IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WALTER JOSEPH BECKMAN,

Plaintiff,

v. Case No. 3:18cv02189-MCR/EMT

ESCAMBIA COUNTY, FLORIDA,

Defendant.
_____/

MOTION TO DISMISS WITH PREJUDICE AND MEMORANDUM OF LAW

Defendant Escambia County, Florida moves to dismiss the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) on the following grounds which are incorporated into the memorandum of law.

INTRODUCTION

Plaintiff has filed a complaint for injunctive and declaratory relief against Escambia County (County) pursuant to Title II of the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12131, *et seq.*, (ADA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.§ 794. Plaintiff has also filed substantially identical complaints against Okaloosa County and Santa Rosa County alleging the same claims for relief.[1] Attached as Exhibit "A" to each complaint filed against the three counties is a copy of a letter entitled, "Request for Accommodation." They are all dated May 15, 2018 and

[1] *Beckman v. Okaloosa County*, Case No. 3:18-cv-02122-MCR/MJF; *Beckman v. Santa Rosa County*, Case No. 3:18-cv02053-RV/MJF.

are purported to have been written by Mr. Beckman. Each letter requests "electronic documents" related to the budgets of each county for each of the years 2015 through 2018 together with all county commission agendas and "back-up" materials for the years 2016, 2017 and 2018.

In essence, Plaintiff contends that his inability to view these electronic documents on each county's website with his screen reader constitutes intentional discrimination in violation of the ADA and Section 504 entitling him to injunctive relief and compensatory damages. As Plaintiff has invoked a 19th century military figure in support of his complaint, it is only fair that County quote from a 19th century figure of even greater stature to frame this Court's resolution of the motion to dismiss:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and wasted time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation. (Abraham Lincoln, July 1, 1850, excerpts from notes for a law lecture.)

MEMORANDUM OF LAW

I. STANDARD FOR GRANTING RULE 12(b)(6) MOTION TO DISMISS WITH PREJUDICE.

In disposing of a Rule 12(b)(6) motion, a court must accept all of the complaint's allegations as true, considering them in the light most favorable

to the plaintiff. *Pielage v. McConnell*, 516 F. 3d 1282, 1284 (11th Cir. 2008). Although a pleading need only contain a short and plain statement showing that the pleader is entitled to relief, a plaintiff must nevertheless articulate ". . . enough facts to state a claim to relief that it is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "But where the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009) (quoting Fed. R. Civ. P. 8(a)(2)) (internal punctuation omitted). A court must dismiss a plaintiff's claims if the allegations do not nudge the "claims across the line from conceivable to plausible." *Twombly,* 550 U.S. at 570. If no set of facts can be plausibly alleged to state a claim for relief, then dismissal with prejudice is the appropriate remedy. *Lait v. Medical Data Systems, Inc.*, ___ F. App'x. ___, 2018 WL 5881522, at *2 (11th Cir., Nov. 9, 2018) (dismissal with prejudice affirmed when construing the plausibility of a claim based on facts alleged citing *Iqbal*).

II. FACTUAL ALLEGATIONS

Applying the legal standard above, County will summarize pertinent allegations of ultimate fact from his complaint.[2]

[2] Citation will be by paragraph number of the complaint which is Document No. 1.

Plaintiff is a resident of the State of Florida, is disabled and a qualified individual as defined by the ADA. (¶ 13). He is legally blind and considers himself a member of a protected class under the ADA because of having suffered optic nerve damage which now substantially limits his ability to visualize his world and adequately traverse obstacles. (¶ 14). His disability substantially limits the major life activity of seeing. *Id*. Due to his disability, he requires that documents be saved in an accessible format such as HTML or a PDF so that he can read electronic documents with screen reader software. (¶ 17).

The County's online portal found at MyEscambia.com provides persons with pertinent information concerning living in and visiting the County. (¶ 22). Plaintiff claims to be an interested person. *Id*. He catalogs the types of materials and publications that County's website provides such as a guide to the safe consumption of fish caught in Florida, a list of addresses for hurricane shelters and a fact sheet on the environmental quality of Pensacola Bay natural resources. (¶¶ 23-24). He groups the electronic information available from the website into electronic service documents, electronic policy documents and electronic agenda documents. (¶¶ 24-26). In May of 2018, Plaintiff says that he visited the County's website "with the intent of educating himself about the quality of life and

governmental functioning in Escambia County." (¶ 33). Because County's electronic documents were not provided in an accessible HTML or PDF format, Plaintiff was prevented from becoming informed about County's governmental functioning, policies and other activities. (¶ 34). This exclusion caused Plaintiff to suffer feelings of segregation, rejection and isolation as he was excluded from participating in community services, programs and activities offered by the County. *Id*. He states that as a Florida resident he has an interest ". . . in the quality of life [sic] level of environmental concern with interest in response to disaster conditions (preparation and aftermath), safe consumption of locally caught fish, pet adoption policies and fees, [ ] veterans' protections . . ." and ". . . investigating County budgeting choices and strategies, and how the County responds to environmental disasters and concerns (such as BP oil spill)." (¶ 32).

On May 15, 2018, Plaintiff submitted a letter to County, Exhibit "A" to the complaint, and wrote that ". . . my screen reader would not work with your electronic documents. I was specifically interested in documents relating to the budget of Escambia County (electronic documents) for 2018, 2017, 2016 and 2015 and all County Commission Agendas and backup material for year 2018, 2017 and 2016." (¶ 35, Exhibit A). His letter asks, "Would you please make these documents accessible in your site so that they will work with

screen readers?" (Exhibit A). Plaintiff attaches the response letter by Eric Kleinert, Human Resources Director for County as Exhibit "B" in which Mr. Kleinert describes a series of recent improvements enhancing accessibility of the County's website. (¶ 36, Exhibit B). Mr. Kleinert requests that Plaintiff specify those documents in which he has an immediate interest. Mr. Kleinert stated that he ". . . can work with staff to ensuring those documents are available to you in an accessible format. Your specificity in identifying these documents is appreciated." Mr. Kleinert then leaves his email address and a phone number for Mr. Beckman to contact him. (Exhibit B).

There are no allegations that Plaintiff contacted Mr. Kleinert or sought assistance from any other County employee to obtain specific documents in an accessible format that he could review consistent with his stated desire to become more acquainted with budgeting and other governmental functions. Despite not conferring with Mr. Kleinert to obtain accessible documents, Plaintiff alleges that County failed to make electronic documents accessible on its website which has caused him to suffer shame, humiliation and emotional suffering and pain because he is being segregated and prohibited from enjoying the programs, services and activities of County. (¶ 38). Plaintiff also alleges that County has not provided any other auxiliary aid or service to assist Plaintiff to access and fully comprehend electronic

documents. (¶ 40). Mr. Kleinert's response (Exhibit B) is not alleged to be an auxiliary aid or service that was offered to Plaintiff.

III. ARGUMENT

A. PLAINTIFF HAS FAILED TO ALLEGE A NEXUS BETWEEN THE WEBSITE AND A PHYSICAL PLACE OR FACILITY OPERATED BY ESCAMBIA COUNTY.

This Court should grant the motion to dismiss as Plaintiff has failed to allege any nexus between the website made available by County and a physical place that is owned or operated under the auspices of County. District Courts in the Eleventh Circuit generally analyze the accessibility of websites and nexus to a physical location following *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002) *reh'g. en banc denied*, 54 F. App'x. 493 (11th Cir. 2002) as a template. In *Rendon,* a deaf contestant wanted to be part of a telephone selection process for the television show "Who Wants to be a Millionaire." Contrary to Title III of the ADA, he was prevented from participating because of the difficulty in answering questions that would qualify a potential contestant to appear on the show. *Id. at 1283*. *Rendon* held that the ADA applied to an off-site telephone application process because it restricted access to a good, service or privilege at a tangible public accommodation which was the television show and studio. *Id.* at 1285. The *Rendon* court observed that Title III seeks to obviate or remove

tangible and intangible barriers to the disabled in enjoying "goods, services and privilege." *Id.* at 1283-1284. *See also Haynes v. Dunkin' Donuts, LLC*, __ F. App'x. ___, 2018 WL 3634720 (11th Cir. July 31, 2018) (website allows customers to locate physical stores and buy gift cards online and should be accessible to the blind, applying *Rendon* to reverse grant of motion to dismiss).

Although the Eleventh Circuit has not definitively spoken on the accessibility of electronic documents on websites, District Courts within the Eleventh Circuit in applying Title III have held that websites "are not covered by the ADA unless some function on the website hinders the full use and enjoyment of a physical space." *Gomez v. Bang & Olufsen AM, Inc.*, 2017 WL 1957182, at *3 (S.D. Fla. Feb. 2, 2017); *see also Price v. Everglades College, Inc*., 2018 WL 3428156, at *2 (M.D. Fla. July 16, 2018). Allegations that there is an inability to use a website to gain information about a physical location do not withstand a motion to dismiss unless there are allegations that the website impeded access to an enjoyment of a physical facility or location. *Gomez v. Knife Mgmt., LLC*, Case No. 17-cv-23843-GAYLES, 2018 U.S. Dist. LEXIS 159178 (S.D. Fla. Sept. 14, 2018) (no nexus between website and restaurants); *Price*, 2018 WL 3428156, at *2 (inability to obtain information from a website is not the equivalent of impeding access to

physical location); *Haynes v. Trader Joe's Co.*, Case No. 18-60214-civ-DIMITROULEAS/SNOW, 2018 U.S. Dist. LEXIS 67031 (S.D. Fla. April 19, 2018) (website is not in and of itself a public accommodation subject to the ADA); *Buchholz v. Aventura Beach Assocs.* 2018 WL 318476, at *3 (S.D. Fla. Jan 5, 2018) (applying *Rendon*, the ADA is not applicable to a website unconnected to a physical location); *Gomez v. La Carreta Enters.*, Case No. 17-61195-civ-DIMITROULEAS, 2017 U.S. Dist. LEXIS 202662 (S.D. Fla. Dec. 6, 2017) (inaccessibility of website standing alone is insufficient to allege an ADA violation); *Gomez v. Bang & Olufsen Am. Inc.*, 2017 WL 1957182, at *3, (" . . . websites are not covered by the ADA unless some function of the website hinders the full use and enjoyment of a physical space").

Other district courts have found the nexus plausibly alleged when the enjoyment of the physical facility is by necessity linked to the website. *Jones v. Lanier Federal Credit Union*, 2018 WL 4694363 (N.D. Ga. Sept. 26, 2018) and *Jones v. Piedmont Plus Federal Credit Union*, 2018 WL 4694362 (N.D. Ga. Sept. 26, 2018) (websites deterred plaintiff from visiting physical facilities); *Fuller v. Smoking Anytime Two, LLC*, 2018 WL 3387692 (S.D. Fla. July 10, 2018) (website's inaccessibility prevents visually impaired user from locating stores, purchase gift cards, order merchandise, etc.), *Gil v. Winn-*

Dixie Stores, Inc., 257 F. Supp. 1340 (S.D. Fla., 2017) (blind patron denied full enjoyment because website heavily integrated with physical store locations).

This same rationale of enjoyment of physical space applies to Title II under the ADA. *See Gil v. Broward County*, Case No. 18-60282-CIV-DIMITROULEAS (S.D. Fla. May 7, 2918) (considering Title II as it applies to public entities, the inability to gain information from a website does not equate to an inability to gain access to buildings or facilities).[3] There is dearth of case law or other authority regarding the application of Title II to websites owned or operated by local governments. Title II provides that local governments must provide full and equal enjoyment for the disabled to public accommodations. *Kornblau v. Dade County*, 86 F.3d 193 (11th Cir. 1996); 42 U.S.C. § 12132 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The Department of Justice has withdrawn its previously announced rulemaking actions regarding website accessibility as reflected in the Federal Register. See notice of withdrawal found at: https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-

[3] A copy of the United States District Court for the Southern District of Florida's Order Granting Defendant's Motion to Dismiss does not appear to be available through WestlawNext. For convenience, the County has attached as Exhibit 1 to this motion, a copy of that order obtained through PACER.

four-previously-announced (last viewed November 21, 2018).

Plaintiff may make reference to a 2008 circular promulgated by the DOJ discussing the importance of government websites that increase citizen participation and reduce costs. Plaintiff has argued previously that the DOJ in this circular recommends that all electronic documents be accessible. However, there is no rule or regulation providing for such, nor is there authority regulating how much of website's documents must be accessible using any particular software. *See Gomez v. General Nutrition Corporation*, 323 F. Supp. 3d 1368 (S.D. Fla. 2018) (no showing made that a particular software provides more website accessibility than others, denying motion for summary judgment as to remedy). Plaintiff's anticipated argument for expanding Title II to government websites does not account for the hardship and expense that would be imposed on local governments to make all documents electronically accessible going back several years. This argument would not account for retention schedules of public records as adopted by Division of Library and Information Services, Florida Department of State, with which each county in Florida must comply. Sections 119.021(2)(a) & (b), Fla. Stat. (2018); Fl. Admin. Code Ch. 1B-24 and 1B-26.

Plaintiff has not met the threshold of plausibility by showing a nexus

between the County's website and some physical location to which his access has been impeded. Plaintiff has not alleged that there is a park, an office building, recreation center, library, boat dock or any other facility that he cannot visit because of the alleged inaccessibility of electronic documents. A plaintiff must demonstrate how he has been or will be denied access to the County's physical facilities. *Gomez v. Knife Mgmt.,* 2018 U.S. Dist. LEXIS 159178, at *5-6 (motion to dismiss granted as plaintiff has not sufficiently alleged standing where he has not visited defendant's physical restaurant, nor alleged how defendant's website impedes his ability to visit one of the restaurants); *Gomez v. Alfano Bros.*, Case No. 17-62380-civ-ZLOCH, 2018 U.S. Dist. LEXIS 79190 (S.D. Fla. May 9, 2018) (motion to dismiss granted where plaintiff has not asserted how he has been denied access to defendant's brick and mortar locations because he cannot access its website); *Haynes v. Trader Joe's Co.*, 2018 U.S. Dist. LEXIS 67031, at *12-13 (motion to dismiss granted where plaintiff has not adequately alleged his inability to access a website impedes his access to physical stores); *Buchholz v. Aventura Beach Assocs.*, 2018 WL 318476, at *3 (motion to dismiss granted where no allegation that the inability to use the website impeded his access to the hotel and resort); *Gil v. Broward County*, Case No. 18-60282-CIV-DIMITROULEAS (motion to dismiss granted for absence

of allegations of impeding access to county's buildings or facilities) (attached).

In this complaint, Plaintiff alleges certain difficulties with electronic accessibility, but nowhere does he allege that he was impeded from using the County's facilities. *See Kidwell v. Fla. Commission on Human* Relations, 2017 WL 176897, at *4 (M.D. Fla. Jan. 17, 2017) (claim of future injury conjectural given distance between plaintiff's residence and Busch Gardens and infrequency of trips to Busch Gardens coupled with lack of expressed desire to return). As explained in *Gomez v. La Carreta Enters.*, 2017 U.S. Dist. LEXIS 202662, at *10-11.

> Businesses are not required to have websites. If a business has a website, it cannot impede a disabled person's full use and enjoyment of the physical space the business occupies. Nearly all websites associated with a physical business location provide information about location, hours, and goods and services provided by the business. Some of these websites do not interface with screen readers. If the Court allows ADA accessibility claims to proceed for these websites under a theory that a visually impaired plaintiff was denied access to *information* about the physical business location, then this Court would be saying, in effect, that *all* websites must interface with screen readers. The Court is not willing to take that leap because it would eviscerate the framework established by district courts within the Eleventh Circuit construing *Rendon*.

This analysis as applied to commercial enterprises is equally applicable to public facilities. *Rendon* does not mandate that a website in and of itself be

a public accommodation when it is hosted by a county. Plaintiff still has the option of traveling to each county and acquiring the information he deems appropriate as outlined in his letters of May 15, 2018. He could avail himself of Mr. Kleinert's offer to name particular documents he wants so that he could begin obtaining the information he requests. Nothing on Escambia County's website impedes his access to walk the halls of county government to obtain the documents he wishes to read.[4]

B. PLAINTIFF'S REQUEST FOR ACCOMODATION IS MORE AKIN TO A PUBLIC RECORDS REQUEST.

Interestingly, Plaintiff's complaint cites to the Florida Public Records Act found at §§ 119.01 *et seq*., Fla. Stat. (2018), but then makes no further reference to it. (¶ 1). As observed by the First District Court of Appeal, access to public records is constitutionally guaranteed and enforced through Chapter 119. *Lakeshore Hospital Authority v. Lilker*, 168 So. 3d 332 (Fla. 1st DCA 2015). The First District recites from § 119.01(1) that it is the policy of Florida that all county and municipal records be open for personal inspection and copying by any person. *Id*. The court noted that the requirements of the

[4] As a matter of public record, Plaintiff was interviewed two years previously and described his interests and hobbies, including running races with the assistance of a running partner. One of his main interests was visiting Disney World. *See* http://werunwild.com/meet-our-november-athlete-of-the-month-walter-beckman/ (last viewed November 26, 2018). *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1279-80 (11th Cir. 1999) (public records which are equally available to the parties will be judicially noticed and considered on a motion to dismiss).

Public Records Act could be met solely through electronic access if that were the requestor's wishes. *Id*. Citing to § 119.07(2)(a) Fla. Stat. (2013), the court noted that access to public records by remote electronic means is an additional means of inspecting or copying public records, but that if a requestor wanted hard copies, then his wish must be respected. 168 So. 3d at 333.

Although Plaintiff has couched his requests for multi-year budget records, commission agendas and back-up documents as an accessibility issue under the ADA, these documents are public records. They are subject to inspection and copying in a format of Plaintiff's choosing as long as he is willing to pay the reasonable expenses of retrieval and copying. *NCAA v. Associated* Press, 18 So. 3d 1201 (Fla. 1st DCA 2009), *rev. denied*, 37 So. 3d 848 (Fla. 2010); §§ 119.07(4)(a)1 and 119.07(4)(d). Mr. Kleinert's response asking Plaintiff to clarify and particularize those documents that he is seeking so that they can be formatted in an electronically accessible manner is consistent with the requirements of the Florida Public Records Act.

Plaintiff has chosen, apparently, not to screen read particular public records at a reasonable cost but has chosen to make his requests the subject of a federal case against Escambia County and two other counties to the east.

C. PLAINTIFF HAS NOT BEEN REFUSED A REASONABLE ACCOMODATION.

As described in Exhibit "B", Mr. Kleinert responded to Plaintiff's request with a clarification that Plaintiff more particularly described those documents that he was interested in screen reading from the hundreds of pages of documents which were discernable from his request. Rather than engage in the interactive process to identify a reasonable accommodation, Plaintiff ignored Mr. Kleinert's response and filed suit four months later.

With this backdrop, Plaintiff has failed to bring himself within the rubric that in order to show discrimination under the ADA and Section 504 for a failure to provide a reasonable accommodation, Plaintiff must first actually request one and then be refused. *See Iaciofano v. School Board of Broward County, Florida*, 2017 WL 564368, at *5 (S.D. Fla. Feb. 13, 2017); *Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1219 (11th Cir. 2008). It is also axiomatic that a qualified individual alleging a disability is not entitled to the accommodation of his choice, but only to a reasonable accommodation. *Stewart v. Happy Herman's Cheshire Bridge*, 117 F.3d 1278, 1285-1286 (11th Cir. 1997).

Plaintiff has eschewed the interactive process for identifying a reasonable accommodation to a claimed disability and instead has instigated the present lawsuit. In this respect, Plaintiff cannot complain that he does

not have access to documents compatible with his screen reader when he has not identified the software program that he is using, nor has he identified particular documents that he could begin reading now. As other documents are identified by Plaintiff, then they could become available to him as County makes them accessible. The documents would then be available in stages. The failure to engage in the interactive process to identify a reasonable accommodation is fatal to Plaintiff's claim. *See Wilf v. Bd. Of Regents of the Univ. Sys. Of Ga.*, 2012 WL 12888680, at *21-22 (N.D. Ga. Oct. 15, 2012) (granting a university's motion for summary judgment on plaintiff's failure-to-accommodate claims under Title II and the Rehabilitation Act as plaintiff failed to engage in an interactive process); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) (observing that the interactive process requires participation by both parties, and "neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability"; "[a] party that fails to communicate, by way of initiation or response, may also be acting in bad faith"). *See also Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (disagreeing with *Beck* to the extent that an employer must engage in the interactive process regardless of whether a reasonable accommodation exists, citing *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 448 (11th Cir. 1996)).

As stated previously, Plaintiff failed to engage in an interactive process with the County to seek a reasonable resolution of his document requests so that he could listen to them with his screen reader software. It appears that he was more interested in access to the public facilities offered by this Court than County's public facilities. For the reasons set forth above, the motion to dismiss should be granted.

D. PLAINTIFF HAS FAILED TO ALLEGE FACTS OF INTENTIONAL DISCRIMINATION TO MAKE A PLAUSIBLE SHOWING FOR COMPENSATORY DAMAGES.

Intentional discrimination under Title II of the ADA and Section 504 can be alleged by making a showing of ultimate facts of deliberate indifference to plaintiff's statutory rights. *Liese v. Indian River County Hosp. Dist.*, 701 F.3d 334, 342 (11th Cir. 2012). Plaintiff must show that the County knew that harm to a federally protected right was substantially likely and failed to act on that likelihood. *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1147 (11th Cir. 2014). Plaintiff must also allege such deliberate indifference by an official who has authority to address the alleged discrimination, to institute corrective measures and who has actual knowledge. *Liese*, 701 F. 3d at 349. In a failure-to-accommodate case under Title II, a plaintiff must make a specific demand for an accommodation such that a defendant knows the nature of the disability and circumstances are such that it must know to

make appropriate inquires about the need for an accommodation. *Kidwell v. FCHR,* 2017 WL 176897, at *5-6 (citing cases).

Rather than showing intentional discrimination by County, Plaintiff's letter to County and County's written response which are attached to his complaint as exhibits, demonstrate County's willingness to work through the inaccessibility issues on County's website and provide Plaintiff with an initial set of documents that he could begin reading with his screen reader software. As more documents became accessible, they could have been made available to Plaintiff. County's response shows a respect for Plaintiff's ADA rights and a willingness to work with Plaintiff to provide him those documents that he believes are necessary for him to learn more about Escambia County.

The facts alleged in the complaint and as reflected in the correspondence attached are unlike the facts before the U.S. District Court in *National Association of the Deaf v. Florida*, 318 F. Supp. 3d 1338 (S.D. Fla. 2018) *appeal filed* Case No. 18-12786 (June 29, 2018); which may be cited by Plaintiff. In that case, plaintiffs alleged that they gave written notice to the Florida Senate and House of alleged violations of the ADA and Section 504 that video proceedings were not closed captioned so that deaf and hard of hearing persons could view and understand legislative proceedings. 318

F. Supp. 3d at 1342-1343. The defendants failed to respond to the correspondence generated by plaintiffs. *Id*. at 1343. The actions of those defendants also demonstrated that they were not going to change current practices. *Id.* at 1348. However, contrary to the facts of *National Association of the Deaf*, here, County amply shows its willingness to work with Plaintiff. Plaintiff ignored Mr. Kleinert's response and filed suit four months later without alleging any interaction with him.

These allegations do not legally give rise to a claim for compensatory damages, as they do not show the bare minimum for intentional discrimination. Because intentional discrimination is lacking, compensatory damages, as a remedy, should be dismissed from the complaint. *See Stewart v. Happy Herman's Cheshire Bridge,* 117 F.3d at 1287 (affirming grant of summary judgment where no reasonable juror could find for plaintiff where employer did not obstruct informal interactive process and made reasonable efforts to communicate to provide an accommodation).

Here, compensatory damages are not an appropriate remedy where so many facts are lacking as to what documents Plaintiff is seeking to screen read and whether Plaintiff is agreeable to having documents being made accessible in stages for his screen reading software. Without facts showing County ignored the interactive process, Plaintiff's claim for compensatory

damages amounts to a "gotcha" rather than a viable legal remedy.

CONCLUSION

In essence, Plaintiff's complaint is a request for public records under Florida law masquerading as a claim for intentional discrimination and failure to accommodate reasonably under the ADA and Section 504. Plaintiff appears to be making an argument for a modification or an extension of the law that a website should be considered a public facility in and of itself when owned or operated by a local government. However, the great majority of District Courts, when applying *Rendon* to website accessibility under the ADA and Section 504, dismiss these claims when no nexus is shown between accessibility and enjoyment of a physical location or facility. The District Court in *Gil v. Broward* County, attached, has applied this same analysis to local governments. Accordingly, County's motion to dismiss should be granted with prejudice.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to N.D. Fla. Loc. Rule 7.1(F), the number of words in this memorandum is 4,523.

Respectfully submitted,
Escambia County Attorney's Office
221 Palafox Place, Suite 430
Pensacola, Florida 32502
(850) 595-4970

/s/ Charles V. Peppler
By: Charles V. Peppler
Deputy County Attorney
Florida Bar No. 239739
Attorney for Escambia County, Florida