

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES OF AMERICA,)
)
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 Plaintiff,)
)
 v.) CIVIL ACTION
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 DREW B. MORVANT, D.D.S.,) No. 93-3251
) Section J (1)
 and)
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 DREW B. MORVANT, D.D.S.,)
 A PROFESSIONAL DENTAL CORPORATION)
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 Defendants)
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PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS/MOTION TO STRIKE

I. INTRODUCTION

This memorandum is submitted in response to Defendant's supplemental memoranda, filed on December 28, 1993 and January 11, 1994, in support of his motion to strike the government's request for damages for Ismael Pena. The United States maintains that pursuant to the statutory authority conferred upon the Attorney General, the government may seek such damages in the instant case. Under either 42 U.S.C. § 1988 or the federal common law, the request for damages to compensate Pena survives.

II. ARGUMENT

A. PURSUANT TO 42 U.S.C. § 1988 AND LSA-C.C. ART. 2315.1, THE GOVERNMENT'S REQUEST FOR DAMAGES FOR PENA SURVIVES

1. The Rule in 42 U.S.C. § 1988 Governs the Survival of Claims Brought Pursuant to the Americans with Disabilities Act

42 U.S.C. § 1988 is a far-reaching statute, designed to remedy the deficiencies of federal civil rights statutes and to effectuate the underlying purposes thereof.¹ When enacted, section 1988 governed those actions brought pursuant to the Reconstruction Civil Rights Acts. Since that time, courts have applied section 1988 in a variety of civil rights actions, either explicitly or by adopting the statutory rule that, in the absence of federal directive, courts should look to the appropriate state law. See, e.g., Slade v. U.S. Postal Service, 952 F.2d 357, 360 (10th Cir. 1991) (Title VII of the Civil Rights Act of 1964 ("Title VII")) ("'[I]f federal law does not provide a rule of

¹ See Brazier v. Cherry, 293 F.2d 401, 408 (5th Cir.), cert. denied, 368 U.S. 921 (1961):

[1988] reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes. . . . [Section 1988] comprehends those facilities available in local state law but unavailable in federal legislation, which will permit the full effectual enforcement of the policy sought to be achieved by the statutes.

See also Sherrod v. Pink Hat Cafe, 250 F. Supp. 516, 519 (N.D. Miss. 1965):

[Section 1988] is a broad congressional direction to the federal court system to draw on state law when to do so will carry out and fulfill the purposes of other congressional enactments designed to protect persons in their civil rights.

decision in a civil rights case, federal law will incorporate the appropriate state law, unless that law is 'inconsistent with the Constitution and laws of the United States.'" (citing Bennett v. Tucker, 827 F.2d 63, 67 (7th Cir. 1987) (quoting § 1988)); Grandbouche v. Clancy, 825 F.2d 1463, 1465 (10th Cir. 1987) (Bivens action); Kilgo v. Bowman, 789 F.2d 859, 876 (11th Cir. 1986) (Title VII) (citing Brazier, 293 F.2d 401); Scott v. University of Delaware, 601 F.2d 76, 81-82 n.8 (3rd Cir.) (same), cert. denied, 444 U.S. 931 (1979); Beard v. Robinson, 563 F.2d 331, 333 (7th Cir. 1977) (Bivens action) ("Faced with the absence of a governing federal rule of decision, most courts that have considered the question of the survival of federal civil rights claims have looked to state law, either on the authority of 42 U.S.C. § 1988 or simply because reference to state law obviated the need to fashion an independent federal common law rule."), cert. denied, 438 U.S. 907 (1978).² Accordingly, substantial authority belies Defendant's narrow and restrictive reading of the statute. See Defendant's Memorandum at 1-3. The issue of survival of a civil rights action is governed by the section 1988 rule.

² See also Anspach v. Tomkins Industries, Inc., 817 F. Supp. 1499, 1510 (D. Kan. 1993) (Title VII); Glanz v. Vernick, 750 F. Supp. 39, 42-43 (D. Mass. 1990) (damages claim for individual discriminated against on the basis of HIV survives because the rights and remedies of the 1973 Rehabilitation Act are derived from Title VI of the 1964 Civil Rights Act, which "like all other federal civil rights statutes, is governed by 42 U.S.C. § 1988"); Hamilton v. Rogers, 573 F. Supp. 452, 453-54 (S.D. Tx. 1983) (Title VII); Sherrod v. Pink Hat Cafe, 250 F. Supp. 516, 519 (N.D. Miss. 1965) (Title II of the 1964 Civil Rights Act).

Consistent with the federal courts' application of the section 1988 rule, the government maintains that this statutory directive governs the survival of actions brought pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et. seq. The ADA is a civil rights statute, designed to protect the rights of and prohibit discrimination against individuals with disabilities. Nothing in the statute indicates that the Act should not be enforced under a civil rights regime; rather, the legislative history indicates that the statute was enacted so as to extend to persons with disabilities "the same civil rights protections provided to women and minorities . . ."³ The narrow interpretation of section 1988 urged by Defendant would contravene the purpose of that statute and limit the very protections the ADA was designed to expand.

Accordingly, pursuant to the section 1988 rule that, in the absence of federal directive, courts should look to state law, the Louisiana survivorship statute, Article 2315.1, controls.

2. Article 2315.1 Dictates that a Claim for Damages Survives an Injured Person's Death

Since Article 2315.1 provides that a right of action for damages for injury to a person survives that person's death, the government's claim in the instant case survives. Defendant's argument that the Louisiana survivorship statute is inapplicable, merely because the United States, rather than the aggrieved

³ H.R. Rep. No. 101-485, 101st Cong., 2d. Sess., Pt. 3, at 25 (1990).

individual, possessed the original right of action, has no merit. See Defendant's Supplemental Memorandum at 3-5.

The underlying purpose of the Louisiana survivorship statute is to ensure that the decedent's heirs recover those damages to which the decedent would have been entitled were he still alive. See LSA-C.C. art. 2315.1(a) ("[i]f a person who has been injured by an offense or quasi-offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi-offense shall survive . . .") (emphasis added).⁴ By providing a survival action, the Louisiana legislature has statutorily created the means by which that purpose is effected. See Robertson v. Wegmann, 436 U.S. 584, 589 (1978) (noting that state survivorship statutes were intended to modify the 19th century common-law rule that an injured party's claim for damages was extinguished upon his death).

The fact that in the instant case the United States, rather than Pena, possessed the original right of action is immaterial to the issue of survival of "the right to recover all damages."⁵

⁴ The statute also ensures that the wrongdoer is not permitted to avoid the consequence of violating the law merely because of the death of the injured party.

⁵ Indeed, the government's claims for damages for individuals deprived of their civil rights have been found to survive. See, e.g., United States v. City of Chicago, Civ. Act. No. 73-C-2080, 1989 WL 65009, at * 5 (N.D. Ill. June 8, 1989) (damages awarded to surviving spouse and/or estate of victims of discrimination in consent decree after liability under Title VII had been found by the court); EEOC v. Greyhound Lines, Inc., 411 F. Supp. 97, 102 (W.D. Pa. 1976) (death of party who originally filed complaint with EEOC did not moot Commission's Title VII action for monetary damages for decedent); EEOC v. Local 2P,

Were he still alive, whatever monetary damages the court might award in the government's action would go to Pena. Consistent with the underlying purpose of the survivorship statute, the claim for damages, therefore, survives.⁶

3. Defendant's Actions Constitute an "Offense or Quasi-Offense" Within the Meaning of Article 2315.1

Finally, Defendant's discriminatory actions clearly constitute an "offense or quasi-offense" within the meaning of the Louisiana survivorship statute. See Defendant's Supplemental Memorandum at 5-7. The Fifth Circuit explicitly has stated that since a federal civil rights action arises from the defendant's violation of a duty imposed by federal law, such action should be "characterize[d] . . . as one sounding in tort -- i.e., an 'offense or quasi-offense.'" Page v. U.S. Industries, Inc., 556 F.2d 346, 352 (5th Cir. 1977) (citing Sims v. New Orleans Railway & Light Co., 64 So. 823 (La. 1914) (offenses and quasi-offenses are "infringements of some right

Lithographers & Photoengravers Int'l Union, 412 F. Supp. 530, 541 (D. Md. 1975) (back pay awarded to the EEOC on behalf of the estate of aggrieved individual in Title VII action).

⁶ Indeed, this action was initiated by Pena's filing of a complaint with the Department of Justice. Survival of the government's claim furthers his own desires that appropriate redress be obtained. (Cf. Nathan v. Touro Infirmary, 512 So.2d 352, 355 (La. 1987) (filing of complaint with medical review panel prior to death was the equivalent of asserting right of action).

personal to the individual or the violation of some duty imposed by law.")), cert. denied, 434 U.S. 1045 (1978).⁷

Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation, including dental offices. 42 U.S.C. §§ 12181(7)(F), 12182(a). This action alleges that Defendant refused to treat Pena solely on the basis of his HIV-positive status, a violation of a "duty imposed by law." Page, 556 F.2d at 352. Moreover, the nature of the alleged harm suffered by Pena is most analogous to the injuries compensated in tort actions, namely, humiliation, emotional distress, frustration, and anxiety. Accordingly, the alleged actions of the Defendant constitute an "offense or quasi-offense" within the meaning of the Louisiana survivorship statute. Article 2315.1, therefore, provides the basis for recovery.

⁷ See also Pegues v. Morehouse Parish Sch. Bd., 632 F.2d 1279, 1281 (5th Cir. 1980) (affirming application in employment discrimination action of Louisiana statute of limitations for actions resulting from "offenses or quasi-offenses") (citing Page, 556 F.2d at 352), cert. denied, 451 U.S. 987 (1981); Heyn v. Board of Supervisors of La. State Univ., 417 F. Supp. 603, 605 (E.D. La. 1976) (civil rights action brought pursuant to 42 U.S.C. § 1983 sounds in tort); Whitsell v. Rodrigues, 351 F. Supp. 1042, 1044 (E.D. La. 1972) (federal civil rights action governed by Louisiana statute of limitations for offenses and quasi-offenses).

The Supreme Court has applied a similar analysis and has held that federal civil rights actions are most analogous to those arising in tort. See, e.g., Wilson v. Garcia, 471 U.S. 261, 266-68 (1985) (state statute of limitations for personal injury claims is most appropriate to and must be applied in actions brought pursuant to 42 U.S.C. § 1983); Curtis v. Loether, 415 U.S. 189, 195 (1974) (actions under the Fair Housing Act, 42 U.S.C. § 812, sound in tort).

Thus, in light of the fact that: (a) 42 U.S.C. § 1988 is applicable; (b) LSA-C.C. art. 2315.1 dictates that a claim for damages survives; and (c) violations of the ADA constitute "offenses or quasi-offenses" within the meaning of article 2315.1, the government's request for damages for Pena survives.

B. PURSUANT TO FEDERAL COMMON LAW, THE GOVERNMENT'S REQUEST FOR DAMAGES FOR PENA SURVIVES

1. A Federal Cause of Action that is Remedial in Nature Survives the Death of the Aggrieved Individual

Even assuming, arguendo, that Defendant's arguments with respect to section 1988 and article 2315.1 were correct, it is settled law that the survival of a federal cause of action is, in the absence of an expression of contrary intent, a matter of federal common law. James v. Home Constr. Co. of Mobile, Inc., 621 F.2d 727, 729 (5th Cir. 1980). See also Smith v. Dept. of Human Serv.[s], State of Okla., 876 F.2d 832, 834 (10th Cir. 1989); 7C Charles A. Wright et. al., Federal Practice and Procedure: Civil § 1952 at 526 (2d ed.). In this circuit, the federal common law rule is that a federal cause of action survives in favor of the plaintiff's estate unless it is an action for penalties. James, 621 F.2d at 730 (citing Schreiber v. Sharpless, 110 U.S. 76 (1884) and Murphy v. Household Finance Corp., 560 F.2d 206 (6th Cir. 1977)).

In James, the court applied an analysis first articulated in Murphy. It considered three factors to determine whether an action, brought pursuant to the Truth-in-Lending Act ("TILA"),

42 U.S.C. § 1635, was remedial and whether, therefore, it survived the plaintiff's death. The court considered:

(1) whether the purpose of the action was to redress individual wrongs or wrongs to the public;

(2) whether the recovery ran to the individual or to the public; and

(3) whether the recovery was disproportionate to the harm suffered.

James, 621 F.2d at 730 (citing Murphy, 560 F.2d at 209.) In light of its analysis of these three factors, the court concluded that the TILA action was primarily remedial in nature. Thus, the court held that the action survived in favor of the administrator of the deceased plaintiff's estate.

Numerous courts have applied the James/Murphy analysis and have held that, as a matter of federal common law, a cause of action for monetary damages under a federal civil rights statute survives in favor of the aggrieved individual's estate. See, e.g., Cook v. Hairston, 948 F.2d 1288, 1991 WL 253302 (6th Cir. 1991) (section 504 of the 1973 Rehabilitation Act)⁸; Kilgo v. Bowman Transp. Inc., 789 F.2d 859, 876 (11th Cir. 1986) (Title VII); Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 n.3 (4th Cir. 1985) (Age Discrimination in Employment Act ("ADEA")); Khan v. Grotnes Metalforming Systems, Inc., 679 F. Supp. 751, 756 (N.D. Ill. 1988) (ADEA and Title VII); Worsowicz v. Nashua Corp., 612 F. Supp. 310, 312-13 (D. N.H. 1985) (ADEA); Asklar v.

⁸ This decision is unpublished. However, as explained in note 11, infra, the government finds the court's analysis persuasive.

Honeywell, Inc., 95 F.R.D. 419, 423 (D. Conn. 1982) (ADEA); Ricca v. United Press Int'l, 28 Fair Empl. Prac. Cas. (BNA) 1816, 1817 (S.D.N.Y. 1982) (ADEA).⁹ But see Smith, 876 F.2d at 835 (ADEA action seeking only liquidated damages is penal in nature and does not survive plaintiff's death).

2. Federal Common Law Requires the Survival of the Government's Claim for Damages Under the ADA

When the James/Murphy analysis is applied to the instant case, it is clear that this action, with respect to Pena, is remedial in nature.

The first prong of the analysis is satisfied by considering the purposes of the ADA, as set forth in the statute:

[a] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

[b] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; [and]

[c] to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities. . .

42 U.S.C. § 12101(b). Indeed, with respect to Pena, the sole purpose of this action is to redress the individual wrong of being denied dental care on the basis of disability.

⁹ Courts also have applied the analysis in non-civil rights cases brought pursuant to federal statutes that are silent as to the issue of survivability. See, e.g., United States v. NEC Corp., 1993 WL 522133, at 7 (11th Cir. 1993) (False Claims Act); Matter of Wood, 643 F.2d 188, 190-91 (5th Cir. 1980) (TILA); Smith v. No.2 Galesburg Crown Fin. Corp., 615 F.2d 407, 414 (7th Cir. 1980) (TILA), overruled on other grounds, Pridegon v. Gates Credit Union, 683 F.2d 182, 194 (7th Cir. 1982).

Second, pursuant to 42 U.S.C. § 12188(b)(2)(B), claims for monetary damages run to the aggrieved individual, rather than the public. In this action, the government specifically requested that monetary damages be awarded directly "to Pena and/or his heirs or successors." First Amended Complaint at 5.

Third, pursuant to 42 U.S.C. § 12188(b)(2)(B), claims for monetary damages may not be in excess of the harm suffered. In fact, Congress expressly provided that monetary damages do not include the authority to seek punitive damages. 42 U.S.C. § 12188(b)(4).¹⁰ With respect to Pena, this action seeks only those damages that will compensate him for the injuries occasioned by the alleged discriminatory conduct, and nothing more.¹¹

¹⁰ While the United States also may seek civil penalties as a means of vindicating the public interest, the exercise of that authority will always be ancillary to the requests for equitable and compensatory relief, which are designed to vindicate individual wrongs. Cf. Asklar v. Honeywell, Inc., 95 F.R.D. 419, 423 (D. Conn. 1982) (primary purpose of ADEA is remedial, notwithstanding the statutory authorization to seek liquidated damages). See also Khan v. Grotnes Metalforming Systems, Inc., 679 F. Supp. 751, 756 (N.D. Ill. 1988) (same).

¹¹ Cf. Cook, 948 F.2d 1288, 1991 WL 253302, in which the Sixth Circuit applied a similar analysis in an action brought pursuant to Section 504 of the 1973 Rehabilitation Act, a federal statute that prohibits discrimination on the basis of disability by federal agencies and recipients of federal funding. In Cook, the court found that (1) "§ 504 is directed more to improving the lot of certain handicapped individuals who may suffer discrimination, rather than to redressing wrongs suffered by the general public"; (2) "[r]ecovery under § 504 runs to the individual"; and (3) "the Act does not authorize any damages in excess of the harm suffered." 948 F.2d at 1288, *2, 1991 WL at 253302, **6. The court, therefore, concluded that § 504 is remedial in nature, and that any claim for damages under § 504 survives the aggrieved individual's death. Id. See also

With respect to Ismael Pena, therefore, this action is remedial in nature. As noted in the previous section, the fact that the United States, and not Pena, has instituted this suit is of no consequence for purposes of determining whether the claim at issue survives Pena's death. If the government was entitled to seek damages when Pena was alive, it is entitled to do so now.¹² Pursuant to federal common law, the government's request for damages should survive his death.

In the end, the government urges the court to recognize the survival of its claim for damages with respect to Pena by applying either the rule articulated in 42 U.S.C. § 1988 or, in the alternative, the federal common law. In an action to enforce

Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), where the Supreme Court acknowledged that monetary damages may be awarded to plaintiffs' estates in actions brought pursuant to section 504. Id. at 630.

¹² Similarly, Defendants' argument that the government does not have standing to request damages for Pena is without merit. Defendant's Supplemental Memorandum at 10-14. The government does not, and has not, "sue[d] on behalf of heirs of alleged victims." See id. at 11. This action is brought on behalf of the United States. The Attorney General is authorized to file a civil action when (a) there is a pattern or practice of discrimination, or (b) any persons or group of persons has been discriminated against under title III of the ADA and the discrimination raises an issue of public importance, 42 U.S.C. § 12188 (b) (1) (B), and may seek "such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved ..." 42 U.S.C. § 12188 (b) (2) (B). This action is fully consistent with Congress' express grant of standing to the Attorney General and the statute's authorization to seek monetary damages to compensate victims of discrimination.

If this Court finds that the government's damage request survives Pena's death, then damages may be awarded to Pena's heirs and/or successors. There is no basis, either in the case law or the statutes, for any "standing" argument to the contrary.

title III of the ADA, whether the outcome of the court's ruling effectively favors Pena's statutory beneficiaries (pursuant to 42 U.S.C. § 1988 and LSA-C.C. art. 2315.1) or his estate (pursuant to federal common law) is not material to the government's interest, so long as the claim for damages survives. The government notes, however, that survivorship statutes vary from state to state. A ruling that looks to the federal common law in determining the survival of a claim for damages will likely foster a more uniform application of the statute, avoid differing results occasioned by the vagaries of state law, and thereby serve as a more effective deterrent to discriminatory conduct.

C. PENA'S HEIRS AND/OR SUCCESSORS NEED NOT BE NAMED IN THE COMPLAINT

Finally, there is no basis for Defendant's allegation that the Complaint in this action is deficient because it fails to explicitly identify Pena's heirs and/or successors. Defendant's Supplemental Memorandum at 8.

Rule 8 of the Federal Rules of Civil Procedure simply requires that the Complaint state:

... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and

(3) a demand for judgment for the relief the pleader seeks.

Fed. Rule Civ. Proc. 8.¹³ The government has fully satisfied the requirements of this Rule. The Complaint contains a short and

¹³ See also 5 Charles A. Wright et. al., Federal Practice and Procedure: Civil § 1255 at 367-68 (2d ed.) ("The sufficiency of a pleading is tested by the statement of the claim and the demand for judgment is not considered part of the claim.")

plain statement of the government's claim -- namely, that Defendant has violated title III of the Americans with Disabilities Act -- and a demand for specific injunctive and monetary relief. The identity of Pena's heirs and/or successors can easily be obtained through the discovery process; there is no requirement, under either Rule 8 or Rule 11, that they be specifically identified in the Complaint.

III. CONCLUSION

For the foregoing reasons, the government respectfully requests that Defendant's Motion to Strike the government's request for damages for Pena be denied. Additionally, for the reasons set forth in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss/Motion to Strike, the government respectfully requests that Defendant's Motion to Dismiss/Motion to Strike be denied in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the United States of America, do hereby certify that I have this date served upon the counsel of record listed below, by telefacsimile and by first-class mail, a true and correct copy of the foregoing Plaintiff's Supplemental Memorandum In Opposition to Defendant's Motion to Dismiss/Motion to Strike.

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SO CERTIFIED this 15th day of January, 1994.

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the United States of America, do hereby certify that I have this date served upon the counsel of record listed below, by telefacsimile and by first-class mail, a true and correct copy of the foregoing Plaintiff's Supplemental Memorandum In Opposition to Defendant's Motion to Dismiss/Motion to Strike.

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SO CERTIFIED this 18th day of January, 1994.

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