

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

DAVID L. CHALK JR,)	
)	
Plaintiff,)	
vs.)	NO. 4:05-cv-00072-JDT-WGH
)	
SOUTH DEARBORN COMMUNITY SCHOOL)	
CORPORATION,)	
GENE P. FERGUSON,)	
KAREN SUE CUTTER,)	
ROGER L. ULLRICH,)	
DARYL L. CUTTER,)	
ROBERT B. FEHRMAN,)	
JOAN L. FEHLING,)	
KARLA S. RAAB,)	
PATRICIA A. RAHE,)	
TERRY W. LUHRSEN,)	
THOMAS L. BOOK,)	
C. TODD BOWERS,)	
GARY RUSSELL,)	
ROBERT ROLLINS,)	
JACK HELLER,)	
DAVID KOEHLER,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

DAVID L. CHALK, JR.,)
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 Plaintiff,)
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 vs.) 4:05-cv-0072-JDT-WGH
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 SOUTH DEARBORN COMMUNITY)
 SCHOOL CORPORATION, GENE P.)
 FERGUSON, KAREN SUE CUTTER,)
 ROGER L. ULLRICH, DARYL L. CUTTER,)
 ROBERT B. FEHRMAN, JOAN L.)
 FEHLING, KARLA S. RAAB, PATRICIA A.)
 RAHE, TERRY W. LUHRSEN, THOMAS L.)
 BOOK, C. TODD BOWERS, GARY)
 RUSSELL, ROBERT ROLLINS, JACK)
 HELLER, and DAVID KOEHLER,)
)
 Defendants.)

ENTRY ON DEFENDANTS' MOTION TO DISMISS (DKT. NO. 9)¹

On December 15, 2003, Plaintiff, David L. Chalk, Jr., was fired from his position as a middle school principal with the Defendant South Dearborn Community School Corporation ("SDCSC"). The basis for the termination as stated by the Superintendent of Schools, also a Defendant, was immorality, unprofessionalism, failure to manage staff, failure to notify the district of a criminal conviction, violation of policy and leaving work without permission. Preeminent among the stated reasons for his termination was Chalk's unreported plea of no contest to a charge of public indecency or indecent

¹ This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

exposure in Hamilton County Ohio in October of 1998. Chalk does not believe this to be the real reason for his termination. He has brought this lawsuit alleging that he has been discriminated against by SDCSC, the individual board members, the superintendent, former superintendent, assistants to the superintendent, elementary school principal and assistant middle school principal, naming all as individual defendants. The basis for the alleged discrimination is his status as a gay HIV positive male. He alleges violations of the Americans with Disabilities Act (“ADA”), Rehabilitation Act and 42 U.S.C. § 1983.

Pursuant to Fed. R. Civ. P. 12 (b)(6), Defendants have moved for dismissal of all claims against the individual defendants, dismissal of the Rehabilitation Act claim as duplicitous of the ADA claim and dismissal of any claim for punitive damages against SDCSC. Chalk has agreed that his suit should not be maintained against the individual Defendants in their official capacities, that his ADA claim may not be brought against the individuals in any capacity and that punitive damages are unavailable in connection with the ADA or Rehabilitation Act claims. For the reasons discussed in this entry, the court finds that Defendants’ motion is, for the most part, well taken.

Standard of Review

The standard of review for a Rule 12(b)(6) motion to dismiss for failure to state a claim is stringent. Under federal notice pleading, a complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief[.]” Fed. R. Civ. P. 8(a)(2). As the Supreme Court directed lower courts long ago, “[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 v. Gibson*, 355 U.S. 41, 45-46 (1957). When ruling on a 12(b)(6) motion, the court must view the complaint in the light most favorable to the plaintiff and take the allegations of the complaint as true. *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996).

Analysis

Count I of Chalk’s Complaint seeks damages for violations of the ADA. Punitive damages are not available under the ADA or the Rehabilitation Act. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). In addition, individuals, as opposed to employers, may not be held liable under the ADA. *Silk v. City of Chicago*, 194 F.3d 788, 797 n.5 (7th Cir. 1999). Consequently, Count I remains viable only insofar as it seeks compensatory relief against SDCSC.

The elements of an ADA claim and a claim under the Rehabilitation Act are nearly identical. *Id.* at 798 n.6. A Rehabilitation Act claim, like that brought in Count II here, has the single additional requirement that the plaintiff be involved with a program for which his employer receives federal financial assistance. *Id.* Chalk claims that because there is a split in authority with regard to whether or not an individual may be held liable under the Rehabilitation Act, he should be allowed to proceed against both SDCSC and the individual defendants with Count II of his Complaint. In asserting that there is a split of authority, Chalk cites to *Schrader v. Fred A. Ray, M.D., P.C.*, 296 F.3d

968 (10th Cir. 2002). Unfortunately for Chalk, the *Schrader* decision does not stand for the proposition that individual liability may ensue under the Rehabilitation Act. In fact, in footnote five of the decision the court specifically states that “[W]e, of course, are not presented here with the issue of whether the Rehabilitation Act imposes personal liability upon a supervisor.” *Id.* at 974 n.5. And, although the Seventh Circuit has yet to opine specifically with respect to personal liability under the Rehabilitation Act, courts have been fairly consistent in opining that, like under Title VII of the Civil Rights Act, individuals may not be found liable under the Rehabilitation Act. *See, e.g., Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999); *Hallett v. New York State Dept. of Corr. Servs.*, 109 F. Supp. 2d 190, 199 (S.D.N.Y. 2000); *Montez v. Romer*, 32 F. Supp. 2d 1235, 1240 (D. Col. 1999); *Blumenthal v. Murray*, 995 F. Supp. 831, 836 (N.D. Ill. 1998). This court will not take any different tact. Count II of Chalk’s Complaint will be dismissed as to the individual defendants. However, since a claim under the Rehabilitation Act is very similar but not identical to a claim under the ADA, Count II will not be dismissed in its entirety as duplicitous at this point. Both Count I and Count II will remain as against SDCSC.

Defendants argue that Chalk is barred from pursuing a claim under 42 U.S.C. § 1983 when the sole basis for the claim is the violation of rights protected by the ADA or Rehabilitation Act. Although the Seventh Circuit has yet to opine regarding this issue, several circuits have reached a determination consistent with the conclusion urged by Defendants. *Vinson v. Thomas*, 288 F.3d 1145 (9th Cir. 2002); *Lollar v. Baker*, 196 F.3d 603 (5th Cir. 1999); *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999); *Holbrook*

v. City of Alpharetta, 112 F.3d 1522 (11th Cir. 1997). The consensus reasoning in these cases is that a statute that affords a remedy for specific wrongs is the preferred method of enforcing those statutory rights over a statute which provides broader general protections. *E.g.*, *Lollar*, 196 F.3d at 609.

The problem with applying that analysis here is that the case at bar has just recently been put at issue and the allegations of the Complaint include a contention that the Defendants deprived Chalk of rights and privileges protected by the Constitution. In other words, at the pleading stage there is more alleged against the defendants than merely the denial of rights established by the ADA or Rehabilitation Act and there are circumstances imaginable which could support an independent claim on behalf of Chalk for denial of constitutionally protected rights under § 1983.² If, after discovery, it is determined that the sole basis for the § 1983 claim is the alleged denial of rights established and enforced through the ADA or Rehabilitation Act, summary judgment would be appropriate in favor of Defendants on Count III. However, until that occurs, this court agrees with the analysis set forth in *Baumgardner v. County of Cook*, 108 F.

² Without prejudging Chalk's claims, the court can say that it is extremely skeptical that his pre-suit investigation has uncovered sufficient factual foundation to establish colorable § 1983 claims against each of the fifteen individual defendants he has named in this lawsuit, including assistant principals and administrative assistants. While some or all of these defendants likely believe they should be dismissed from this suit promptly, court procedures, the liberal pleadings interpretation rules and the standard of review applied to dismissal motions require the court to give ample opportunity to any plaintiff to establish that evidence exists to support the cause of action. If, at a later date, it is determined that no factual or legal basis existed to include a particular claim or defendant, those same rules and procedures allow a defendant to seek and the court to apply sanctions against the plaintiff or his counsel for any frivolous or harassing action.

Supp. 2d 1041 (N.D. Ill. 2000), wherein Magistrate Judge Denlow points out that the ADA derives its definitions, remedies and procedures from Title VII and reminds that the Seventh Circuit has, on several occasions, ruled that a public sector employee bringing an action under Title VII does not foreclose a separate § 1983 claim for deprivation of rights established by the Constitution as opposed to rights created by statute. *E.g., Ratliff v. City of Milwaukee*, 795 F.2d 612, 623-624 (7th Cir. 1986).

The individual school board Defendants go on to argue that even if the § 1983 claims survive at this stage, they are entitled to qualified immunity. They cite to *Wood v. Strickland*, 420 U.S. 308 (1975) as grounds for granting qualified immunity. It is certainly true that actions taken by school board members in the good faith fulfillment of their responsibilities are protected by qualified immunity. *Id.* at 319-321. However, again this lawsuit is in its infancy. The court must liberally interpret Chalk's allegations and assume that they are true at this stage. *Doherty*, 75 F.3d at 322. It is true that the question of the application of qualified immunity should be addressed at the earliest possible point to effectuate its underlying purpose of protecting public officials from litigation rather than just from ultimate liability. *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001). However, that point is seldom found at the motion to dismiss stage, as § 1983 plaintiffs are not required to plead facts that would indicate that immunity is not available. See *Alvarado v. Litscher*, 267 F.3d 648, 651-652 (7th Cir. 2001). Because, at this point the court cannot definitively categorize the nature of the alleged constitutional violation without knowing facts that are not included in the complaint, the

board member Defendants' request for dismissal premised on this affirmative defense is premature.

With respect to punitive damages, Defendants are correct that no punitive damages may be recovered against the school district in a § 1983 action. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Punitive damages may be recovered against the individual defendants if the evidence shows that they acted with evil intent or reckless disregard for Chalk's constitutional rights. *Stachniak v. Hayes*, 989 F.2d 914, 928 (7th Cir. 1993).

Conclusion

Defendants' Motion to Dismiss (Dkt. No. 9) is **GRANTED IN PART**. Plaintiff's Complaint is dismissed in its entirety as to the individual defendants in their official capacities. Count I and Count II of the Complaint is dismissed as to all defendants other than SDCSC and the claim for punitive damages against SDCSC under Count I is dismissed as well. Count III remains as a claim against SDCSC and the individual defendants in their personal capacities, except that no punitive damages may be recovered against SDCSC.

ALL OF WHICH IS ENTERED this 18th day of August 2005.

John Daniel Tinder, Judge
United States District Court

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