

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SALLY J. SHELLENBERGER	:	CIVIL ACTION
	:	
v.	:	
	:	
SUMMIT BANCORP., INC.	:	NO. 99-5001

MEMORANDUM

Baylson, J.

June 2, 2006

I. Introduction

Plaintiff Sally J. Shellenberger (“Plaintiff” or “Shellenberger”) filed suit against Defendant Summit Bancorp, Inc. (“Defendant” or “Bancorp”) on October 8, 1999 alleging violation of Plaintiff’s rights under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq., and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa. Cons. Stat. §§ 951–963. The case was tried for three days before Judge Herbert J. Hutton of this Court beginning January 8, 2001. On January 10, Judge Hutton granted Defendant’s Motion for Judgment as a Matter of Law pursuant to F.R. Civ. P. 50. Plaintiff appealed the decision and on February 19, 2003, the Third Circuit reversed the Court’s ruling insofar as it granted judgment on Plaintiff’s retaliation claim under the ADA. Shellenberger v. Summit Bancorp., Inc., 318 F.3d 183 (3d Cir. 2003). This case was transferred to the calendar of the undersigned in an order dated April 18, 2006, and a trial date of June 12, 2006 was set by the Court.

Presently before the Court are several issues raised by the parties in the May 18, 2006 pre-trial telephone conference. The parties were instructed to brief the following issues: (1)

whether Plaintiff's claim under the PHRA claim will be included in the new trial, and (2) whether the surviving retaliation claim under the ADA provides for compensatory and punitive damages and, following therefrom, whether a jury trial is available for the new trial of that claim. Defendant submitted its brief (Doc. No. 67) on May 23, 2006 and Plaintiff filed its memorandum in opposition (Doc. No. 68) one day later.¹

II. Discussion

A. Survival of the PHRA Claim

Plaintiff argues that she is entitled to a trial on her PHRA retaliation claim has not been dismissed, as she appealed the dismissal of her action in its entirety. Defendant however, argues that the judgment of the Third Circuit should be construed in accordance with its plain language, and because only the ADA retaliation claim was reversed and remanded, the rest of the claims are no longer part of the case and may not be considered by this Court.

The Court has examined Plaintiff's Third Circuit brief and notes that, aside from the "Statement of Subject Matter Jurisdiction," where Plaintiff states that the "action is authorized and instituted" pursuant to the ADA and PHRA, see Pl's Appellate Br. at 1, the state statute is not mentioned in the entire document. In fact, in the conclusion of her appellate brief, Plaintiff wrote as follows: "It is respectfully submitted that Ms. Shellenberger produced at trial sufficient evidence that she was terminated by Summit in retaliation for her protected activity *under the Americans with Disabilities Act.*" Id. at 27 (emphasis added). After requesting the reversal of

¹ In an April 20, 2006 Order, the Court required the parties to submit written reports on the status of the case. In those documents, filed by Plaintiff and Defendant on April 21st and May 4th respectively (Doc. Nos. 63 and 64), the parties made various arguments on the matters presently before the Court. Therefore, in addition to the formal briefs described above, the Court will consider the contents of those "status reports" in reaching its decision.

the trial court's decision on Defendant's Rule 50 motion, Plaintiff sought in the alternative "a new trial consistent with finding that Ms. Shellenberger's evidence established that her termination resulted from her protected activity under the [ADA] . . ." Id. at 28. The Court finds that Plaintiff's appellate brief did not raise the issue of the PHRA claim in any substantive manner.²

In addition to the limited scope of Plaintiff's appellate brief, the Court, in addressing the surviving claims for retrial, must also bear in mind the specific mandate from the appeals court in this case. In its January 23, 2003 opinion, the Third Circuit panel reversed and remanded only as to Plaintiff's ADA retaliation claim. The judgment issued by the Third Circuit reads as follows:

On consideration of the arguments made on appeal, it is hereby ORDERED AND ADJUDGED by this Court that the Order granting the Rule 50 Motion for Judgment as Matter of Law of the district court entered on January 12, 2001, is

² Plaintiff argues that she has not waived presentation of the PHRA claim, since she identifies that claim in the opening of her appellate brief through reference to "retaliation claims." She contends that the use of the plural in that instance can only reference two separate statutes, as there is only a single occurrence of retaliatory activity at issue in the case. The Court is unwilling to reinterpret the Third Circuit's remand based on the insertion of a plural in the opening paragraph of an appellate brief. An appellant is deemed to have waived an issue if not raised in its brief. Brenner v. Local 514, United Bhd. of Carpenters, 927 F.2d 1283, 1298 (3d Cir. 1991) (waiver of argument not included in appellate brief); see also Laborers' Int'l Union v. Foster Wheeler Corp., 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes 'a passing reference to an issue . . . will not suffice to bring that issue before this court.'" (quoting Simmons v. City of Philadelphia, 947 F.2d 1042, 1066 (3d Cir. 1991) (plurality opinion) (Becker, J.))); Fed. R. App. P. 28(a). Plaintiff's failure to include any meaningful reference to the PHRA in its appellate argument is thus a significant barrier to her efforts to resurrect the state claim, and the Court finds that the pluralization of the word "claim" is insufficient to require the addition of the PHRA claim to the new trial ordered by the Third Circuit for the ADA retaliation claim.

The Court also notes that the Third Circuit includes a similar reference to "claims" in its Shellenberger opinion. 318 F.3d at 184 ("For the reasons that follow we will reverse and remand for a new trial on her retaliation claims."). The use of the plural is not consistent, however, as the court two pages later writes that "[a]s noted at the outset, Shellenberger is only appealing the judgment dismissing the retaliation claim." Id. at 186. Because the analysis contained in the appellate opinion focuses entirely on the ADA, and without any explicit mention of the PHRA in the Third Circuit decision, the Court is similarly reluctant to insert an additional claim into the new trial based on the unexplained use of a plural noun.

hereby reversed, insofar as it granted judgment on Shellenberger's claim under the ADA, and the case is remanded to the district court for a new trial on Shellenberger's retaliation claim.

Third Circuit Judgment at 1 (Feb. 14, 2003).

“Under the mandate rule, a species of the law of the case doctrine, ‘a trial court must comply strictly with the mandate directed to it by the reviewing court.’” Skretvedt v. E.I. Dupont de Nemours, 372 F.3d 193, 203 (3d Cir. 2004) (quoting Ratay v. Lincoln Nat'l Life Ins. Co., 405 F.2d 286, 288 (3d Cir. 1968)). In Cowgill v. Raymark Industries, Inc., 832 F.2d 798 (3d Cir. 1987), the Third Circuit held that “[w]hen a court of appeals reverses a judgment and remands for further consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed determinations of the trial court normally continue to work an estoppel.” Id. at 802 (citing 1B Moore et al., Moore's Federal Practice ¶ 30.416[2], at 517 (3d ed. 1984)). The Third Circuit has “consistently rejected . . . attempts to litigate on remand issues that were not raised in a party's prior appeal and that were not explicitly or implicitly remanded for further proceedings.” Skretvedt, 372 F.3d at 203.

Here, since Plaintiff failed to raise the PHRA claim in her appellate brief and the Third Circuit gave no mention to the statute in either its opinion or its judgment, the Court holds that it is bound by the clear language of the appellate court's remand order. The Court will therefore deny Plaintiff's request to include the PHRA claim in the new trial ordered by the Third Circuit for the ADA retaliation claim.

B. Remedies and Right to Jury Trial for ADA Retaliation Claim

As for the ADA retaliation claim, Plaintiff argues that the ADA provides for compensatory and punitive damages and therefore a jury trial. Defendant, however, contends

that the plain language of the statute permits only equitable remedies for retaliation claims and that Plaintiff should thus receive a bench trial.

The remedial provisions of the ADA warrant a brief explanation. The ADA is divided into four subchapters: Subchapter I (42 U.S.C. §§ 12111–12117) addresses discrimination in terms and conditions of employment, Subchapter II (Id. §§ 12131–12165) addresses discrimination regarding access to public services, and Subchapter III (Id. §§ 12181–12189) addresses discrimination in places of public accommodation. Subchapter IV (Id. §§ 12201–12213), contains “Miscellaneous Provisions,” and § 12203(a) prohibits retaliation by an employer against individuals who act in opposition to practices prohibited by the ADA. Although the ADA does not specify the substantive remedies available to plaintiffs suing on retaliation grounds, subsection (c) of the retaliation provision adopts the remedies set forth in each of the first three subchapters. See id. §§ 12117, 12133, 12188. Section 12203 states:

(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.

....

(c) Remedies and Procedures. The remedies and procedures available under sections 107, 203, and 308 of this title [42 U.S.C. §§ 12117, 12133, and 12188 respectively] shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III, respectively.

Id. § 12203.

The remedies available under § 12117 are relevant in this case, since the alleged retaliation occurred in the terms and conditions of employment. Section 12117 in turn adopts the “powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and

2000e-9 ” of the Civil Rights Act of 1964. Equitable remedies are provided by § 2000e-5(g), but neither this section nor the other named sections provide for compensatory or punitive damages.

ADA remedies were expanded by the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(2), which makes compensatory and punitive damages available to ADA plaintiffs. Section 1981a(a)(2) states:

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 . . . of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5] (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 . . . under . . . section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C. § 12112(b)(5), which requires reasonable accommodation of disabilities], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent.

Id. It is important to note that while §§ 12112 and 12112(b)(5) are specifically listed in the above-quoted statutory excerpt, § 12203 is not mentioned.

Federal courts are divided on whether § 1981a(a)(2) applies to § 12203. Compare Bowles v. Carolina Cargo Inc., 100 F. App’x 889 (4th Cir. 2004) (non-precedential) (holding that compensatory and punitive damages for ADA retaliation claims are precluded), and Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961 (7th Cir.), cert. denied, 542 U.S. 932 (2004) (same), and Rhoads v. FDIC, 94 F. App’x 187 (4th Cir.) (non-precedential), cert. denied, 543 U.S. 927 (2004) (same), with Edwards v. Brookhaven Sci. Assocs., LLC, 390 F. Supp. 2d 225 (E.D.N.Y. 2005) (holding that compensatory and punitive damages for ADA retaliation claims are permissible), and Muller v. Costello, 187 F.3d 298 (2d Cir. 1999) (allowing compensatory damages for an ADA retaliation claim but providing no analysis).

In Kramer, the Seventh Circuit held that compensatory and punitive damages for ADA retaliation claims are precluded. 355 F.3d at 965. The court reasoned that the 1991 Civil Rights Act expanded remedies only for *specific* ADA claims. Id. The amendments expanded § 2000e-5(g) remedies, allowing compensatory and punitive damages in some circumstances, specifically for violations of 42 U.S.C. §§ 12112 and 12112(b)(5), which deal with an employer’s failure to make reasonable accommodations to qualified employees with disabilities. However, since § 12203 is not listed, the court held that § 1981a(a)(2) damages do not apply to ADA retaliation claims. Id. Subsequent courts in other circuits have adopted this analysis. See, e.g., Bowles, 100 F. App’x at 889; Rhoads, 94 F. App’x at 187; Witt v. County Ins. & Fin. Servs., 2004 WL 2644397, at *6 (N.D. Ill. 2004).³

While the Third Circuit has not addressed the issue, the Kramer analysis has been adopted by judges in the Eastern and Western Districts of Pennsylvania. Santana, 2005 WL 1941654, at *2 (E.D. Pa. Aug. 11, 2005) (“Since § 1981a(a)(2) does not specifically identify ADA’s anti-retaliation provision among those sections under which compensatory and punitive damages are available . . . [plaintiff’s] demand for such damages must be stricken.”); Sabbrese v. Lowe’s Home Ctrs., Inc., 320 F. Supp. 2d 311, 331–32 (W.D. Pa. 2004).

The only post-Kramer decision to allow compensatory and punitive damages in an ADA

³ As Plaintiff points out, courts have criticized the logic of this statutory scheme, since it “precludes an award of compensatory and punitive damages in an ADA retaliation case when such damages are available in Title VII retaliation cases.” Sink v. Wal-Mart Stores, 147 F. Supp. 2d 1085, 1101 (D. Kans. 2001); see also Cantrell v. Nissan N. Am., Inc., 2006 WL 724549 (M.D. Tenn. Mar. 21, 2006); Santana v. Lehigh Valley Hosp. & Health Network, 2005 WL 1941654 (E.D. Pa. Aug. 11, 2005). Nonetheless, finding the statutory language to be clear, the courts have accepted the reasoning of Kramer and deferred to Congress to remedy the inconsistency. See Sink, 147 F. Supp. 2d at 1101; Santana, 2005 WL 1941654, at *2 n.1.

retaliation suit is Edwards.⁴ 390 F. Supp. 2d at 235–36. The Edwards court rejected Kramer, claiming that the Seventh Circuit’s analysis was too narrow and argued that because, pursuant to the 1991 Amendments, plaintiffs can recover compensatory and punitive damages under Subchapter I, such remedies are also available to ADA retaliation plaintiffs, as Subchapter IV’s remedies derive from Subchapter I. Id.

However, this Court finds persuasive the analyses of the Seventh Circuit in Kramer and Judge Stengel of this Court in Santana. The Court agrees that there is no basis in the statutory text for compensatory and punitive damages for ADA retaliation claims. “When legislation expressly provides a remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.” Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers, 414 U.S. 453, 458 (1974). Since § 1981a(a)(2) specifically enumerated the exact sections to which compensatory and punitive damages apply, it is inappropriate for a court to insert § 12203 into a carefully defined list in the statutory text.

In this case, the Third Circuit reversed the Court’s judgment as a matter of law for defendant and remanded Plaintiff’s retaliation claim under the ADA. For the reasons discussed above, this Court concludes that compensatory and punitive damages provided for in

⁴ Other courts have reached the same conclusion as Edwards while providing little, if any, analysis of the issue. See, e.g., Muller, 187 F.3d at 298 (allowing compensatory damages for an ADA retaliation claim but providing no analysis); Lovejoy-Wilson v. Noco Motor Fuels, Inc., 242 F. Supp. 2d 236 (W.D.N.Y. 2003) (same); Ostrach v. Regents of the Univ. of Cal., 957 F. Supp. 196, 200–01 (E.D. Cal. 1997) (permitting the recovery of compensatory damages after a lengthy statutory analysis).

In Kramer, the court specifically discussed the Ostrach decision, criticizing its statutory analysis and the conclusions drawn therefrom. Kramer, 355 F.3d at 966. In quoting § 1981a(a)(2), Ostrach replaced with ellipses critical limiting language that specifically enumerated statutory sections to which it applied. Ostrach, 957 F. Supp. at 201. Since the Ostrach court failed to note that § 1981a(a)(2) denotes specific sections for which compensatory and punitive damages are available, the Court concludes that its analysis does not fully address the issue presented and is of little use in the instant case.

§ 1981a(a)(2) do not apply to § 12203 retaliation claims. Therefore **Plaintiff may seek only equitable remedies.**

The 1991 Civil Rights Act provides for a jury trial where compensatory or punitive damages are sought. 42 U.S.C. § 1981a(c). Therefore, if these remedies are not permitted for the retaliation claim, Plaintiff is not entitled to a jury trial. See Kramer, 355 F.3d at 966 (holding that a jury trial is unavailable because it is contingent upon plaintiff's ability to seek compensatory or punitive damages); Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988) (“Where . . . the remedy is explicitly equitable, then there is no [S]eventh [A]mendment right to a jury.”); Sabbrese, 320 F. Supp. 2d at 331–32 (holding that a jury trial is unavailable, since only equitable remedies were permitted).

Since this Court has concluded that Plaintiff is not entitled to compensatory or punitive damages, it similarly concludes that, pursuant to 42 U.S.C. § 1981a(c), a jury trial is unavailable for the retrial of Plaintiff's ADA retaliation claim.

III. Conclusion

For the reasons stated above the Court finds that Plaintiff's claim under the PHRA was terminated by the Court's grant of Defendant's Rule 50 Motion and was not reinstated by the Third Circuit in its limited reversal of the trial court ruling. The Court also concludes that the statutory language does not provide for compensatory or punitive damages for plaintiffs in ADA retaliation suits, and, for this reason, Plaintiff is not entitled to a jury trial on the surviving claim.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SALLY J. SHELLENBERGER	:	CIVIL ACTION
	:	
v.	:	
	:	
SUMMIT BANCORP., INC.	:	NO. 99-5001

ORDER

AND NOW, this 2nd day of June, 2006, this case having been remanded by the United States Court of Appeals for the Third Circuit and recently transferred to the undersigned, and in consideration of the briefs submitted by the parties on the issues of surviving claims, jury trial, and allowable elements of damages, it is hereby ORDERED that Plaintiff's claim under the PHRA has been dismissed and will not be retried and that Plaintiff is not permitted to seek compensatory or punitive damages for her ADA retaliation claim and will therefore not receive a jury trial. In view of the Court's trying the case without a jury, and for the convenience of counsel, trial will start Tuesday, June 13, 2006 in Courtroom 3A at 9:30 a.m. The Court will have a final pretrial conference by telephone on Thursday, June 8, 2006 at 4:00 p.m.

BY THE COURT

s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.