

Will these claims for disability discrimination in public accommodations or governmental facilities be brought?

The availability of damages as a remedy, even minimal damages, gave victims an incentive to spend the time and energy necessary to maintain a federal court lawsuit. Most lawsuits under the Americans with Disabilities Act are filed on behalf of disability rights activists and by lawyers who receive their fees and costs if their clients prevail on the lawsuit. The only remedy for the victim of discrimination is the benefit of returning to the premises that should no longer discriminate against them.

However, these lawsuits succeed because they most often involve removal of physical barriers to people with mobility impairments or complicated electronic barriers created for the blind or print impaired on websites. However, with most claims of discrimination involve a policy or procedure that can easily be changed. If a policy or procedure is changed, and its not likely to reoccur, a court may determine that any remedy is removed, and if this happens before a decision whether discrimination had occurred, a court may deem the case to be moot and dismiss the case. The consequences to this are that there would be no entitlement for attorneys' fees and costs to the plaintiff for their case.

As a lawyer in this area of law for the past 25 years, the limitation of access to the courts for an effective remedy has been diminished considerably. Until 2001, when filing a lawsuit for discrimination, and the existence of the lawsuit fixed the problem, then the lawyer representing the victim of discrimination would be entitled to her fees. In 2001, the Supreme Court changed this practice to only allowing fees to be awarded to the victim's attorney when there is action by a court that changed the legal relationship between the parties, which includes a money judgment, judicial action that forces a change in the practice, or a judicially enforced settlement agreement.

This decision allowed a Defendant to attempt to drag a case out until the discriminatory policy is permanently changed, and then to deem the case moot so it would be dismissed. This has been the strategy in most of my cases against the State of Florida, even when it involved the egregious practice that the State of Florida maintained to place medically fragile children into geriatric nursing homes rather than to pay for home-based care. Once Ms. Sheely's decision was issued, demanding damages for victims of discrimination would prevent a case from being deemed to be moot as a claim for damages would remain, even if the practice had stopped. Without the availability of damages to prevent a defendant from rendering a case moot, only cases with clear cut issues or deeply established policies could be brought without the probability of dismissal.

The result will be that mostly activists will continue to file lawsuits under Section 504 and the ADA for cases that are economically infeasible to litigate the case, and the case can be easily resolved, or for a case that involves a deeply entrenched and widespread problem in which a ruling on the merits of a case is required for its resolution.