UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KELLY CORMIER	:	**CIVIL ACTION**
	:	**3:03cv1819 (JBA)**
Plaintiff,	:	
	:	
v.	:	
	:	
CITY OF MERIDEN, et al.	:	
	:	
Defendants.	:	

RULING ON DEFENDANT'S MOTION TO DISMISS
COUNT 2 OF FIRST AMENDED COMPLAINT [DOC #17]

I. FACTUAL BACKGROUND

Plaintiff Kelly Cormier was a public safety dispatcher for the City of Meriden. First Amended Complaint (Compl.)[Doc. #16] ¶¶ 8, 60. She brings this suit against the City and its Mayor, Deputy Fire Chief, and Director of Personnel and claims in Count 2 of her complaint that defendants intentionally discriminated against her in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, et seq. (2004). Compl. [Doc. #16] ¶¶ 39-48. In support of this claim plaintiff alleges that she is a qualified individual with a disability for purposes of 42 U.S.C. § 12112(a) because she suffers physical impairments resulting from multiple sclerosis, which was diagnosed in 2002. Compl. [Doc. #16] ¶ 9. Plaintiff alleges that her supervisors refused to reasonably accommodate her request for a work schedule

modification recommended by her physician. Id. at ¶¶ 21-38. She further alleges that she was the target of harassment by co-workers and other supervisors in her department because of her disability and requested accommodations, and that defendants failed to abate the harassment. Id. at ¶¶ 40-47.

Defendants move to dismiss Count 2[1] on three grounds: that Title II of the ADA prohibits only discrimination in public services and does not cover employment discrimination; that even if Title II does apply to employment discrimination, plaintiff failed to exhaust her administrative remedies; and that the complaint contains no nexus between the conduct of any of the named individual defendants and the alleged discriminatory actions by plaintiff's co-workers.

The Court holds that Title II's coverage of public programs, services, and activities does not include employment actions by municipal entities, and therefore Count 2 will be dismissed. The Court does not reach defendants' other arguments.

II. DISCUSSION

A. Standard

In ruling on a motion to dismiss under Fed. Rules Civ. Pro. 12(b)(6), the Court will "construe in plaintiff's favor any well-

[1]The Court's ruling on defendants' Motion to Dismiss directed to the other counts is contained in a simultaneously-issued endorsement order.

pleaded factual allegations in the complaint." Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991). To survive the motion, the plaintiff must set forth "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957), quoting Fed. Rules Civ. Pro. 8(a)(2), see also Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46 (footnote omitted), see also Jahgory v. NY State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997).

B. Circuit Split on Applicability of Title II to Employment

The Second Circuit never has addressed whether Title II prohibits discrimination in employment by public entities.[2] There is a split among the circuits which have ruled on this issue. The Ninth Circuit held that Title II does not apply to employment. Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1184 (9th Cir. 1999). The Eleventh Circuit held that Title II

[2]In Castellano v. City of New York, 142 F.3d 58, 70 (2d Cir. 1998), the Second Circuit held that various portions of the City's employee retirement plans did not violate Title I or Title II of the ADA, and that disabled retirees were "qualified individuals" for purposes of Title I. It then assumed without deciding that the retirees also were "qualified individuals" under Title II. Id.

does apply. Bledsoe v. Palm Beach County, 133 F.3d 816, 820 (11th Cir. 1998). The Fourth, Fifth and Tenth Circuits have assumed without deciding that Title II applies to public employment. Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999), Holmes v. Texas A&M Univ., 145 F.3d 681, 684 (5th Cir. 1998), Doe v. Univ. of Maryland Medical Sys., 50 F.3d 1261, 1265 (4th Cir. 1995).

Among the three District Courts in Connecticut to consider the question, two early rulings have held that Title II applies to public employment, Worthington v. City of New Haven, 1999 WL 958627 (D. Conn. 1999), Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997), and one more recently has concluded that it does not, Filush v. Town of Weston, 266 F. Supp. 2d 322 (D. Conn. 2003). For the reasons that follow, this Court finds that employment discrimination cases are not actionable under Title II.

C. Department of Justice Regulations

The courts that have found employment-related claims cognizable under Title II generally have concluded they must defer to Department of Justice regulations at 28 C.F.R. § 35.140, interpreting that provision to prohibit employment discrimination by state entities.[3] See Bledsoe, 133 F.3d at 822, Worthington,

[3] The regulation reads as follows:

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under

1999 WL 95827 at *7, Hernandez, 959 F. Supp. at 133. The Eleventh Circuit referenced a House Judiciary Committee Report evidencing Congress's intent to delegate rulemaking authority to the Attorney General. Bledsoe, 133 F.3d at 822, citing H.R. Rep. 101-485(III) at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 475 ("[T]itle II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited."). The Bledsoe Court continued by noting that, under Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984), a court must defer to administrative interpretation of a statute unless the regulations are arbitrary, capricious, or manifestly contrary to the statute. Bledsoe, 133

> any service, program, or activity conducted by a public entity.
>
> (b)(1) For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.
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> (2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

28 C.F.R. § 35.140. The EEOC has jurisdiction over employment discrimination claims brought by individuals employed by private and public entities with fifteen or more employees, while DOJ regulations promulgated under the Rehabilitation Act govern employment discrimination claims by employees of public entities with fewer than fifteen employees. See Beth Collins, The Americans with Disabilities Act: Rehabilitating Congressional Intent, 28 J. Legis. 213, 218 (2002).

F.3d at 822-23. Therefore, the Eleventh Circuit concluded, it must defer to the DOJ interpretation of Title II.

The Eleventh Circuit skipped the first step of the Chevron statutory analysis, however. Chevron, 467 U.S. at 843. Under the first Chevron step, the statutory language--here of Title II--is examined to determine if it evinces a clear Congressional intent. Id. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. Only if Congressional intent is ambiguous does the court take the second step of determining whether the administrative regulations are arbitrary, capricious or contrary to the statute. Id. at 843.[4]

D. Plain Meaning of Title II

1. Statutory Language

As explained above, the first Chevron step requires the Court to examine whether the meaning of Title II is clear. When interpreting the terms of a statute, the court "generally look[s] first to the plain language... and interpret[s] it by its ordinary, common meaning." Luyando v. Grinker, 8 F.3d 948, 951 (2d Cir. 1993). The operative section of Title II, entitled "Public Services," reads: "Subject to the provisions of this

[4] Both Hernandez, 959 F. Supp. at 133, and Worthington, 1999 WL 958627 at *7, simply concluded without expansion that the regulations are the definitive interpretation of the statute.

subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2004). Thus the statute has two clauses: the first refers specifically to "services, programs, or activities," and the second refers more broadly to discrimination by an entity that provides such services, programs, and activities.

With respect to the first clause, the plain meaning of the phrase "services, programs, and activities," refers "only to the 'outputs' of a public agency, not to 'inputs' such as employment." Zimmerman, 170 F.3d at 1174. As Judge Underhill wrote,

> If asked what services, programs, and activities it provided, the Town might respond that it provided basic municipal services such as public education, public transportation, or law enforcement. It would not answer that it hired teachers, bus drivers, and police officers. ...These municipal services are considered the Town's "outputs," while the personnel and equipment engaged to provide such services would be considered the Town's "inputs."

Filush, 266 F. Supp. 2d at 328 (citing Zimmerman, 170 F.3d at 1174). In this case, Meriden might describe the "services, programs, and activities" its Fire Department provides as taking emergency telephone calls, dispatching fire and emergency personnel, putting out fires, and otherwise protecting public

safety. It would not likely answer that one of its departmental "services, programs, and activities" is hiring its employees.

The second clause of Title II is connected to the preceding clause because the phrase "such entity" references an entity described in the first clause as providing "services, programs, and activities." It clarifies that no qualified individual with a disability who is involved with public programs, services, and activities may "be subjected to discrimination" beyond the sort of discrimination inherent in excluding that person or denying that person benefits.

While the Second Circuit has never addressed the specific issue at hand--whether the anti-discrimination clause of Title II was intended to cover employment by state entities--it has interpreted the second clause of Title II in the context of a municipal zoning dispute. Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997). Plaintiffs in Innovative challenged the denial of a zoning permit for a drug rehabilitation center, complaining of violations of both Title II of the ADA and Section 504 of the Rehabilitation Act.[5] Id. at 40. The Second Circuit held that zoning decisions were an "activity" of the city, defined as a "natural or normal

[5] The defendant municipality appealed the district court's preliminary injunction requiring the municipality to permit the zoning change. The Court of Appeals affirmed the injunction, holding, in relevant part, that plaintiffs demonstrated likelihood of success on the merits on their claims under ADA Title II and Section 504 of the Rehabilitation Act. Innovative Health Sys., 117 F.3d at 44-46.

function or operation." Id. at 44 (quoting Webster's Third New International Dictionary (1993)). Thus, the court held, "both the ADA and the Rehabilitation Act clearly encompass zoning decisions by the City because making such decisions is a normal function of a governmental entity." Id. at 45. "Moreover,...the language of Title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of the City. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context...." Id. at 44-45.

On the one hand, Innovative's very broad characterization of the second clause as a "catch-all" provision could be read to suggest that the second clause is entirely distinct from the first, and prohibits all discrimination of any sort by a public entity without regard or connection to its provision of public programs, services, or activities. See Zimmerman, 170 F.3d at 1175 (criticizing Bledsoe and Innovative because a broad reading of the second clause necessarily interprets that clause to be "entirely independent from the first."). However, this Court believes that the better interpretation of the Second Circuit's opinion is that the non-discrimination clause is a "catch all" covering governmental actions beyond excluding from participation, or denying benefits to, qualified individuals with disabilities who seek to be involved with governmental services,

programs, or activities. The City of White Plains, in interfering with a zoning permit sought by the Innovative plaintiffs, had not excluded them from any programs or denied them benefits, but it had discriminated against them in the sense that it treated them less favorably than similarly-situated non-disabled applicants for zoning permits. Thus, the Second Circuit held, the second clause of Title II prohibited the City's discriminatory actions with respect to zoning, a normal function or "activity" of the municipality.

Under this interpretation, Innovative, like Zimmerman, reads the second clause to prohibit discrimination in relation to the public "programs, services, and activities" referenced in the first clause.[6]

While the statutory language and overall ADA structure[7] persuade the Court that this is the better reading of Title II, the Court acknowledges that other courts have read this language and reached the opposite conclusion regarding the meaning of the non-discrimination clause. See Bledsoe, 133 F.3d at 822, Worthington, 1999 WL 95827 at *7, Hernandez, 959 F. Supp. at 133. Nonetheless, the Court is persuaded that the overall context of Title II compels the conclusion that employment discrimination

[6] This reading leaves no tension between the Second Circuit's decision in Innovative and this Court's holding that Title II does not encompass employment discrimination by municipal entities.

[7] See infra, § II.D.2-3.

claims are not cognizable under that provision.

2. Statutory Context

An important contextual clue is found in the definition of "qualified individual with a disability" under Title II:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (emphasis supplied). An employee does not receive an entity's services or benefits, nor participate in its programs or activities; an employee of an entity is part of the structure that provides the services, benefits, programs and activities. See Zimmerman, 170 F.3d. at 1176 ("the 'action' words in the statute assume a relationship between a public entity, on one hand, and a member of the public, on the other. The former provides an output that the latter participates in or receives.") (emphasis in original).

In contrast, common parlance would describe a qualified employee in terms of capability to perform a job, which is the definition utilized in Title I: "'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds

or desires. . ." 42 U.S.C. § 12111(8).

A further contextual clue is found in the definitions of the entities subject to Titles I and II, respectively. Title I prohibits discrimination by a "covered entity,"[8] defined as "an employer, employment agency, labor organization, or joint labor-management committee."[9] In contrast, Title II prohibits discrimination by a "public entity,"[10] defined as "any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation...."[11] Title II does not include any definition relevant to employers, as in Title II.

Moreover, Congress included in Title I detailed standards and definitions that are uniquely applicable to the employment context. Title I prohibits discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In contrast, Title II nowhere refers to "employment" or its characteristics. See 42 U.S.C. § 12131-34.

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[8] 42 U.S.C. § 12112

[9] Id. at 12111.

[10] Id. at 12132,

[11] Id. at 12131.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (internal citation and quotation marks omitted). It is more reasonable, therefore, to conclude that when Congress referred to employment in such detail in Title I but made no reference to it in Title II, it did not mean to include employment within the ambit of Title II.

3. Statutory Structure

Another significant clue is the overall structure of the ADA. The statute is divided into five distinct titles: Title I, "Employment"; Title II, "Public Services;" Title III, "Public Accommodations;" Title IV, "Telecommunications;" and Title V, "Miscellaneous Provisions." Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 327-28 (1990). While the headings are not dispositive, they do indicate the subject matter that Congress sought to cover in each title. Almendarez-Torres v. United States,523 U.S. 224, 234 (1998)("'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." (quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-529 (1947)). The headings of the ADA clearly distinguish

between the titles governing disability discrimination in employment and disability discrimination in public services.

The Supreme Court's recent discussion of Title I and Title II in Tennessee v. Lane, __ U.S. __, 124 S. Ct. 1978 (2004), also sheds some light on the distinctions between the two titles. Lane held that the Eleventh Amendment did not prohibit two wheelchair-bound individuals from suing a state for violating Title II of the ADA by failing to make its courthouse physically accessible. Id. at 1994. The Supreme Court previously had held that the Eleventh Amendment barred employment discrimination suits against state employers for violations of Title I. Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001). In describing the scope of the ADA, Lane differentiated among the ADA prohibition on discrimination against persons with disabilities as falling in "three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III." Id. at 1984. Describing the focus of Title II, the Supreme Court stated: "It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of

fundamental rights." Id. at 1989.

As examples, the Supreme Court cited public education, mental health treatment, marriage, voting, zoning, corrections, and participation in the court system as a juror or litigant. Id. at 1989-90. None of the examples discussed is analogous to employment by the entities providing these services, programs, and activities. Id. at 1989-90.

In its sovereign immunity analysis, Lane concluded that the differences between Titles I and II were of such significance as to warrant different outcomes. Id. at 1987. The Supreme Court in Garrett had found that Title I was not a valid abrogation of state sovereign immunity because Congress did not act within its enforcement power under § 5 of the Fourteenth Amendment, given that there was insufficient factual evidence of past state discrimination in employment. Lane, 124 S. Ct. at 1987, Garrett, 531 U.S. at 370. In contrast, the Supreme Court found a substantial record of "evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services." Lane, 124 S. Ct. at 1991 (emphasis added). Thus, reading Garrett and Lane together, Title I alone covers discrimination against employees, while Title II protects the public against discrimination in public services, programs, and activities. Granted, the Lane opinion itself is very narrow, focusing only on the denial of

fundamental constitutional rights, and does not discuss employment, yet it provides a fairly strong indication that the Supreme Court would not consider Title II to be the appropriate statutory vehicle for employment cases.

4. Remedies

The difference in the structure of the respective remedies in Titles I and II cuts in both directions on the question of whether Title II encompasses the employment discrimination claims of at least some public employees.

Titles I and II prescribe different remedies for violations of their provisions. The ADA does not itself contain remedial sections; rather, it incorporates statutory sections of other antidiscrimination laws. Title I of the ADA adopts the remedies of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 12117(a). Title II, by contrast, adopts the remedies from Section 504 of the Rehabilitation Act, 29 U.S.C. § 794a, which in turn adopts Title VII's exhaustion requirements for employment claims, and Title VI's judicial remedies for claims of discrimination in federally-funded programs.[12]

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[12] The Rehabilitation Act, 29 U.S.C. § 794a, reads:
(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 ... shall be available, with respect to any complaint under section 791 this title [regarding federal employees with disabilities], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. ...
(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 ... shall be available to any person aggrieved by any act or failure to act by any recipient of federal

The Eighth Circuit has interpreted this scheme to mean that the remedies available turn upon the status of the plaintiff as an employee or non-employee, rather than the fact that the claim is brought under Title I or Title II of the ADA. Randolph v. Rodgers, 253 F.3d 342, 347 n. 8 (8th Cir. 2001). Other courts have looked to whether the claim is brought under Title I or Title II, and held that Title II, like Title VI, does not contain any exhaustion requirement, whereas Title I does require exhaustion of administrative remedies. See Zimmerman, 170 F.3d at 1172 ("Title II does not require [the plaintiff] to file a charge with the EEOC."), Davoll, 194 F.3d at 1124, Jackson v. City of Chicago, 215 F. Supp. 2d 975, 977 (N.D. Ill. 2002), Filush, 266 F. Supp. 2d at 330; Worthington, 1999 WL 958627 at *7. The Second Circuit has not decided the issue, but has suggested that Title II may not require exhaustion. Tsombanidis v. West Haven Fire Dep't., 352 F.3d 545 (2d Cir. 2003) (holding that a plaintiff must prove she requested a reasonable accommodation before suing for failure to accommodate, but "it may be that once the governmental entity denies such an accommodation, neither the FHAA nor the ADA require a plaintiff to exhaust the state or local administrative procedures."

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assistance or federal provider of such assistance under section 794 of this title [Section 504 of the Rehabilitation Act, concerning recipients of federal grant money].

(emphasis in original)).[13]

The Eighth Circuit's conclusion--that the exhaustion requirement depends upon one's status as an employee--is not fully satisfactory because it leads to the conclusion that some Title II plaintiffs are required to file pre-suit administrative claims with the EEOC while others, also claiming violations of the same statute, are not. This would spawn a deluge of Title II ancillary litigation concerning which Title II plaintiffs were required to exhaust administrative remedies, a result Congress is unlikely to have intended in the interest of placing similar burdens on all plaintiffs who make the same legal claims. Thus, the Court concludes that Title I requires pre-suit exhaustion of administrative remedies but Title II does not.

In light of this conclusion, the most harmonious interpretation of the statute would be that employment discrimination claims are not cognizable under Title II, for the reasons that follow. If municipal employees,[14] who are clearly covered under Title I, see 42 U.S.C. § 12111(5), could also bring their employment discrimination claims under Title II, and

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[13] Department of Justice regulations are in accord, stating that utilization of administrative grievance procedures under Title II of the ADA is purely optional. 28 C.F.R. § 35.172 ("At any time, the complainant may file a private suit... .").

[14] As discussed supra, § II.C.3, state employees may not sue their employers under Title I because states have sovereign immunity from such suits. Garrett, 531 U.S. at 370.

thereby avoid Title I's administrative remedy exhaustion requirement, it would render that requirement a nullity for a significant class of covered employees. It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985), quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979). There is no indication in the statutory language of the ADA that Congress intended to impose greater restrictions and requirements on private sector employees than employees of municipal governments. See Filush, 266 F. Supp. 2d at 330. Furthermore, there is no reason to think that the policy behind the exhaustion requirement would be any different with respect to public employees' claims of disability discrimination than with respect to their claims of discrimination on the basis of race, color, sex, religion, national origin, or age.

Other aspects of the ADA's remedial provisions also suggest that Title II does not encompass employment cases. Title I caps the amount of compensatory damages recoverable by size of employer, see 42 U.S.C. § 1981a(b)(3), and prohibits punitive damages against municipal employers, see 42 U.S.C. § 1981a(b)(1).[15] Title II has no such limitations. Thus, applying

[15] Title I of the ADA incorporates by reference the remedial provisions of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(b). Damages for violations of Title VII, in turn, are capped pursuant to 42 U.S.C. § 1981a(b), which reads, in pertinent part:

Title II to public employees would nullify these statutory limits for a significant category of employment discrimination plaintiffs. Again, the Court resists reading the ADA in such a way as to effectively nullify some of Title I's statutory limitations. See Mountain States, 472 U.S. at 249.

On the other hand, the difference in the size of employers required to comply with Titles I and II indicates an area in which the two provisions would not be redundant if Title II were interpreted to cover employment-related claims. Title I requires compliance only by employers with fifteen or more

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(b) Compensatory and punitive damages
(1) Determination of punitive damages
A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.
...
(3) Limitations
The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--
(A) in the case of a respondent who has more than 14 and fewer than 101 employees..., $50,000;
(B) in the case of a respondent who has more than 100 and fewer than 201 employees..., $100,000; and
(C) in the case of a respondent who has more than 200 and fewer than 501 employees..., $200,000; and
(D) in the case of a respondent who has more than 500 employees..., $300,000.

42 U.S.C. §§ 1981a(b)(1), (3).

employees, 42 U.S.C. § 12111(5)(A),[16] while Title II covers all municipal entities regardless of size, 42 U.S.C. § 12131(1).[17] Assuming Congress intended no redundancy, Title II could cover only individuals employed by public entities with fewer than fifteen employees. This would be consonant with the legislative history, see H.R. Rep. No. 101-485(II), reprinted in 1990 U.S.C.C.A.N. 367, which indicates that Congress intended the ADA to be broadly remedial, and specifically intended to import all the provisions of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which does not exempt smaller state or municipal agencies from its employment discrimination provisions. It is thus theoretically possible to interpret Titles I and II of the ADA in a non-redundant fashion by recognizing claims by individuals who work for state or municipal entities with fewer than fifteen employees under Title II, while holding that all other employees are required to litigate under Title I.[18] However, this would lead to the odd result that employees of

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[16] "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks... . The term 'employer' does not include ... the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or a bona fide private membership club (other than a labor organization)... ." 42 U.S.C. § 12111(5)(A)-(B).

[17] "The term 'public entity' means--(A) any State or local government;(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government... ." 42 U.S.C. § 12131(1).

[18] Cormier's complaint in this case does not state how many people are employed by the Meriden Fire Department.

municipalities with fewer than fifteen total employees are not required to exhaust their administrative remedies, and are not limited on the size or nature of their damages recovery, while employees of municipalities with fifteen or more employees are so limited. Such an awkward reading is unnecessary, because employees of smaller municipal entities that receive federal grant money already may seek relief under Section 504 of the Rehabilitation Act.

In sum, as Justice O'Connor observed, the ADA is an example of what happens when a bill's "sponsors are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together." Charles Lane, O'Connor Criticizes Disabilities Law as Too Vague, Wash. Post, Mar. 15, 2002, at A2. The legislative history simply compounds the confusion.

E. Legislative History

The Eleventh Circuit viewed references within Title II's legislative history to employment discrimination as "so pervasive as to belie any contention that Title II does not apply to employment actions." Bledsoe, 133 F.3d at 821, citing H.R. Rep. No. 101-485(III), at 50, reprinted in 1990 U.S.C.C.A.N. 445, 473.[19] The referenced House Judiciary

[19] While the cited House Report, H.R. Rep. No. 101-485(III), predated the final version of the ADA, Congress eventually adopted the House's version of Title II without change. See H.R. Conf. Rep. 101-558, H.R. Conf. Rep. 101-596, reprinted in 1990 U.S.C.C.A.N. 565; S. 933, 101st Cong. § 202.

Committee Report discusses Rehabilitation Act regulations concerning both employment of persons with disabilities as well as the need to train municipal employees to deal sensitively with members of the public who have disabilities, leaving ambiguous whether it intended Title II to focus on discrimination against public employees, discrimination by public employees, or both. 1990 U.S.C.C.A.N. at 473-74.[20] Another report by the House Committee on Education and Labor, relied on in Hernandez, 959 F. Supp. 125, 133 n. 9, states that the Committee intended to import into Title II all the provisions of Section 504 of the Rehabilitation Act. H. Rep.

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[20] The report reads, in relevant part:

> In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy... are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. ...
>
> In the area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a "reasonable accommodation" that does not constitute an "undue hardship." ... In determining whether an accommodation would constitute an undue hardship, a number of factors, including the size and budget of the employer are set forth as factors to be considered.
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> Similarly, title II incorporates the regulations ... under Section 504 with respect to program accessibility... The agency must still take any action that would not result in a fundamental alteration to the program or an undue burden, "but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity."
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> Title II should be read to incorporate provisions of titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973... .

H.R. Rep. No. 101-485(III), at 51, reprinted in 1990 U.S.C.C.A.N. 445, 474 (internal citations omitted)

No. 101-485(II), reprinted in 1990 U.S.C.C.A.N. 367.[21] The Rehabilitation Act, in turn, clearly prohibits discrimination in employment by any entity receiving federal funds. 29 U.S.C. § 794. Additionally, the Committee on Education and Labor stated that it did not consider Title II to contain an exhaustive list of prohibited discrimination, but rather relied on the Rehabilitation Act and its implementing regulations to flesh out what it meant to "be subjected to discrimination." H. Rep. No. 101-485(II) at 84, reprinted in 1990 U.S.C.C.A.N. 367.

This one House committee report does not articulate the definitive Congressional interpretation of Title II.[22] The Conference Committee's reports do not discuss the scope of Title II, and are silent on the subject of whether Title II was meant reach employment discrimination claims. See H.R. Conf. Rep. 101-558, H.R. Conf. Rep. 101-596, reprinted in 1990 U.S.C.C.A.N. 565. This question was simply not a concern of the conferees at the time. See Ruth Colker, The ADA's Journey Through Congress,

[21] The report states: "The Committee has chosen not to list all the types of actions that are included within the term 'discrimination', as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation." H. Rep. No. 101-485(II) at 84, reprinted in 1990 U.S.C.C.A.N. 367.

[22] It could be argued that, because the Senate did not significantly change Title II before passage of the final bill, this report of the House Committee on Education and Labor is the most complete discussion of the scope of Title II. See Ruth Colker, The ADA's Journey Through Congress, 39 Wake Forest L. Rev. 1, 30 (2004) Although it may be the best evidence available, it is still not decisive evidence because it does not embody the views of most members of Congress.

39 Wake Forest L. Rev. 1, 40-47 (2004) (debate and conference process focused on definition of 'disability,' particularly whether HIV and drug addition should be included, and remedies available to plaintiffs under the Civil Rights Act of 1990). Therefore, the Court cannot find clear legislative history evincing Congressional consideration and decision that Title II prohibits employment discrimination against public employees.

The Court is well aware of the generally broad remedial purpose of the ADA,[23] and does not find that purpose undermined by its delineation between Titles I and II. While the legislative history could support the conclusion that Congress intended Title II to cover employment claims, viewing that the ADA as a whole so as to harmonize each of its provisions, looking at the statutory language, context, and structure, the Court interprets the provisions of Title II as not extending to discrimination in municipal employment. Thus, the analysis must end at the first step of Chevron.[24] Hence the Court holds that employment discrimination claims are not cognizable under Title II of the ADA, and therefore Count 2 of Cormier's complaint fails to state a claim upon which relief may be granted.

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[23] As the Committee on Education and Labor wrote, "The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life... ." H. Rep. 101-485(II) at 22.

[24] Even if the Court were to proceed to the second Chevron step, as outlined above, the Court would conclude that the legislative history is ambiguous and cannot support the Department of Justice regulation.

III. CONCLUSION

Because Count 2 fails to state a claim upon which relief can be granted for Plaintiff's claim of employment discrimination, Defendants' Motion to Dismiss Count 2 of the First Amended Complaint is GRANTED.

IT IS SO ORDERED.

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut: September 30, 2004