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Supreme Court Rules Title IX and Other Spending Clause Statutes Do Not Permit Damages for Emotional Distress

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On April 28, the U.S. Supreme Court held in *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219 (Roberts, C.J.) that damages for emotional distress are not available for statutes adopted under the spending clause. Although *Cummings* did not involve any higher education institutions, the opinion addressed more broadly discrimination statutes passed under the spending clause, which includes Title IX and Title VI. Going forward, educational institutions may rely on the decision to limit the types of damages that plaintiffs may recover in these lawsuits.[1]

Ruling

In *Cummings*, the plaintiff, who was deaf, received physical therapy from the defendant. Op. 2. The plaintiff sued the defendant, alleging that the defendant's refusal to provide an interpreter at her physical therapy sessions constituted discrimination on the basis of her disability in violation of the Rehabilitation Act of 1973 and the Patient Protection and Affordable Care Act. *Id.* The U.S. District Court for the Northern District of Texas dismissed the complaint because the plaintiff's only compensable injuries were damages for emotional distress, which it ruled were not recoverable in private actions under the Rehabilitation Act or the Affordable Care Act. *Id.* The U.S. Court of Appeals for the Fifth Circuit affirmed. *Id.* The Supreme Court granted certiorari, and ultimately affirmed. *Id.*

The Supreme Court's decision in *Cummings* relied heavily on its earlier decision in *Barnes v. Gorman*, 536 U.S. 181, 187 (2002), which held that punitive damages are unavailable in causes of action derived from spending clause statutes, and also cited its spending clause analyses in Title IX cases. Op. 3-5. Facing a similar issue in *Cummings*, the Court explained that "[i]n order to decide whether emotional distress damages are available under the Spending Clause statutes we consider here, we therefore ask a simple question: Would a prospective funding recipient, at the time it 'engaged in the process of deciding whether [to] accept' federal dollars, have been aware that it would fact such liability?" *Id.* at 5 (citing *Arlington*, 548 U.S. at 296). "If yes, then emotional distress damages are available; if no, they are not." *Id.*

Applying that standard, the Court explained that it was "straightforward" that emotional distress damages could not be recovered because "it is hornbook law" that such remedies are typically unavailable in a breach of contract action. *Id.* at 7. "Under *Barnes*, we therefore cannot treat federal funding recipients as having consented to be subject to damages for emotional distress." *Id.*

Underlying the Court's rationale was the desire to "ensure that funding recipients 'exercise[d] their choice to take

general dollars 'knowingly, cognizant of the consequences of doing so.'" *Id.* (quoting *Pennhurst State Sch. and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). "[C]onsistent with *Barnes*, it is fair to consider recipients aware that, if they violate their promise to the Government, they will be subject to either damages or a court order to perform. Those are the usual forms of relief for breaching a legally enforceable commitment. No dive through the treatises, 50-state survey, or speculative drawing of analogies is required to anticipate their availability." *Id.* at 11.

The Court rejected the plaintiff's argument that traditional contract remedies included damages for emotional distress, and therefore funding recipients were aware that they could be subject to them. *Id.* at 8. Although the plaintiff pointed to examples (including in the Second Restatement of Contracts) where emotional distress damages would be available in contract actions if the breach was the type where serious emotion disturbance is likely to result, the Court rejected the argument. *Id.* The Court declined the plaintiff's invitation to allow a "fine-grained" rule like that to bind recipients of funding to not just to the "usual remedies available in contract actions, but also other unusual, even rare remedies[.]" *Id.* at 8 (emphasis and internal quotations marks omitted).

A dissenting opinion authored by Justice Breyer, and joined by Justices Sotomayor and Kagan, disagreed with the Court's conclusion. It argued that the "[t]he Spending Clause statutes before us prohibit intentional invidious discrimination," and added that this "kind of discrimination is particularly likely to cause serious emotional disturbance." Dissenting Op. 2.

Implications

Although the facts of *Cummings* did not directly relate to colleges and universities, the decision addressed spending clause issues more broadly, and also cited Title IX and other spending clause statutes. After *Cummings*, colleges and universities should be arguing to courts that they are not liable for any emotional distress damages related to claims of discrimination brought under Title IX or similar spending clause statutes.[2]

The removal of this category of damages will have significant effects in Title IX cases where parties feel their school's administrative policies for handling sexual assault allegations discriminated against them and seek to recover noneconomic damages associated with emotional distress. Previously, emotional distress damages were a form of relief sought by plaintiffs for unquantifiable damages associated with allegations of mental anguish, depression, fright, anxiety, humiliation, and physical pain and suffering. The *Cummings* decision may well limit what kinds of cases are viable for a plaintiff to bring under Title IX, and, just as importantly, provide guidance on the value of such cases.

Going forward, colleges and universities should look to *Cummings* early in any Title IX litigation as support to dismiss claims asserting claims for emotional distress. They should also expect that plaintiffs will try to plead around the *Cummings* decision by presenting alleged harm in the form of damages that are more traditionally available in breach of contract cases. Finally, the case may preview a Court likely to impose a more narrow interpretation of implied private rights of action under the spending clause, which was the subject of a short concurring opinion by Justice Kavanaugh, joined by Justice Gorsuch. Stay tuned, as a certiorari petition in a case squarely addressing the scope of the private right of action under Title IX is set for conference on May 12, meaning a decision on that petition could come as early as mid-May. *See Fairfax County Sch. Bd. v. Doe*, Docket No. 21-968.

[1] “Pursuant to its authority to ‘fix the terms on which it shall disburse federal money, … Congress has enacted four statutes prohibiting the recipients of federal financial assistance from discriminating based on certain protected grounds.” *Id.* at 3 (citation omitted). These are Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, and the Affordable Care Act. *Id.*

[2] Significantly, as the dissent in *Cummings* noted, Title VII of the Civil Rights Act, which prohibits discrimination in employment, was not adopted pursuant to the spending clause. Damages for emotional harm are explicitly available in Title VII cases. Dissenting Op. 10; *See* 42 U.S.C. § 1981a(b)(3). This creates the paradoxical situation where a student that is subject to discrimination may not recover for emotional harm, but an employee subject to similar discrimination may recover such damages. Dissenting Op. 10.

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