear notice” they could be subject to private right of action seeking emotional distress damages.

In order to provide sufficient notice to recipients of federal financial assistance about potential liability, all federal agencies should clearly state in all applications for federal funds and notice of awards, and by other means appropriate, that recipients are subject to specific damages for a violation of Section 504, Section 1557, Title VI or Title IX.



## Appendix A: 2022 Review of State Human and Civil Rights Laws: Compensatory Damages (Emotional Distress)

### Damages Terminology and Variance by State

NCD reviewed state human and civil rights laws to determine if they had (1) a public accommodation section, and, if so, (2) whether disability was a protected class, and (3) whether Emotional Distress damages are allowed for prevailing complainants in administrative actions or plaintiffs in a civil action.

Emotional Distress damages are a type of Compensatory damages. Compensatory damages are categorized as either special or general. Special damages often have a firm dollar figure attached to them. Medical bills, lost income due to time off work, property loss and damage, and out-of-pocket expenses related to the incident. General damages include items like emotional distress, pain and suffering, mental illness, and anxiety that are related to the injury in question.<sup>lxii</sup> Actual damages are synonymous with Compensatory damages.<sup>lxiii</sup>

State laws and regulations vary in the terms they use for describing damages. research, no state law used the terms “special” or “general” compensatory damages, only to “Compensatory” and “Actual.”

### **I. States and Territories that Allow Compensatory/Actual Damages for Disability Discrimination by Public Accommodations**

#### **Arkansas**

Any person who is injured by an intentional act of discrimination in violation of subdivisions (a)(2)-(5)(includes public accommodations) of this section shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover compensatory and punitive damages, and, in the discretion of the court, to recover the cost of litigation and a reasonable attorney's fee. AR Code 16-123-107(b).

<https://law.justia.com/codes/arkansas/2015/title-16/subtitle-7/chapter-123/subchapter-1/section-16-123-107/>

#### **California**

CA Civ Code §52(a): Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any

attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

[https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=52.&noDeTreePath=6.2&lawCode=CIV](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=52.&noDeTreePath=6.2&lawCode=CIV)

## **Delaware**

No private action allowed under public accommodations law. State human relations procedure.

If the panel determines that a violation of §4504 of this title has occurred, it shall issue an order stating its findings of fact and conclusions of law and containing such relief as may be appropriate, including actual damages suffered by the aggrieved person "including damages caused by humiliation and embarrassment," costs, expenses, reasonable attorneys' fees and injunctive or other equitable relief. Title 6 §4508(h).

<https://delcode.delaware.gov/title6/c045/>

## **District of Columbia**

The payment of compensatory damages to the person aggrieved by such practice.

§ 2-1403.13(a)(1)(D)

<https://code.dccouncil.us/us/dc/council/code/titles/2/chapters/14/units/A/subchapters/II/parts/D/>

## **Florida**

In any civil action brought under this section, the court may issue an order prohibiting the discriminatory practice and providing affirmative relief from the effects of the practice, including back pay. The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages. Title XLIV 760.11(5)

<https://www.flsenate.gov/Laws/Statutes/2019/0760.11>

## **Idaho**

In a civil action filed by the commission or filed directly by the person alleging unlawful discrimination, if the court finds that unlawful discrimination has occurred, its judgment

shall specify an appropriate remedy or remedies therefor. Such remedies may include, but are not limited to...(c) An order for actual damages ...67-5908(3)

<https://legislature.idaho.gov/wp-content/uploads/statutesrules/idstat/Title67/T67CH59.pdf>

## **Indiana**

The state code allows state human rights commission and state courts to award actual damages for discriminatory treatment by public accommodations, but limiting them in employment discrimination complaints.

The commission may restore complainant's losses incurred as a result of discriminatory treatment, as the commission may deem necessary to assure justice... IC 22-9-1-6 (k)(A).

[The commission may] order payment of actual damages, except that damages to be paid as a result of discriminatory practices relating to employment shall be limited to lost wages, salaries, commissions, or fringe benefits. IC 22-9-1-12.1 (c)(8).

A court may provide the same remedies to a prevailing plaintiff as the state human rights commission. IC 22-9-1-17(b).

<https://www.in.gov/icrc/files/ch1.pdf>

## **Kansas**

No right to civil action found for public accommodations discrimination. Human rights commission awards damages in hearing process.

If the presiding officer finds a respondent has engaged in or is engaging in any ...unlawful discriminatory practice as defined in this act, the presiding officer shall render an order ... Such order may also include an award of damages for pain, suffering and humiliation which are incidental to the act of discrimination, except that an award for such pain, suffering and humiliation shall in no event exceed the sum of \$2,000. KS 44-1005(k).

[http://www.kslegislature.org/li\\_2018/b2017\\_18/statute/044\\_000\\_0000\\_chapter/044\\_010\\_0000\\_article/044\\_010\\_0005\\_section/044\\_010\\_0005\\_k/](http://www.kslegislature.org/li_2018/b2017_18/statute/044_000_0000_chapter/044_010_0000_article/044_010_0005_section/044_010_0005_k/)

## **Maine**

Compensatory damages between 50k and 500k depending on size of public accommodation. Can be ordered by human rights commission or by a court after filing with human rights commission.

<https://www.mainelegislature.org/legis/statutes/5/title5sec4613.html>

<https://www.mainelegislature.org/legis/statutes/5/title5sec4622.html>

## **Maryland**

Sec. 14.03.01.13 (E) Remedies. If the court determines that the respondent has engaged in a discriminatory practice, the court may provide remedies as specified in State Government Article, §20-1009(b), Annotated Code of Maryland.

§20-1009(b) allows for compensatory damages between 50k and 300k.

<http://mdrules.elaws.us/comar/14.03.01.13>

<https://codes.findlaw.com/md/state-government/md-code-state-govt-sect-20-1009.html>

## **Michigan**

No private right of action found or in commission procedure, but emotional distress damages were available in an administrative hearing. <https://www.michigan.gov/mdcr/-/media/Project/Websites/mdcr/mcrc/decisions/bercheni.pdf?rev=ba83c4d0d29f4ea7b52fecb8aa8ca74c&hash=D239CCA8134210631604DF17E7E685BE>

## **Minnesota**

MN allows state human rights commission to award actual damages, specific to emotional distress.

In all cases where the administrative law judge finds that the respondent has engaged in an unfair discriminatory practice, the administrative law judge shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained. In all cases, the administrative law judge may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering, in addition to punitive damages in an amount not more than \$8,500. §363A.29. Subd. 4.

[https://law.justia.com/codes/minnesota/2006/363-363A/363A/363A\\_11.html](https://law.justia.com/codes/minnesota/2006/363-363A/363A/363A_11.html)

## **Missouri**

The Missouri Human Rights Act allows a court to award actual damages, including mental anguish (emotional distress) but caps them based on size of business.

213.111. Right to civil action, when — relief available — costs and attorney's fees, awarded when — right to trial by jury — maximum damages — burden of proof, employment-related civil actions.

2. The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party, other than a state agency or commission or a local commission; except that, a prevailing respondent may be awarded reasonable attorney fees only upon a showing that the case was without foundation.

4. The sum of the amount of actual damages, including damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and punitive damages awarded under this section shall not exceed for each complaining party....

<https://revisor.mo.gov/main/OneSection.aspx?section=213.111&bid=34599&hl=>

### **New Hampshire**

New Hampshire awards compensatory damages in both administrative and judicial venues.

Compensatory damages are available in administrative hearing. §354-A:21(d)

...A court in cases so removed may award all damages and relief which could have been awarded by the commission, except that in lieu of an administrative fine, enhanced compensatory damages may be awarded when the court finds the respondent's discriminatory conduct to have been taken with willful or reckless disregard of the charging party's rights under this chapter. §354-A:21-a(l).

<http://gencourt.state.nh.us/rsa/html/XXXI/354-A/354-A-mrg.htm>

### **New Jersey**

Civil action remedies include compensatory damages, damages for pain & humiliation

<https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/division-on-civil-rights-file-a-complaint/>

### **New Mexico**

The commission may require the respondent to pay actual damages to the complainant and to pay reasonable attorneys' fees. NM Code §28-1-11(E).

<https://law.justia.com/codes/new-mexico/2021/chapter-28/article-1/section-28-1-11/>

## **New York**

If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article (public accommodations included), the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order...including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: ... (iii) awarding of compensatory damages to the person aggrieved by such practice...NYCL EXC §297(4)(c).

<https://www.nysenate.gov/legislation/laws/EXC/297>

## **Oklahoma**

In an action pursuant to Section 1101 et seq. of this title, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff:

1. Actual and punitive damages...O.S. §1503.3(1).

<https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=73482>

## **Rhode Island**

Civil liability. (a) Any person with a disability who is the victim of discrimination prohibited by this chapter may bring an action in the superior court against the person or entity causing the discrimination for equitable relief, compensatory and/or punitive damages or for any other relief that the court deems appropriate. § R.I. Gen. Laws § 42-87-4 (a).

<http://webserver.rilin.state.ri.us/Statutes/TITLE42/42-87/42-87-4.htm>

## **South Dakota**

Right to proceed by civil action in lieu of hearing--Forms of relief available.

In a civil action, if the court or jury finds that an unfair or discriminatory practice has occurred, it may award the charging party compensatory damages. §20-13-35.1.

[https://sdlegislature.gov/Statutes/Codified\\_Laws/2045748](https://sdlegislature.gov/Statutes/Codified_Laws/2045748)

## ● Vermont

The Commission may enforce conciliation agreements and prohibitions against discrimination by bringing an action in the name of the Commission seeking any of the following: Compensatory and punitive damages on behalf of an aggrieved individual or class of individuals similarly situated. 9 V.S.A. § 4553(a)(6)(A)(iii).

<https://legislature.vermont.gov/statutes/section/09/141/04553>

## ● Virgin Islands

The Virgin Islands Civil Rights Act (VICRA) allows compensatory damages (emotional distress):

§64 (15) In addition to other remedies, any person who has been discriminated against as defined in this section may bring an action for *compensatory* and punitive damages in any court of competent jurisdiction. The court in such action shall award to the plaintiff reasonable attorney's fees and costs of the action, in addition to any judgment in favor of the plaintiff. prohibits discrimination by public accommodations on the basis of race, creed, color, or national origin. not disability.

## ● Washington

Any person deeming himself or herself injured by any act in violation of this chapter 9 (includes public accommodations) shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person.... RCW 49.60.030(2).

<https://app.leg.wa.gov/RCW/default.aspx?cite=49.60.030>

## ● West Virginia

The Human Rights Commission may also award incidental damages “as compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity, without proof of monetary loss.

<https://hrc.wv.gov/about/Documents/Investigative%20Procedure.pdf>

## ● Wisconsin

106.52(4)(e) *Civil actions.*

1. A person, including the state, alleging a violation of sub. (3) (public accommodations) may bring a civil action for appropriate injunctive relief, for damages

including punitive damages and, in the case of a prevailing plaintiff, for court costs and reasonable attorney fees.

## **II. States and Territories that Might Allow Compensatory Damages (emotional distress) for Disability Discrimination by Public Accommodations**

### **Connecticut**

The court may grant a complainant in an action brought in accordance with section 46a-100 such legal and equitable relief which it deems appropriate including, but not limited to, temporary or permanent injunctive relief, attorney's fees and court costs. CT Gen Stat § 46a-104.

<https://law.justia.com/codes/connecticut/2012/title-46a/chapter-814c/>

### **Illinois**

(775 ILCS 5/10-102)(C) Relief which may be granted.

(1) In a civil action under subsection (A) if the court finds that a civil rights violation has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages

<https://ilga.gov/legislation/ilcs/ilcs4.asp?DocName=077500050HArt%2E+10&ActID=2266&ChapterID=64&SeqStart=9200000&SeqEnd=-1>

### **Iowa**

A court may award a prevailing plaintiff damages that "shall include but are not limited to actual damages, court costs and reasonable attorney fees." Iowa code §216.15(9)(a)(8) (Same as what a human rights commission can order: See, §216.16(6)) Does not specify the type (general or specific).

<https://www.legis.iowa.gov/docs/code/216.15.pdf>

### **Massachusetts**

Not specific on type of damages

Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not



later than three years after the alleged unlawful practice occurred, *bring a civil action for damages* or injunctive relief

<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151B/Section9>

## **Montana**

Human Rights Bureau rule does not mention damages or relief other than conciliation.

<https://rules.mt.gov/gateway/ChapterHome.asp?Chapter=24.8>

MT Human Rights Act allows hearings officer to issue order rectifying any harm, financial or otherwise, but no specific reference to damages allowed.

49-2-506. Procedure upon decision finding discrimination. (1) If the hearings officer finds that a party against whom a complaint was filed has engaged in the discriminatory practice alleged in the complaint, the department shall order the party to refrain from engaging in the discriminatory conduct. The order may:...(b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against;

## **Ohio**

§ 4112.99. Civil remedies for violation. Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

[https://law.justia.com/codes/ohio/2006/orc/jd\\_411299-ddf7.html](https://law.justia.com/codes/ohio/2006/orc/jd_411299-ddf7.html)

## **Oregon**

Law contains numerous sections that are complex. Oregon's nondiscrimination law allows for recovery of injunctive and other equitable damages, as well as compensatory damages and punitive damages for disability discrimination by places of public accommodation and the state government, but not against other governmental agencies.

ORS 659A.142

(4) It is an unlawful practice for any place of public accommodation, resort or amusement as defined in ORS 659A.400, or any person acting on behalf of such place, to make any distinction, discrimination or restriction because a customer or patron is an individual with a disability.

(5)(a) It is an unlawful practice for state government to exclude an individual from participation in or deny an individual the benefits of the services, programs or activities of state government or to make any distinction, discrimination or restriction because the

individual has a disability.

(b) Paragraph (a) of this subsection is intended to ensure equal access to available services, programs and activities of state government.

(c) Paragraph (a) of this subsection is not intended to:

(A) Create an independent entitlement to any service, program or activity of state government; or

(B) Require state government to take any action that state government can demonstrate would result in a fundamental alteration in the nature of a service, program or activity of state government or would result in undue financial or administrative burdens on state government."

ORS 659A.885.

(1) Any person claiming to be aggrieved by an unlawful practice specified in subsection (2) of this section may file a civil action in circuit court. In any action under this subsection, the court may order injunctive relief and any other equitable relief that may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay. A court may order back pay in an action under this subsection only for the two-year period immediately preceding the filing of a complaint under ORS 659A.820 with the Commissioner of the Bureau of Labor and Industries, or if a complaint was not filed before the action was commenced, the two-year period immediately preceding the filing of the action. In any action under this subsection, the court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal. Except as provided in subsection (3) of this section:

(a) The judge shall determine the facts in an action under this subsection; and

(b) Upon any appeal of a judgment in an action under this subsection, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (3).

(2) An action may be brought under subsection (1) of this section alleging a violation of (a) . . . **659A.103 to 659A.145** . . . .

(3) In any action under subsection (1) of this section alleging a violation of ORS . . . **659A.103**:

(a) The court may award, in addition to the relief authorized under subsection (1) of this section, compensatory damages or \$200, whichever is greater, and punitive damages;

## Texas

Subject to Section 121.0041, if applicable, the person with a disability deprived of his or her civil liberties may maintain an action for damages in a court of competent jurisdiction, and there is a conclusive presumption of damages in the amount of at least \$300 to the person with a disability. Sec. 121.004(b)

<https://statutes.capitol.texas.gov/Docs/HR/htm/HR.121.htm#121.004>

## Utah

Any person who is denied the rights provided for in Section 13-7-3 shall have a civil action for damages and any other remedy available in law or equity against any person who denies him the rights provided for in Section 13-7-3 or who aids, incites or conspires to bring about such denial. Section 13-7-4(3).

<https://le.utah.gov/xcode/Title13/Chapter7/13-7-S4.html>

### **III. States and Territories that Do Not Allow Compensatory Damages (emotional distress) for Disability Discrimination by Public Accommodations**

## Alabama

Follows federal laws, no state complaint process for disability discrimination in public accommodations.

<https://dhr.alabama.gov/directory/equal-employment-civil-rights/>

## Alaska

No damages except for reasonable expenses or reasonable attorney's fees.

[http://www.legis.state.ak.us/basis/folioproxy.asp?url=http://www.jnu01.legis.state.ak.us/cgi-bin/folioisa.dll/stattx11/query=\\*/doc/{t9368}?](http://www.legis.state.ak.us/basis/folioproxy.asp?url=http://www.jnu01.legis.state.ak.us/cgi-bin/folioisa.dll/stattx11/query=*/doc/{t9368}?)

## Arizona

Disability not a protected class under state civil rights law on public accommodations. Complainant would have to file federally.

<https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/41/01442.htm>

## Colorado

[CO Rev Stat § 24-34-802\(20\(a\)\(II\)\)](#): Actual monetary damages (economic)

<https://law.justia.com/codes/colorado/2018/title-24/principal-departments/article-34/part-8/section-24-34-802/>

## Georgia

Georgia has no public accommodation section in its civil rights law.

## **Hawaii**

Any person who is injured by an unlawful discriminatory practice, other than an unlawful discriminatory practice under part II of this chapter, may: (1) Sue for damages sustained, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorneys' fees together with the costs of suit. 489-7.5(a)(1)

## **Kentucky**

KRS 344.450 Civil remedies for injunction and damages.

Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.

<https://kchr.ky.gov/About/Pages/Kentucky-Civil-Rights-Act.aspx>

## **Louisiana**

No public accommodations law

[http://www.capitol.hawaii.gov/hrscurrent/Vol11\\_Ch0476-0490/HRS0489/HRS\\_0489-.htm](http://www.capitol.hawaii.gov/hrscurrent/Vol11_Ch0476-0490/HRS0489/HRS_0489-.htm)

## **Nebraska**

Neither NE's public accommodations act or rule allow for monetary damages.

<https://neoc.nebraska.gov/laws/pdf/ActProvidingEqualEnjoymentofPublicAccommodations.pdf>

<https://neoc.nebraska.gov/laws/pdf/PARules.pdf>

## **Nevada**

NRS 651.090 Deprivation of, interference with and punishment for exercising rights and privileges: Civil actions; damages; equitable relief; costs and attorney's fees.

2. In an action brought pursuant to this section, the court may: (a) Grant any equitable relief it considers appropriate, including temporary, preliminary or permanent injunctive relief, against the defendant. (b) Award costs and reasonable attorney's fees to the prevailing party.

<https://www.leg.state.nv.us/nrs/nrs-651.html#NRS651Sec070>

## **North Carolina**

§ 168A-11. Civil action. (b) Any relief granted by the court shall be limited to declaratory and injunctive relief...

(d) In any civil action brought under this Chapter, the court, in its discretion, may award reasonable attorney's fees to the substantially prevailing party as part of costs. (1985, c. 571, s. 1; 1999-160, s. 1.)

[https://www.ncleg.net/enactedlegislation/statutes/html/bychapter/chapter\\_168a.html](https://www.ncleg.net/enactedlegislation/statutes/html/bychapter/chapter_168a.html)

## **North Dakota**

14-02.4-20. Relief. Neither the department nor an administrative hearing officer may order compensatory or punitive damages under this chapter.

<https://www.ndlegis.gov/cencode/t14c02-4.pdf?20150821135716>

## **Pennsylvania**

Section 9 (d)(2) If, after a trial, Commonwealth Court finds that a respondent engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the court may award attorney fees and costs to the complainant on whose behalf the action was commenced.

<https://www.legis.state.pa.us/cfdocs/legis/LI/uconsCheck.cfm?txtType=HTM&yr=1955&sessInd=0&smthLwInd=0&act=222&chpt=0&sctn=9&subsctn=0>

## **Puerto Rico**

No human rights law.

## **South Carolina**

No public accommodations law.

<https://www.scstatehouse.gov/code/t01c013.php>

## **Tennessee**

Disability is not a protected class in TN law on public accommodations.

## ● Virginia

No compensatory damages.

<https://law.lis.virginia.gov/report/0AtCs/>

## ● Wyoming

No public accommodations law.

[www.wyomingworkforce.org/workers/labor/rights](http://www.wyomingworkforce.org/workers/labor/rights)

## Endnotes

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<sup>i</sup> *Cummings v. Premier Rehab Keller, P.L.L.C.*, \_\_\_ U.S. \_\_\_, 142 S. Ct. 1562, 212 L. Ed. 2d 552, *reh'g denied*, 142 S. Ct. 2853 (2022).

<sup>ii</sup> The Congressional Research Service has released a useful analysis of the impact of *Cummings* on other civil rights laws in “Civil Rights Remedies in *Cummings* and Implications for Title VI and Title IX.” (June 29, 2022).  
<https://crsreports.congress.gov/product/pdf/LSB/LSB10775> (Accessed Oct. 6, 2022).

<sup>iii</sup> U.S. Constitution, Article I, Section 8, Clause 1. “Spending Law” statutes derive their authority from this section of the U.S. Constitution. The “Spending Clause” authorizes Congress to raise taxes and spend money “to pay the Debts and provide for the common Defence [sic] and the general Welfare of the United States.” Federal agencies distribute billions of dollars in federal assistance, and Congress sets conditions and parameters concerning use of federal funds enacted through this spending clause authorities. This is distinct from statutes that are based, for example, on the “Commerce Clause,. The Commerce Clause refers to Article 1, Section 8, Clause 3 of the U.S. Constitution, which gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

<sup>iv</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327 (1990), § 2(b)(4); codified at 42 U.S.C. § 12101(b)(4).

<sup>v</sup> *Barnes v. Gorman*, 536 U.S. 181, 122 S. Ct. 2097 (2002).

<sup>vi</sup> Courts can further order injunctive, also known as equitable relief, to order a defendant in an antidiscrimination suit to take or refrain from taking such action. While perhaps not intuitive, a Court under the Title I of ADA covering employment may order equitable monetary relief which is not considered compensatory damages. Lost past or future wages and benefits which result from employment discrimination is considered equitable relief and not compensatory damages. 42 U.S.C. § 1981a Civil Rights Act of 1991, PL 102–166, November 21, 1991, 105 Stat 1071; see e.g., *Picinich v. United Parcel Serv.*, 583 F. Supp. 2d 336, 344 (N.D.N.Y. 2008), *aff'd*, 318 F. App'x 34 (2d Cir. 2009).

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- vii See footnote 3.
- viii 42 U.S.C. § 2000d *et seq.*
- ix *Barnes*, 536 U.S. at 185.
- x Title VI of the Civil Rights Act is silent on the issue of punitive damages.
- xi *Barnes*, 536 U.S. at 188.
- xii *Louisville & N.R. Co. v. Hull*, 24 Ky.L.Rptr. 375 (Ct. App. Ky., May 29, 1902).
- xiii Notably, many state laws provide for damages where Title III of the ADA does not. For example, plaintiffs in California may bring accessibility lawsuits under the state’s Unruh Civil Rights Act, California Civil Code § 52(a) and (b), allowing \$4,000 per violation as well as punitive damages and attorney’s fees. The California Disabled Persons Act, as well as a variety of other state laws, provide additional avenues for the recovery of damages.
- xiv See *Doe v. Salvation Army*, 685 F.3d 564, 574 (6th Cir. 2012) (“There is nothing in the plain meaning of the statutory words or the legislative history of § 504 that would exclude social services when done as a form of worship, even though such social services may in some cases also be called religious service.”).
- xv See *Nordwall v. PHC-LAS Cruces, Inc.*, 960 F.Supp.2d 1200, 1228 (D. New Mexico, 2013).
- xvi *Ibid.*, 960 F.Supp.2d at 1229, quoting *Saltzman v. Bd. of Comm’rs of N. Broward Hosp. Dist.*, 239 F. App’x. 484, 487–88 (11th Cir. 2007).
- xvii *Ibid.*, 960 F.Supp.2d at 1229-30.
- xviii *Ibid.*, 960 F.Supp.2d at 1230.
- xix *Barnes*, 536 U.S. at 185.
- xx *Cummings*, 142 S. Ct. at 1578 (Breyer dissenting).
- xxi 42 U.S.C. § 12132. Enforcement “The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [of the ADA.]”
- xxii *Cummings*, 42 S. Ct. at 1578 (Justice Breyer dissenting).
- xxiii 20 U.S.C. § 1681 - § 1688.
- xxiv The contract law analogy applied to Section 504 remedies was then extrapolated to Title II of the ADA.
- xxv *Barnes*, 536 U.S. at 188.
- xxvi *Ibid.*, 536 U.S. at 189.
- xxvii *Ibid.*, 536 U.S. at 187.
- xxviii *Cummings*, 42 S. Ct. at 1577 (Justice Breyer dissenting citing Restatement (Second) of Contracts § 353).
- xxix *Barnes*, 536 U.S. at 187.
- xxx *Ibid.*, 536 U.S. at 188.
- xxxi *Cummings*, 142 S. Ct. at 1571.
- xxxii 505 F.3d 1173 (11th Cir. 2007).
- xxxiii 349 Mich. 459, 84 N.W.2d 816, 823 (1957).
- xxxiv *Ibid.*, 349 Mich. at 466-7.
- xxxv *Sheely*, 505 F.3d at 1199.
- xxxvi 332 F.3d 1347, 1354, 1359 (11th Cir. 2003).
- xxxvii 777 F.2d 1431, 1435 (11th Cir. 1985).

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- xxxviii 178 Misc. 363, 34 N.Y.S.2d 312, 314–16 (N.Y. Sup.Ct. 1942).
- xxxix *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 679 (5th Cir., 2020), citation to *Sheely*, 505 F.3d at 1199.
- xl *Barnes*, 546 U.S. at 187.
- xli *See Nashville, C. & St. L. Ry. v Campbell*, 212 Ala. 27 (1924) (“[A]ny breach of a contract entitling a plaintiff to recover nominal damages will support a recovery for mental suffering, even though no injury to person or property is shown”); *Gregory & Swapp, PLLC v. Kranendonk*, 2018 Utah 36, 424 P.3d 897 (Utah 2018) (“When the primary nature of the contractual obligations involves peculiarly personal interests, as opposed to pecuniary interests, emotional distress damages stemming from a breach of that contract may be warranted.”).
- xlii *Stewart*, 349 Mich. at 469.
- xliii Includes Community Mental Health Centers, Comprehensive Outpatient Rehabilitation Facilities, Critical Access Hospitals, Dialysis Facilities, Federally Qualified Health Centers, Home Health Agencies, Hospice Providers, Hospitals, Rural Health Clinics, Skilled Nursing Facilities among other healthcare organizations.
- xliv CMS has legal authority under Title XVIII of the Social Security Act to require health care providers to meet the legal requirements of the civil rights nondiscrimination statutes and regulations enforced by OCR in order to participate in the Medicare Part A program. These statutes and regulations ensure that eligible persons have equal access to quality health care regardless of their race, color, national origin, disability, or age. The specific statutes include: Title VI of the Civil Rights Act of 1964 (which prohibits discrimination on the basis of race, color and national origin); Section 504 of the Rehabilitation Act of 1973 (which prohibits discrimination on the basis of disability); the Age Discrimination Act of 1975 (which prohibits discrimination on the basis of age); and Section 1557 of the Affordable Care Act (which prohibits discrimination on the basis of race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity), age, or disability in certain health programs or activities).
- xlv Ninety-eight percent of civil cases are filed in state courts. As of 2015 more than half of civil case filings were contract cases. Weiss, D., “Tort suits in state courts are ‘down sharply’ as contract claims grow.” *ABA Journal*, July 26, 2017. [https://www.abajournal.com/news/article/tort\\_suits\\_in\\_state\\_courts\\_are\\_down\\_sharply\\_as\\_contract\\_claims\\_grow](https://www.abajournal.com/news/article/tort_suits_in_state_courts_are_down_sharply_as_contract_claims_grow) (accessed Oct. 7, 2022).
- xlvi *See* 54 A.L.R.4th 901 (Originally published in 1987).
- xlvii *Ibid.*
- xlviii 113 Ky. 561, 68 S.W. 433 (1902).
- xlix *Kishmarton v. William Bailey Constr., Inc.*, 93 Ohio St. 3d 226 (2001).
- l 94 So. 3d 782 (La. Ct. App. 1st Cir. 2012), *writ denied*, 90 So. 3d 442 (La. 2012).
- li Louisiana Statutes Annotated – Civil Code. Art. 1998 (1985).
- lii 504 U.S. 555 (1992).
- liii *Aikins v. St. Helena Hosp.*, 843 F.Supp. 1329 (N.D.Cal.1994).
- liv *Giterman v. Pocono Med. Ctr.*, 361 F.Supp.3d 392, 406 (M.D.Pa. 2019).
- lv 742 F. Supp. 2d 1192 (D. Colo. 2010).
- lvi *Barnes*, 536 U.S. at 188.
- lvii 548 U.S. 291 (2006).
- lviii *Ibid.*, 548 U.S. at 296.



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<sup>lix</sup> Cummings, 142 S. Ct. at 1576-7 (Cavanaugh concurrence).

<sup>lx</sup> Ibid., 142 S. Ct. at 1578 (Breyer dissenting).

<sup>lxi</sup> See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Barnes*, 536 U.S. at 187, *Cummings*, 142 S. Ct. at 1570.

<sup>lxii</sup> *The Law Dictionary featuring Black's Law Dictionary* (2nd ed.)

<https://thelawdictionary.org/article/two-different-types-compensatory-damages/>

(accessed Oct. 6, 2022).

<sup>lxiii</sup> Legal Information Institute, Cornell Law School, “damages,”

<https://www.law.cornell.edu/wex/damages>. (Accessed Oct 6, 2022); Ibid., “actual

damages,” [https://www.law.cornell.edu/wex/actual\\_damages](https://www.law.cornell.edu/wex/actual_damages) (Accessed Oct 6, 2022).