Nos. 08-6200 & 09-5722

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS BAKER,
Plaintiff/Appellee-Cross-Appellant,

v.

WINDSOR REPUBLIC DOORS, INC.,
Defendant/Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 06-01137

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE UNITED STATES AS AMICI CURIAE IN SUPPORT OF PLAINTIFF/APPELLEE-CROSS-APPELLANT

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency established by Congress to administer, interpret, and enforce the Title I employment discrimination provisions of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. The Attorney General also has responsibility for enforcing the employment provisions of the ADA against public employers. The appeal in this case presents an important, and recurring, issue of statutory construction that affects plaintiffs' ability to obtain full relief for employment-based retaliation under the ADA. Because this Court's resolution of this issue will affect the

government's enforcement of the ADA, the Commission and the Department of Justice offer their views to the Court pursuant to Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE[1]

Whether an individual who is a victim of employment-based retaliation that violates section 503 of the ADA, 42 U.S.C. § 12203, is eligible for damages under the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(2).

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings[2]

On June 20, 2006, Douglas Baker filed this suit against Windsor Republic Doors ("WRD") under the ADA and state law, alleging that in refusing to allow him to return to work, the company discriminated against him because of his disability, denied him reasonable accommodation, and retaliated against him for exercising his rights under the ADA. RE.1 (complaint) & 2 (amended complaint).[3] The court denied WRD's motion for summary judgment (RE.43), and a four day jury trial began on September 2, 2008. RE.95, 96, 97.

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[1] The government takes no position with respect to any other issue presented in this appeal.

[2] The government adopts the district court's statement of the facts in its May 1, 2009, opinion for purposes of this brief. *Baker v. Windsor Republic Doors, Inc.*, 2009 WL 1231035 (W.D. Tenn. May 1, 2009); RE.121.

[3] Citations to the record are abbreviated "RE." and refer to the district court docket entry number.

The jury returned a verdict finding that Baker had been regarded as disabled, was a qualified individual, was not provided a reasonable accommodation under the ADA (or parallel state law), and had suffered retaliation. The jury awarded back pay and damages. RE.85. The court entered judgment against WRD and ordered the company to reinstate Baker with reasonable accommodations. RE.88. The reinstatement order was stayed pending resolution of post-trial motions and appeals. RE.116.

B. District Court's Decisions

After trial, the district court granted WRD's motion for judgment as a matter of law as to Baker's ADA discrimination and failure to accommodate claims, but it denied the motion with regard to his retaliation claim. *Baker v. Windsor Republic Doors, Inc.*, 2009 WL 1231035 (W.D. Tenn. May 1, 2009). In a subsequent decision, relevant to the argument the government and Commission advance as amici, the court affirmed the jury award of compensatory damages on Baker's ADA retaliation claim. *Baker v. Windsor Republic Doors, Inc.*, 635 F. Supp. 2d 765 (W.D. Tenn. July 10, 2009).

The court began its analysis by setting out the text of the ADA's anti-retaliation provision in section 503(a) as well as the remedies and procedures provision in section 503(c). 635 F. Supp. 2d at 766 (quoting §§ 42 U.S.C. 12203(a) and (c)). The court then recognized that "Section 12117 [section 107 of

the ADA], which is one of the statutes referenced [in section 503(c)], incorporates certain powers, remedies, and procedures of [Title VII of] the Civil Rights Act of 1964, including the provisions of 42 U.S.C. § 2000e-5 [the enforcement provisions of Title VII, in section 706]." *Id*. The court noted that when the ADA was first enacted, this same remedial scheme applied to claims for disability discrimination under section 102 of the ADA, 42 U.S.C. § 12112. *Id*. The court further observed that although section 2000e-5 does not authorize compensatory damages, Congress enacted the Civil Rights Act ("CRA") of 1991, 42 U.S.C. § 1981a(a)(2), which expanded the remedies available under 42 U.S.C. § 2000e-5(g)(1) to include compensatory and punitive damages for certain violations of the ADA. *Id*. at 767. Specifically, the court stated, "[w]hile § 1981a(a)(2) lists the statutory claims to which it applies, such as violations of § 12112 [section 102 of the ADA], this statute does not explicitly reference the anti-retaliation provision at § 12203 [section 503 of the ADA]." *Id*.

The court stated that a literal reading of § 1981a(a)(2) supports defendant's argument that compensatory damages are not available for an ADA retaliation claim. *Id*. at 768. It explained this rationale as follows.

> The relevant statutory language extends compensatory damages to statutory claims: (1) brought pursuant to the "powers, remedies, and procedures" of § 2000e-5 through § 12117(a) [Section 107 of the ADA] *and* (2) against a defendant who violated one of the specific statutory provisions listed. A retaliation claim under § 12203 [Section 503 of the ADA]

> meets the first of these criteria but not the second because, unlike § 12112 [Section 102 of the ADA], it was not explicitly referenced in the 1991 Act.

Id. at 768-69 (emphasis in original). The court stated that this is the view of a "slight majority of courts." *Id*., citing *Kramer v. Banc of Am. Sec., LLC*, 355 F.3d 961, 965 (7th Cir. 2004); *EEOC v. Faurecia Exhaust Sys., Inc.*, 601 F. Supp. 2d 971, 975-76 (N.D. Ohio 2008). The court also noted that a "minority view is that the cross-reference to § 12117 in § 12203 indicates Congressional intent that the remedies for violations of the latter statute should be the same as those available under Title I of the ADA, which means § 1981a(a)(2) would necessarily extend compensatory damages to retaliation in tandem with discrimination." *Id*. at 768 (citing *Edwards v. Bookhaven Sci. Assocs., LLC*, 390 F. Supp. 2d 225, 236 (E.D.N.Y. 2005)).

However, the court noted that a literal reading of the statute is not controlling if it produces an absurd result or is contrary to other provisions of the ADA. *Id.* at 769. Here, the court was persuaded by Baker's argument that finding § 1981a(a)(2) inapplicable to his claim would be contrary to Congress's intent "to enact a co-extensive cause of action for retaliation when it proscribed intentional discrimination at § 12112." *Id.*

The court gave particular emphasis to several recent Supreme Court decisions finding that intentional discrimination encompasses retaliation. *Id.* at

769-70 (discussing *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (Title IX case holding that a private right of action for retaliation is contained within statutory prohibition against intentional discrimination on the basis of sex); *CBOCS West, Inc. v. Humphries*, ___ U.S. ___, 128 S.Ct. 1951, 1958 (2008) (holding that a private right of action for retaliation is included within the language of 42 U.S.C. § 1981, which ensures right of non-white people to "make and enforce contracts"); *Gomez-Perez v. Potter*, ___ U.S. ___, 128 S.Ct. 1931 (2008) (interpreting "the ADEA federal-sector provision's prohibition of 'discrimination based on age' as … proscribing retaliation," although the Act contained no explicit prohibition against federal-sector retaliation) (internal citation omitted)).

The court found the Supreme Court's holding in *Gomez-Perez* "most relevant" to the issue presented in this case. *Id.* at 769. In that case, the Court found that the presence of an explicit private sector anti-retaliation provision in the ADEA was not exclusive because

> *[a] prohibition of "discrimination" either does or does not reach retaliation,* and the presence or absence of another statutory provision expressly creating a private right of action cannot alter [its] scope. In addition, it would be perverse if the enactment of a provision explicitly creating a private right of action – a provision that, if anything, would tend to suggest that Congress perceived a need for a strong remedy – were taken as a justification for narrowing the scope of the underlying prohibition.

Id. at 770 (quoting 128 S.Ct. at 1938 (emphasis added)). Observing that *Gomez-Perez* "seems to indicate that unless a statute states otherwise, prohibitions against intentional discrimination are meant to include retaliation claims" (*id.* at 771 (citations omitted)), the district court concluded in this case that Baker's retaliation damages award "is supported by both the explicit prohibition at § 12203 and the implicit prohibition at § 12112." *Id.* Further, "[b]ecause § 1981a(a)(2) [i]ndisputably permits a compensatory award for violations of § 12112, it would be an absurd result to hold that Congress intended compensatory damages to be available only under § 12112 and not § 12203 – considering that these statutes codify identical causes of action for retaliation." *Id.* Therefore, the court held that § 1981a(a)(2) extends compensatory damages to ADA retaliation claims and sustained the jury's damage award. *Id.*

SUMMARY OF ARGUMENT

This Court should affirm the district court's ruling that damages are available in actions under section 503 of the ADA for retaliation in employment. The language and structure of the ADA remedies provisions, the purposes of the retaliation provision, and all relevant legislative history compel that result.

The "plain language" approach adopted by the Seventh and Ninth Circuits should be rejected. The mere omission of a reference to the retaliation provision in the damages statute creates ambiguity requiring use of other tools of statutory

construction. Reading the statute in light of all related statutory provisions and understanding the ADA's incorporation of remedies from Title VII as modified by the Civil Rights Act of 1991 compels the conclusion that damages are available for ADA retaliation claims.

The omission of a reference to the retaliation provision in the damages statute is not dispositive because Congress had a logical reason for that omission. The ADA retaliation provision applies to claims arising under the public services and public accommodations sections of the ADA as well as to the employment section. These other protections were beyond the scope of the employment discrimination amendments enacted in the 1991 Civil Rights Act.

The plain language approach focusing on only the damages provision ignores the requirement that statutes must be read in the context of the entire statutory scheme of which they are a part. But it also ignores some features of the language of the provision in question.

Specifically, the courts following this approach do not account for the damages provision's specific exclusion of disparate impact claims, and thus read too much into the omission of any reference to retaliation claims. Similarly, they ignore the fact that the damages statute, in providing damages for intentional discrimination under the ADA, at least arguably provides the same relief for

retaliation claims because, as recognized by the Supreme Court, retaliation is a form of intentional discrimination.

The plain language approach leads to absurd results in light of the important purpose of anti-retaliation provisions in assuring unfettered access to the machinery of law enforcement. That purpose is undermined by a reading of the remedies provision that excludes effective relief for ADA retaliation claims.

Finally, the ambiguity created by the statutory silence and the absurdity of reading that silence to mean Congress deliberately intended to preclude damages justify looking to legislative history to clarify Congress's intent. The history of the Civil Rights Act of 1991 and of the ADA retaliation provision both compel the conclusion that Congress intended to provide the full panoply of relief for ADA employment retaliation claims.

ARGUMENT

THE LANGUAGE, STRUCTURE, AND LEGISLATIVE HISTORY OF THE ADA, TITLE VII, AND THE CIVIL RIGHTS ACT OF 1991, WHEN PROPERLY CONSTRUED, COMPEL THE CONCLUSION THAT DAMAGES ARE AVAILABLE IN ACTIONS FOR UNLAWFUL RETALIATION IN EMPLOYMENT UNDER SECTION 503 OF THE ADA.

The starting point in statutory interpretation is the language at issue, and "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S.

337, 341 (1997). The question of whether damages are available for retaliation claims depends on the interpretation and interaction of several statutory provisions, all of which are codified as sections of Title 42 of the United States Code and were enacted as portions of three statutes: the ADA (42 U.S.C. §§ 12101 *et seq.*), Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), and the Civil Rights Act of 1991 (42 U.S.C. § 1981a).

Two courts of appeals have concluded, based on their reading in isolation of the damages provision of the Civil Rights Act, 42 U.S.C. § 1981a(a)(2), that damages are not available in ADA retaliation cases because the damages statute does not mention the retaliation provision of the ADA. *See Kramer v. Banc of Am. Secs.*, 355 F.3d 961 (7th Cir. 2004); *Alvarado v. Cajun Operating Co.*, 2009 WL 4724267 (9th Cir. 2009). More specifically, the *Kramer* court stated that "the plain language" of section 1981a(a)(2) "permits recovery of compensatory and punitive damages … only for those claims listed therein." 355 F.3d at 965. Because "claims of retaliation under the ADA (§ 12203) are not listed" in section 1981a(a)(2), the court concluded that the remedies for such claims are "limited to the remedies set forth in § 2000e-5(g)(1)." *Id. Accord Alvarado*, 2009 WL 4724267at *6 ("The text of section 1981a is not ambiguous.").

However, as the Supreme Court has observed, statutory silence "normally creates ambiguity. It does not resolve it." *Barnhart v. Walton*, 535 U.S. 212, 218

(2002). Given the uncertainty that Congress's silence creates in this case, other interpretive tools must be employed to understand its intent. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."). In this case, it is the Commission's and government's view that Congress could not have meant to say no to damages for ADA retaliation claims. All available evidence of the structure of the ADA remedies provisions, of the purposes served by anti-retaliation provisions, and of congressional intent both in enacting the ADA anti-retaliation provision and in expanding remedies for employment discrimination in the 1991 Civil Rights Act, supports the conclusion the district court reached here, that damages are available for ADA retaliation claims.

To understand the interaction between the relevant statutory provisions, it is necessary to recognize the basic structure of the ADA. The ADA contains several subchapters commonly referred to as "Titles." Title I governs "Employment," Title II governs "Public Services," and Title III governs "Public Accommodations and Services Operated by Private Entities." *See* Title I, 42 U.S.C. §§ 12111 *et seq.*; Title II, 42 U.S.C. §§ 12131 *et seq.*; Title III, 42 U.S.C. §§ 12181 *et seq.* Each of these subchapters, or "Titles," contains its own remedies and enforcement provisions. Section 102 of Title I, 42 U.S.C. § 12112, prohibits employment-based

discrimination, and section 107 of Title I, 42 U.S.C. § 12117, states that the remedies and procedures for violations of Title I are those remedies and procedures available pursuant to Title VII of the Civil Rights Act of 1964, including those found in section 706(g), 42 U.S.C. § 2000e-5(g).[4] Title V of the ADA, which is titled "Miscellaneous Provisions," contains section 503, 42 U.S.C. § 12203, which broadly prohibits retaliation and coercion under Titles I, II, and III.[5] Unlike Titles

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[4] Section 107(a) of the ADA, 42 U.S.C. § 12117(a), provides:

> Powers, remedies, and procedures. – The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title [sections 705, 706, 707, 709, and 710 of Title VII of the Civil Rights Act of 1964] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter …

[5] Sections 503(a) and (b) of the ADA, 42 U.S.C. §§ 12203(a) & (b), provide:

> (a) Retaliation. – No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> (b) Interference, coercion, or intimidation. – It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any

I, II, and III, however, Title V does not contain its own remedies and procedures provision. Instead, section 503(c) of Title V states that the remedies and procedures available for employment-based retaliation claims under Title I are those remedies available under section 107, 42 U.S.C. § 12117.[6]

This statutory scheme establishes that the remedies available for employment-based retaliation claims under section 503 are coextensive with the remedies available at section 107, 42 U.S.C. § 12117, which, in turn, are coextensive with the remedies available pursuant to Title VII, including those at section 706(g), 42 U.S.C. § 2000e-5(g). While section 706(g) does not authorize compensatory and punitive damages, in the 1991 Civil Rights Act, Congress amended 42 U.S.C. § 1981 to permit damages in Title VII and ADA cases, like this case, brought under section 706 to seek relief for intentional discrimination. *See* 42 U.S.C. § 1981a(a)(1) (authorizing damages for Title VII cases brought under

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> other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

[6] Section 503(c) of the ADA, 42 U.S.C. § 12203(c), provides:

> Remedies and procedures – The remedies and procedures available under sections 12117, 12133, and 12188 of this title [sections 107, 203, and 308 of the ADA] shall be available to aggrieved persons for violations of subsections (a) and (b) of the section, with respect to subchapter I, subchapter II and subchapter III, respectively, of this chapter.

the powers of section 706);[7] 42 U.S.C. § 1981a(a)(2) (authorizing compensatory and punitive damages in ADA cases brought under the powers of section 706).[8] Accordingly, because compensatory and punitive damages are available for Title VII violations under section 706(g), 42 U.S.C. § 2000e-5(g), they are also available under section 107 of the ADA, 42 U.S.C. § 12117 (which incorporates the

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[7] Section 1981a(a)(1) provides:

> In an action brought by a complaining party under 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 or 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, or 2000e-16), … , the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

[8] Section 1981a(a)(2) provides:

> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), … against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under … section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) … the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

remedies of section 706(g)), and therefore – pursuant to section 503(c) of the ADA (which incorporates the remedies and procedures of section 107 of the ADA) – for employment-based retaliation claims.

Therefore, as the district court correctly concluded in this case, WRD's argument – that compensatory damages are unavailable because section 1981a(a)(2) only lists claims brought under section 12112 (section 102 of Title I of the ADA) and fails also to list claims of retaliation under section 12203 (section 503 of Title V of the ADA) – should be rejected. Appellant Br. at 38-43. The absence of a reference to section 503 in section 1981a(a)(2) does not operate to exclude compensatory and punitive damages for employment-based retaliation claims for two reasons.

First, as just explained, these damages are available by a straight, albeit extended, pathway via the reference in section 1981a(a)(2) to section 706 of Title VII, which, in turn, provides the remedies available under section 107 of the ADA, which, in turn, supplies the remedies authorized by section 503(c). Because the damages are available under this incorporation pathway, there was no need for Congress explicitly to list the retaliation provision. *See, e.g.*, Mark C. Weber, *Workplace Harassment Claims under the Americans with Disabilities Act: A New Interpretation*, 14 Stan. L. & Pol'y Rev. 241, 262 (2003) (concluding the "incorporation-by-reference pathway leads in a straight line from ADA Title V's

section 12203 to ADA Titles I and II to the Civil Rights Act of 1964 to the Civil Rights Act of 1991, placing section 12203 squarely within section 1981a").

Second, Congress's decision not to enumerate claims under section 503 when amending section 1981 makes sense given the text and scope of section 503. Reference to section 503 would have expanded the scope of remedies available for retaliation claims brought under the public accommodations and public services provisions of Titles II and III of the ADA, when all Congress intended in adding the damages provisions to section 1981 was to provide additional remedies for intentional *employment* discrimination claims. *See* Civil Rights Act of 1991, Pub. L. 102-166, Sec. 3 ("The purposes of this Act [include] – (1) to provide remedies for intentional discrimination and unlawful harassment in the workplace …."), & Sec. 102 (amending 42 U.S.C. § 1981 to add new section, 42 U.S.C. § 1981a, entitled "Damages in cases of intentional discrimination in employment").

Titles II and III have their own incorporated remedies provisions, made applicable to retaliation claims by the operation of section 503(c). Title II permits awards of compensatory but not punitive damages in private suits brought against public entities for claims of disability discrimination in the provision of public services. *See Barnes v. Gorman*, 536 U.S. 181, 189 (2002). Title III permits only the imposition of injunctive relief in private suits challenging discrimination in the provision of public services by private entities. *See Goodwin v. CNJ, Inc.*, 436

F.3d 44, 49-51 (1st Cir. 2006) (citing *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 293 (6th Cir. 1999). Thus, it is apparent that Congress could not refer to section 503 of the ADA without changing the remedial provisions of ADA titles it was not attempting to amend when it undertook its historic expansion of employment discrimination remedies by passing the Civil Rights Act of 1991.

In refusing to follow the incorporation-by-reference pathway through the relevant sections of the three related statutes, WRD's argument (Appellant Br. at 38-39), as well as the *Kramer* and *Alvarado* courts' "plain language" analysis, contravene the Supreme Court's directive that courts should examine statutory language "in light of context, structure, and related statutory provisions." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 558 (2005); *Robinson*, 519 U.S. at 341 (courts must consider the "broader context of the statute as a whole"). Here, the three statutes are linked, by explicit references, and when they are read together, it is apparent from the statutory language itself that damages are available in an ADA retaliation action. By failing to read the relevant statutes as a whole, the Seventh and Ninth Circuits' interpretation focuses too narrowly only on the damages provision itself. In considering the remedies available in an ADA retaliation case, it is indefensible to focus on an amendment providing damages and ignore the language of the primary statute initially providing the right of action. The Supreme Court has cautioned that statutory interpretation does not

"look at one word or one provision in isolation" but rather "looks to the statutory scheme for clarification and contextual reference." *Smith v. United States*, 508 U.S. 223, 233-34 (1993) (emphasizing the "holistic" nature of statutory interpretation). If one starts with the ADA retaliation provision and traces its incorporation provisions back to Title VII, and then considers the Civil Rights Act amendment providing damages for intentional discrimination claims brought under section 706 of Title VII, it is clear that those damages are available for ADA retaliation claims against employers. [9]

In addition to ignoring the incorporation pathway Congress set out, the Seventh and Ninth Circuits also missed the significance of key relevant portions of the single provision they did examine. Notably, in considering the plain language of section 1981a, neither court discussed the fact that the only type of claim Congress specifically exempted from the damages provision was one for disparate impact. *See* 42 U.S.C. § 1981a(a)(2) ("In an action . . . against a respondent who

[9] We note that the Eighth, Tenth, and Second Circuits all have affirmed jury awards of compensatory and/or punitive damages in ADA employment-based retaliation cases, suggesting that these circuits view section 503 as authorizing such damages. *See, e.g.*, *Salitros v. Chrysler Corp.*, 306 F.3d 562, 574-76 (8th Cir. 2002) (affirming jury's punitive damage award for retaliation claim); *Foster v. Time Warner Entertainment, Co.*, 250 F.3d 1189, 1196-98 (8th Cir. 2001) (affirming jury's compensatory and punitive damage award for retaliation claim); *EEOC v. Wal-Mart Stores*, 187 F.3d 1241 (10th Cir. 1999) (in retaliation and discrimination case, affirming jury's punitive damage award); *Muller v. Costello*, 187 F.3d 298, 314-15 (2d Cir. 1999) (affirming compensatory damage award based on jury's finding of retaliation).

engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)"). The express exclusion of impact claims supports the interpretation that Congress included retaliation claims among those for which damages are available.

Further, the courts' insistence that the reference to violations under section 102 is dispositive of the question whether Congress meant to provide damages for retaliation claims ignores the fact that this reference is both over- and under-inclusive in light of the stated intent to provide damages for intentional discrimination claims. All violations enumerated in section 102 are not species of intentional discrimination, and the unmentioned retaliation claim is a form of intentional discrimination. There is no question that where retaliation is proscribed, it is understood to be a form of intentional discrimination, because by definition it entails treating an individual differently because he or she has engaged in statutorily protected conduct. For example, in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), a Title IX case holding that a private right of action for retaliation is contained within the statutory prohibition against intentional discrimination on the basis of sex, the Court explained that:

> Retaliation is * * * a form of "discrimination" because the complainant is subjected to differential treatment. * * * Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against

> a person *because* he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex in violation of Title IX.

544 U.S. at 173-174 (internal citations omitted).

If the ADA had no retaliation provision, the Supreme Court's reasoning in *Jackson* and other recent cases examining retaliation claims brought under various civil rights statutes suggests that such protection would be inferred. *See CBOCS West, Inc. v. Humphries*, ___ U.S. ___, 128 S.Ct. 1951, 1958 (2008) (holding that a private right of action for retaliation is included within the language of 42 U.S.C. § 1981, which ensures the right of non-white people to "make and enforce contracts"); *Gomez-Perez v. Potter*, ___ U.S. ___, 128 S.Ct. 1931 (2008) (interpreting "the ADEA federal-sector provision's prohibition of 'discrimination based on age' as … proscribing retaliation," although the Act contained no explicit prohibition against federal-sector retaliation) (internal citation omitted)).

Under the Supreme Court's holdings in *Jackson*, *CBOCS*, and *Gomez-Perez*, the relief afforded under the ADA's prohibition against discrimination is also afforded to those who suffer retaliation in employment in violation of the ADA. This is so because the reference in the damages provision of the Civil Rights Act of 1991 to the intentional discrimination provision of the ADA (section 102, 42 U.S.C. § 12112) necessarily encompasses the provision of a similar remedy for retaliation as a form of intentional discrimination. Put another way, if the Seventh

and Ninth Circuits are correct in thinking that the language of section 1981a is dispositive and that the incorporation pathway should be rejected, the availability of damages for retaliation claims is nonetheless provided by the statute's reference to claims for intentional discrimination. Of course the ADA *does* prohibit retaliation and interference explicitly, so there is no need to infer this prohibition from the prohibition of intentional discrimination. However, since the damages provision at issue omits reference to the retaliation provision of the ADA, it is important to recognize that reading the plain terms of the ADA prohibitions on both discrimination and retaliation in light of the Supreme Court decisions construing the term discrimination to encompass retaliation leads to the conclusion that the same damages available for other forms of intentional discrimination must be available for retaliation claims.

Courts rejecting the statutory analysis compelled by Congress's incorporation scheme have suggested that following the logic of the incorporation pathway would somehow nullify the reference in section 1981a(a)(2) to sections 12112 and 12112(b)(5) or make those references superfluous. *See Alvarado*, 2009 WL 4724267 at *7 (quoting *EEOC v. Faurecia Exhaust Sys., Inc.*, 601 F. Supp. 2d 971, 975-76 (N.D. Ohio 2008)). This objection is unfounded. Congress is not required to use the same method in every instance to achieve its purposes when it has a reason for using different approaches. It is unclear why the incorporation

pathway dictated by the reference to claims brought under section 706 of Title VII – to support damages for retaliation claims – should empty the references to the specific discrimination provisions of the ADA "of any meaning" as the *Faurecia* court believed. 601 F. Supp. 2d at 976. That Congress elected a straightforward method of identifying the discrimination claims provided in Title I for which damages are available says nothing one way or the other about the incorporation route it believed was necessary for providing remedies for retaliation.

Insistence on a rigidly literal reading of the damages provision in isolation has led the Seventh and Ninth Circuits to an absurd result that militates against their approach to statutory construction. The Supreme Court has noted that it is possible for a statute that appears clear on its face to become ambiguous when viewed in the context of the full legislative scheme, *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000), and that a statute is ambiguous "where the disposition required by the text" would lead to an absurd result, *Lamie v. United States Tr*., 540 U.S. 526, 536 (2004).

While the crabbed and literal reading of section 1981a(a)(2) embraced by the Seventh and Ninth Circuits may support WRD's argument, the issue of whether damages are available for retaliation claims is too complex and important to rest on the mere absence of an explicit reference to section 503 of the ADA. It is inconceivable that Congress would have intended to adopt a statutory scheme that

protects individuals from both disability based discrimination and retaliation based on asserting one's rights under the disability provisions, but then provide effective remedies only for the underlying discrimination claims and not for retaliation claims. The ADA retaliation provision is arguably more protective of individuals' rights than the Title VII retaliation provision, in that it expressly prohibits not only discrimination against individuals who engage in protected activity, 42 U.S.C. § 12203(a), as Title VII does in 42 U.S.C. § 2000e-3, but also makes it unlawful "to coerce, intimidate, threaten, or interfere with any individual in the exercise of . . . any right granted or protected" by the ADA, 42 U.S.C. § 12203(b). It would be anomalous indeed for Congress to have insured that victims of retaliation under Title VII would obtain compensatory and punitive damages upon proof of retaliation, but to deny that remedy to victims of employment based retaliation or interference under the ADA.

The anomaly of this reading is acutely obvious in light of the rationale underlying anti-retaliation provisions. The Supreme Court has emphasized that the anti-retaliation provisions of federal anti-discrimination laws must be read broadly to effectuate the underlying enforcement scheme. In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 66 (2006), the Court held that Title VII's anti-retaliation provisions must be interpreted more broadly than its substantive provisions because "Title VII depends for its enforcement upon the cooperation of

employees who are willing to file complaints and act as witnesses." Providing a narrower spectrum of remedies to persons who are punished for complaining about discrimination on the basis of disability would certainly deter employees from invoking federally protected statutory rights, such as by filing charges with the EEOC. In addition, judicial imposition of a subordinate remedial scheme for ADA retaliation claims flies in the face of the basic precept that "[r]etaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to different treatment." *Jackson*, 544 U.S. at 171-72. The available remedies for all such discrimination should be the same. No federal anti-discrimination statutory scheme has a lesser remedial scheme for retaliation, and Congress could not have intended such a result under the ADA.[10]

The Ninth Circuit sought to articulate an explanation for its narrow literal reading of the damages provision that would avoid the absurd results epithet. It concluded that the exclusion of damages for retaliation makes sense because a retaliation claim does not depend on proof of coverage under the ADA, while discrimination claims do, so "Congress may have well advisedly limited punitive

[10] *See* Katie Mueting, *A Case for Allowing Victims of ADA Retaliation and Coercion in Employment to Recover Legal Damages*, 92 Iowa L. Rev. 1493 (2007) (finding that the *Kramer* court misinterpreted the ADA and the Civil Rights Act of 1991); Brian M. Saxe, *Comment, When a Rigid Textualism Fails: Damages for ADA Employment Retaliation*, 2006 Mich. St. L. Rev. 555, 562 (2006) (criticizing *Kramer* and arguing that compensatory and punitive damages are available to victims of retaliation under section 503).

and compensatory damage awards to those plaintiffs who are able to prove discrimination due to an actual disability." *Alvarado*, 2009 WL 4724267 at *7. This conclusion is insupportable. First, many victims of retaliation under the ADA *are* individuals with disabilities. Second, the discrimination protections of the ADA are not extended only to individuals with "actual" disabilities, since those regarded as disabled or who have a record of a disability are also protected. *See* 42 U.S.C. § 12102(2)(B) ("record of"), § 12102(2)(C) ("regarded as"). And third, several of the provisions of section 102 also apply to individuals who do not necessarily have disabilities, such as the prohibition on discrimination against someone associated with an individual with a disability in section 102(b)(4), and the prohibitions on various medical examinations and inquiries in section 102(d), which necessarily extend to individuals who do not have disabilities. *See Lee v. City of Columbus*, 644 F. Supp. 2d 1000, 1011-12 (S.D. Ohio 2009) (relying on decisions and reasoning in other circuits, finding that a plaintiff need not prove a disability in order to challenge a medical examination or inquiry under section 102(b)(4)) (citations omitted).

The Ninth Circuit also opined that the "limitation is unsurprising because ADA retaliation claims have been historically redressed by equitable relief only pursuant to 42 U.S.C. § 2000e-5(g)(1)." *Alvarado*, 2009 WL 4724267 at *6 (citing *Lutz v. GlendaleUnion High Sch.*, 403 F.3d 1061, 1067-69 (9th Cir. 2005)). It is

unclear what the court meant by this curious observation. Equitable remedies were the only remedies available for any violations of Title VII or the ADA until Congress enacted the Civil Rights Act of 1991, so this was never a unique feature of retaliation claims under either statute. The cited case, decided several years after damages and jury trials became available in Title VII and ADA cases, did not hold that only equitable relief was available for a retaliation claim; rather the court concluded that the plaintiff was not entitled to a jury trial with the attendant compensatory or punitive damages for her retaliation claims because she had waived the right to a jury. *Lutz*, 403 F.3d at 1067-69.

In that the Seventh and Ninth Circuits considered the plain language dispositive, neither considered the legislative history that supports the reading of the statutory provisions advanced here. *Kramer*, 355 F.3d at 966; *Alvarado*, 2009 WL 4724267 at *6. Because their plain language approach leads to absurd results that are not "coherent and consistent" with the overall statutory scheme, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989), consulting the legislative history to ascertain Congress's intent is entirely appropriate. The history of the ADA confirms that Congress intended compensatory and punitive damages to be available for employment-based retaliation claims. The House Committee on the Judiciary provided a section-by-section analysis of the ADA in its report on the bill. It states that "section 503(c) provides the same remedies and

procedures for victims of retaliation and coercion as in the underlying title," i.e., victims of employment-based retaliation "would have the same remedies and procedures available under section 107 as an individual alleging employment discrimination." H.R. Rep. No. 101-485, pt. 3, at 72 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 495.

The report further states that "the cross-reference to [T]itle VII in section 107" means that "any amendments to [T]itle VII that may be made . . . in any other bill would be fully applicable to the ADA." *Id.* at 48. The committee report explained that it rejected an amendment to eliminate section 107's cross-reference to Title VII and to substitute the actual words of the cross-referenced sections, which it called "an attempt to freeze the current [T]itle VII remedies (i.e., equitable relief, including injunctions and back pay) in the ADA." *Id.* Significantly, the committee report states, "[b]y retaining the cross-reference [in section 107] to [T]itle VII, the Committee's intent is that the remedies of [T]itle VII, currently *and as amended in the future*, will be applicable to persons with disabilities." *Id.* (emphasis added). Thus, the legislative history of the ADA reveals that Congress intended that any future amendments to Title VII expanding the available remedies – such as the 1991 Civil Rights Act – would apply to claims under section 107 of the ADA and, accordingly, to retaliation-based claims under section 503.

And the legislative history of the 1991 CRA also confirms that Congress intended compensatory and punitive damages to be broadly available for claims of intentional employment discrimination, including employment-based retaliation claims. *See* House Judiciary Committee report, H.R. Rep. No. 102-40 (II), at 4 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 697 ("Certain sections of Title VII are explicitly cross-referenced in [section 12117] of the ADA, to ensure that persons with disabilities have the same remedies as under Title VII. This would include having the same remedies as Title VII, as amended by this Act, and by any future amendment. This issue was specifically addressed by the Committee during its consideration of the ADA."); *id.* at 27, 1991 U.S.C.C.A.N. at 721 ("All too frequently, Title VII leaves victims of employment discrimination without remedies of any kind [for] their injuries and allows employers who intentionally discriminate to avoid any meaningful liability.") (footnote omitted).

CONCLUSION

This Court should affirm the district court's order concluding that section 503 of the ADA authorizes compensatory damages. This is the proper result through the reference in 42 U.S.C. § 1981a(a)(2) to Title VII's section 706(g) (42 U.S.C. § 2000e-5(g)), which, in turn, provides the remedies available under section 107 of the ADA, which, in turn, supplies the remedies authorized by section 503(c).

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This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5900, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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