UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

LINDA McCOLLUM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4:09-cv-121-M
	)	
OWENSBORO COMMUNITY AND TECHNICAL COLLEGE,	)	
	)	
	)	
Defendant.	)	
	)	

INTERVENOR UNITED STATES' REPLY MEMORANDUM OF LAW

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INTERVENOR UNITED STATES' REPLY MEMORANDUM OF LAW

This brief is filed in reply to defendant's response to the United States' opening brief, Docket No. 19.

ARGUMENT

THE ADA'S RETALIATION PROVISION VALIDLY ABROGATES THE STATES' SOVEREIGN IMMUNITY WHERE THE RETALIATION IS FOR EFFORTS TO ENFORCE TITLE II RIGHTS IN THE EDUCATION CONTEXT

As the United States explained in its opening brief, the ADA's retaliation provision, 42 U.S.C. 12203, is a proper exercise of Congress's Fourteenth Amendment power – and thus validly abrogates the States' sovereign immunity – where (as in this case) the retaliation is against someone who helps a student enforce his right to accessible public education under Title II of the ADA. The defendant's arguments to the contrary are without merit.

There is no basis for the defendant's continued assertion that finding valid abrogation in this case amounts to "an end-run around" *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), which held that Title I of the ADA – the ban on discrimination in the terms and conditions of employment on the basis of disability – did not validly abrogate

sovereign immunity. See Def.'s Response at 3. As applied to this case, the retaliation provision does not enforce Title I's ban on employment discrimination, but rather Title II's ban on discrimination in the provision of public services, and so *Garrett* has no application here. Plaintiff's complaint clearly pleads that she suffered retaliation in response to her efforts to help a disabled student get access to public education.[1] She does not contend that she or anyone else suffered a violation of Title I's bar on employment discrimination. That the retaliation plaintiff suffered took the form of an employment action against a state employee – as opposed to, say, barring plaintiff from taking classes at the college – does not make this a case about employment discrimination against individuals with disabilities.

Accordingly, this case is nothing like *Demshki* v. *Monteith*, 255 F.3d 986 (9th Cir. 2001), in which the underlying discrimination was Title I employment discrimination. It is far more like *Demby* v. *Maryland Department of Health & Mental Hygiene*, No. 06-1816, 2009 U.S. Dist. LEXIS 12619, at *4 (D. Md. Feb. 13, 2009), in which plaintiffs suffered employment consequences in retaliation for their support of Title II rights. It is unclear on what basis defendant asserts that this is an "employment case" whereas *Demby* was not. See Def.'s Response at 5. This is no more an "employment case" than was *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), in which a male coach was fired for complaining about unequal treatment of the girls' basketball team. His firing, *Jackson* found, was covered by Title IX's requirement that no person, "on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* at 173 (citing 20 U.S.C. 1681(a)). Plaintiff's

[1] Plaintiff did not herself suffer a violation of Title II, and so she would have no basis for pleading a Title II claim, as defendant would have her do. See Def.'s Response at 4-5.

complaint was not that he suffered discrimination because of *his* sex, or otherwise suffered employment discrimination; rather, he was an "indirect victim" of sex discrimination in the provision of an education program. *Id.* at 179 (brackets omitted). In precisely the same manner, plaintiff here contends that she was the indirect victim of disability discrimination in the provision of public services, discrimination that is barred by Title II of the ADA.

Congress had the Fourteenth Amendment authority to bar disability discrimination in the provision of public education through the passage of Title II, as the United States explained in its opening brief. The defendant does not seriously grapple with the caselaw and history contained therein, instead asserting only that "access to higher education is not a fundamental constitutional right." See Def.'s Response at 4 (citing cases finding no such right as a matter of due process). Congress had the authority to bar the States from discriminating on the basis of disability in providing access to public education, regardless of whether the Fourteenth Amendment independently guarantees such access to every member of the public as a matter of substantive due process. Lawmakers extensively documented a long history of State discrimination against the disabled in this area, and so Title II validly abrogates sovereign immunity with respect to public education, as every appellate court to address this question has found. See *Bowers* v. *NCAA*, 475 F.3d 524, 555-556 (3d Cir. 2007); *Toledo* v. *Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005); see also *Goonewardena* v. *New York*, 475 F. Supp. 2d 310, 324 (S.D.N.Y. 2007).

Because Congress had the Fourteenth Amendment authority to enact Title II to remedy disability discrimination in education, it necessarily also had the authority to bar retaliation against those who complain about and seek to prevent such Title II violations. Retaliation against those who complain of Title II discrimination is an extension of that same discrimination.

For this reason, the Supreme Court regularly construes bans on discrimination to cover retaliation against those who complain about such discrimination, even where the statute at issue does not explicitly mention retaliation. See, *e.g.*, *Jackson*, 544 U.S. at 173 (retaliation against male coach who complains of sex discrimination in athletics is simply "another form of intentional sex discrimination"); accord *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442, 128 S. Ct. 1951, 1954-1955 (2008) (ban on race discrimination includes retaliation against someone who opposed such discrimination).

Congress had no obligation, in order to validly abrogate the States' sovereign immunity for a retaliation claim, to compile not only a history of the States' involvement in the underlying discrimination, but also a history of state retaliation against those who oppose discrimination.[2] See Def.'s Response at 2-3 & n.3. Retaliation against those who oppose discrimination is simply one common manifestation of the banned discrimination, and Congress need not explicitly ban each such manifestation, let alone catalogue its history. See *Jackson*, 544 U.S. at 173-174. No legislative findings are necessary to establish the obvious necessity for a ban on retaliation, without which a civil rights law's "enforcement scheme would unravel * * * and the underlying discrimination would go unremedied." *Id.* at 180-181; accord *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (the "primary purpose of antiretaliation provisions" is ensuring "unfettered access to statutory remedial mechanisms"). Moreover, it would be particularly irrational to

[2] To the extent the cases cited by the defendants are to the contrary, they are mistaken. None of them offer any analysis explaining why Congress has such an obligation. Moreover, two of the cases were decided before *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which considerably clarified the scope of Congress's obligation to make findings, and *United States* v. *Georgia*, 546 U.S. 151, 159 (2006), which held that a particular application of Title II validly abrogated the States' sovereign immunity without considering whether Congress had made legislative findings regarding that type of ADA violation.

require Congress to make such findings where, as here, the retaliation ban was enacted simultaneously with the ban on underlying discrimination. By definition, there was no retaliation against those who insisted on ADA compliance before the ADA was enacted, and so Congress could not have compiled the historical record defendant demands when drafting the ADA.

As the United States explained in its opening brief, the ADA's retaliation provision also is valid Fourteenth Amendment legislation because it guarantees the First Amendment right to oppose discrimination on the basis of disability. There is no basis for the defendant's unsupported assertion that violation of First Amendment rights cannot form the basis for a valid abrogation unless a plaintiff also brings a First Amendment claim. See Def.'s Response at 6. Plaintiffs need not plead a separate constitutional violation each time they seek the benefits of a statute that abrogates sovereign immunity.

Defendant also errs in asserting that plaintiff, as a state employee, had no First Amendment right to oppose discrimination taking place in her workplace. See Def.'s Response at 6. It has long been settled that a government worker has a right to protest such discrimination, "a matter inherently of public concern," without fear of retaliation. *Connick* v. *Myers*, 461 U.S. 138, 148 n.8 (1983); accord *id.* at 146 (citing *Givhan* v. *Western Line Consolidated Sch. Dist.*, 439 U.S. 410 (1979)); *Hughes* v. *Region VII Area Agency on Aging*, 542 F.3d 169, 182 (6th Cir. 2008). It is irrelevant that a government worker does not enjoy First Amendment protection for speech within her job description, because no such speech is at issue here. Plaintiff did not complain about her employer's treatment of her, or about her own "job duties." *Fox* v. *Traverse City Area Pub. Schs. Bd. of Educ.*, 605 F.3d 345, 348-350 (6th Cir. 2010) (citation omitted), petition for cert. pending, No. 10-229 (filed Aug. 12, 2010). Nor was it within her job

description to lodge her complaints, such that her speech was "commissioned" by the government. See *Garcetti* v. *Ceballos*, 547 U.S. 410, 422 (2006) (government worker cannot complain that he suffered retaliation for content of memorandum he was required to write). Rather, she took it upon herself to complain that her employer was failing to live up to its obligations under federal anti-discrimination law. Such complaints are protected by the First Amendment.

In any event, as defendant does not contest, Congress is entitled to prohibit conduct beyond that independently prohibited by the First Amendment so long as it "exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Tennessee* v. *Lane*, 541 U.S. 509, 520 (2004). The defendant does not dispute that, in the context of public education, the rights protected by the ADA's retaliation provision closely track those protected by the First Amendment, and so the retaliation provision is congruent and proportional to the constitutional injuries it remedies and prevents.

Finally, because this Court asked for supplemental briefing only on sovereign immunity, it need not address defendant's contention – presented without argument, in a footnote – that the retaliation provision does not authorize the recovery of damages in this case. See Def.'s Response at 6 n.5. In any event, defendant is mistaken. The retaliation provision authorizes different remedies depending on whether the underlying discrimination is a violation of Title I, II or III. See 42 U.S.C. 12203(c). The cases cited by defendant hold that, where the underlying violation is of Title I, damages are not authorized. Even assuming these cases are correct – which they are not[3] – they have no bearing on the recovery of damages where, as here, the

[3] Because this Court need not decide the question, the United States will not burden it

(continued…)

underlying violation is of Title II. See *Herrera* v. *Giampetro*, No. 09-cv-1466, 2010 U.S. Dist. LEXIS 45523, at *26 (E.D. Cal. May 10, 2010) (explaining the distinction).

(…continued)
with argument as to this matter. For extensive explanation, see Br. of the Equal Employment Opportunity Commission and the United States as Amicus Curiae, *Baker* v. *Windsor Republic Doors, Inc.* (6th Cir.), filed Dec. 21, 2009 (Nos. 08-6200, 09-5722), available at http://www.justice.gov/crt/briefs/windsor.pdf. For decisions disagreeing with those cited by defendant, see *Baker* v. *Windsor Republic Doors*, 635 F. Supp. 2d 765, 770-771 (W.D. Tenn. 2009); *Edwards* v. *Brookhaven Science Assocs., LLC*, 390 F. Supp. 2d 225, 236 (E.D.N.Y. 2005).

CONCLUSION

The defendant's motion to dismiss should be denied, because the ADA's retaliation provision validly abrogates the States' sovereign immunity under the circumstances alleged here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2010, the foregoing "Intervenor United States' Reply Memorandum of Law" was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

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