UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA WATSON, et al., Plaintiffs, v. THE A.I. DUPONT HOSPITAL FOR CHILDREN OF THE NEMOURS FOUNDATION, et al., Defendants.	CIVIL ACTION No. 05-674

OPINION

March 30, 2007

Plaintiffs Patricia and John Watson allege, on behalf of themselves and their daughter Emma Watson, that Emma was grievously injured by defendants' conduct relating to Emma's neonatal treatment for congenital heart defects at the Nemours Cardiac Center ("the Cardiac Center"), which is operated by defendant Nemours Foundation ("the Foundation") and affiliated with defendant A.I. DuPont Hospital for Children ("the Hospital"). Plaintiffs' complaint asserts claims against the Hospital and the Foundation ("institutional defendants"), as well as the Cardiac Center's director, defendant Dr. William Norwood, and other doctors and medical providers at the Cardiac Center ("individual defendants"). While plaintiffs' claims primarily sound in state tort

law, pursuant to the court's diversity jurisdiction, plaintiffs have also alleged a violation of § 504 of the Rehabilitation Act of 1973 ("§ 504," codified at 29 U.S.C. § 794). Before the court are two related motions—one filed by the institutional defendants, the other by the individual defendants—for partial summary judgment[1] as to plaintiffs' claim for damages and attorney's fees under § 504.

Arguments of the parties

Plaintiffs base their § 504 claim on "discrimination in the application of Hospital policies and safeguards which were *not* in place for the children admitted to the Cardiac Center despite recognition that such policies were necessary for the protection of every other patient in the hospital." Pls.' Resp. Defs.' Mots. Partial Summ. J. 41. According to plaintiffs' theory, at the time in the late 1990s when the Cardiac Center was created the Foundation and the Hospital were eager to attract a "name" surgeon to serve as the Center's director—the presence of such a "name" surgeon being viewed as a key to profitability. The choice for the job was cardiac surgeon Dr. William Norwood, and plaintiffs allege that, in order to induce him to accept the job, the institutional defendants agreed to give him wide autonomy to operate the Cardiac Center—with minimal oversight and without complying with various policies of the Hospital regarding patient

[1] The institutional defendants' motion is Docket No. 39; the individual defendants' motion is Docket No. 40. Since the two groups of defendants have submitted joint supporting memoranda, the two motions will be addressed as a single motion for partial summary judgment. It is to be noted that plaintiffs "agree to dismiss the claims under [the § 504] cause of action" against each of the individual defendants except Dr. Norwood. Pls.' Resp. Defs.' Mots. Partial Summ. J. 2.

safety, record keeping and reporting requirements. Plaintiffs claim that, in establishing this administrative arrangement, defendants violated § 504 by "subject[ing Emma] to discrimination," 29 U.S.C. § 794, based on her handicap, because the administrative arrangement dictated that children with congenital heart defects—and only such children—would receive a lower level of protective oversight and safeguards than non-handicapped (or differently handicapped) children treated by the Hospital.

In response, defendants contend that: "The crux of this case involves a determination of whether Emma Watson received appropriate medical care. These claims are no more than medical malpractice claims, and are not intended to fall within the purview of the Rehabilitation Act." Defs.' Mot. Partial Summ. J. 10. They claim that—regardless of the level of administrative abstraction at which it is posited—plaintiffs' theory seeks to impose liability for discrimination under § 504 based on medical treatment decisions, in contravention of the statute's proper scope.

Summary judgment standard

Summary judgment is appropriate if the pleadings and evidence in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc. v. BMW of N. Am.,*

Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

Taking plaintiffs' assertions and evidence as true, it is clear that a genuine factual issue exists concerning the level and quality of oversight exercised over the operations of the Cardiac Center by the Hospital and the Foundation. Therefore, the dispositive question here is whether plaintiffs have stated a legal theory which could justify a fact-finder in awarding damages under § 504 based on plaintiffs' version of those disputed facts.

Analysis

Defendants are correct insofar as they argue that § 504 should not be applied to medical treatment decisions. Although the Third Circuit has not expressly so held, in *Wagner v. Fair Acres Geriatric Center*, the court was at pains to distinguish decisions "involv[ing] administrative decision-making" from those involving "medical judgment," the latter category covering "medical treatment cases involving handicapped infants which necessitate complex assessments of the medical needs, benefits and risks of providing invasive medical care." 49 F.3d 1002, 1012 (3d Cir. 1995). In holding that decisions properly characterized as "administrative decision-making"[2] could form the basis of a § 504 claim, *Wagner* may be read as implicitly acquiescing in the Second Circuit's ruling in *United States v. University Hospital* that "medical treatment decisions"

[2] In *Wagner*, the challenged administrative decision was to not admit the plaintiff to a nursing home, purportedly because the home was not equipped to deal with "behavioral problems" related to plaintiff's Alzheimer's disease. 49 F.3d at 1006, 1012.

are outside the purview of § 504. *See United States v. Univ. Hospital*, 729 F.2d 144, 156 (2d Cir. 1984).[3] Defendants rely on *University Hospital*, insisting that plaintiffs are seeking to use the Rehabilitation Act to scrutinize "medical treatment decisions." Plaintiffs, on the other hand, invoke *Wagner*, and argue that their theory alleges conduct—i.e., insufficient provision of oversight and safeguards—which is more closely analogous to the "administrative decision-making" addressed in *Wagner* than to the "medical decisionmaking process" of *University Hospital*, *see id.* at 157.

Whether conduct of the sort alleged by plaintiffs can form a basis for § 504 liability is a question inhabiting a twilight realm in which administrative practice and medical practice overlap—a realm that has yet to be illuminated by appellate case law.[4] It is not necessary to resolve that question here. Even assuming *arguendo* that plaintiffs' theory would suffice, on proper facts, to establish liability under § 504,[5] it is apparent that

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[3] The *University Hospital* analysis has been endorsed by other federal courts. *See, e.g.*, *Grzan v. Charter Hosp. of Nw. Ind.*, 104 F.3d 116 (7th Cir. 1997); *Toney v. U.S. Healthcare, Inc.*, 840 F. Supp. 357 (E.D. Pa. 1993) (Bartle, J.) (Mem.).

[4] However, several of my colleagues on this court have ruled on similar claims, albeit in unpublished dispositions. *E.g.*, *Faustino v. A.I. DuPont Hosp. for Children*, No. 05-3002, 2006 WL 3227820 (E.D. Pa. Oct. 27, 2006) (Mem.) (Tucker, J.) (granting summary judgment on § 504 claim); *Papcoda v. A.I. DuPont Hosp. for Children*, No. 05-3003, 2006 WL 3052726 (E.D. Pa. Oct. 24, 2006) (Mem.) (Kauffman, J.) (same); *Farrell v. A.I. DuPont Hosp. for Children*, Nos. 04-3877, 05-417, 05-441, 05-661, 2006 WL 1284947 (E.D. Pa. May 5, 2006) (Mem.) (Schiller, J.) (granting summary judgment on § 504 claim in *Farrell* and three related cases). *But cf. Everwine v. A.I. DuPont Hosp. for Children*, No. 05-3004, 2005 WL 3150275, at *4 (E.D. Pa. Nov. 22, 2005) (Order) (Shapiro, J.) (denying Rule 12(b)(6) motion to dismiss as to institutional defendants because "[d]ismissal of [the § 504] claim is premature at this time").

[5] "In order to establish a violation of the Rehabilitation Act, a plaintiff must prove (1) that he is a 'handicapped individual' under the Act, (2) that he is 'otherwise qualified' for the position

in the case at bar plaintiffs cannot prove that they are entitled to the *remedy* sought—compensatory damages (and attendant attorney's fees).

Damages under § 504

As a general matter, compensatory damages are available under § 504. *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995).[6] "[T]he remedies for violations of . . . § 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." *Barnes v. Gorman*, 536 U.S. 181, 185 (2002). Because remedies are not prescribed by the statutes themselves, remedies for both Title VI and § 504 have been defined by the courts. In defining the "scope of damages remedies" under these statutes, the Supreme Court has looked to "the contract-law analogy" applicable to Spending-Clause legislation (such as Title VI and the Rehabilitation Act). *Id.* at 186–87 (explaining that "in return for federal funds, the [recipients] agree to comply with federally imposed conditions," and applying contract analogy to find that punitive damages are not available under § 504)

To recover damages for breach of contract, a plaintiff has traditionally been

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sought, (3) that he was excluded from the position sought 'solely by reason of his handicap,' and (4) that the program or activity in question receives federal financial assistance." *Wagner*, 49 F.3d at 1009.

[6] Some courts have held that damages are only available on a showing of intentional discrimination. *See, e.g.*, *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002); *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 115 (2d Cir. 2001); *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 830 (4th Cir. 1994); *Wood v. President & Trustees*, 978 F.2d 1214, 1219–20 (11th Cir. 1992).

required to establish a contractual duty, a breach thereof, and "*resulting* damages." *McCabe v. State Farm Mut. Auto. Ins. Co.*, 36 F. Supp. 2d 666, 672 (E.D. Pa. 1999) (emphasis added) (discussing Pennsylvania law). It is not enough to show (1) that defendant breached (or, to bring the analogy back to the instant case, that the defendant violated § 504), and (2) that the plaintiff suffered injury. Causation much be alleged and proven. However, while the plaintiffs in this case recite that Emma's injuries were caused by the "discriminatory set-up of the entire program," Compl. ¶ 175, the actual, core contention reflected in the complaint is that the injuries were caused "because [the individual defendants] overtly chose to use a surgical and anesthesia/perfusion/cooling strategy which they knew or should have known to be below the standard of care." *Id.* ¶ 177. Plaintiffs' pleading attempts to finesse this distinction, arguing for a chain of causation in which "[h]ad . . . Emma[] not been admitted to the . . . Cardiac Center as it was set-up and run, [she] would not have received the type of . . . care which [she] received, and [she] would not have suffered the dire consequences which [she] did suffer." *Id.* ¶ 173. To follow plaintiffs down this path, however, would require of the fact-finder an appraisal of the "medical treatment decisions" undertaken by Emma's physicians and their supervisors. Thus, the question of negligence *vel non* is at the heart of plaintiffs § 504 claim, and, for the reasons articulated in *University Hospital* and, implicitly, in *Wagner*, may not be pursued in a suit for damages under the rubric of that

statute.[7]

Conclusion

For the reasons stated, the defendants' two motions for partial summary judgment dismissing plaintiffs' § 504 claim will be granted in an order accompanying this opinion.

[7] If the theory of § 504 liability assumed *arguendo* (*see supra* text at note 5) has validity, it is conceivable that the *Wagner*/*University Hospital* principles that foreclose a suit for damages would not preclude an action for injunctive relief designed to protect against future injury.

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ORDER

AND NOW, this 30th day of March, 2007, the plaintiffs having stated their agreement to the dismissal of the complaint as to certain of the individual defendants, *see* note 1 of accompanying opinion, it is hereby **ORDERED** that Count VII of the complaint is **DISMISSED** as to defendants Dr. Christian Pizarro, Dr. John Murphy, Dr. Russell Raphaely, Dr. Ellen Spurrier, Dr. Deborah Davis and Paul Kerins. For the reasons stated in the accompanying opinion, it is further **ORDERED** that defendants' Motions for Partial Summary Judgment (Docket Nos. 39, 40) are **GRANTED** as to the entirety of Count VII of the complaint, and Count VII of the complaint is **DISMISSED** in its entirety.

FOR THE COURT:

/s/ Louis H. Pollak

Pollak, J.