

CLIENT ALERT

## Fifth Circuit Holds that Independent Contractors Can Sue Under Section 504 of the Rehabilitation Act

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The U.S. Court of Appeals for the Fifth Circuit recently held that Section 504 of the Rehabilitation Act of 1973 allows employment discrimination suits by independent contractors. *Flynn v. Distinctive Home Care, Inc.*, No. 15-50314 (5th Cir. Feb. 1, 2016). Adding to a circuit court split on the issue, the Fifth Circuit joins the Ninth and Tenth circuits in finding that the Rehabilitation Act does not incorporate the employer-employee relationship requirement found in Title I of the Americans with Disabilities Act (ADA). While the *Flynn* opinion may increase the likelihood of Supreme Court review, in the meantime it expands the avenues for independent contractors to bring employment discrimination suits in the Fifth Circuit under the Rehabilitation Act.

Plaintiff-Appellant, Dr. Rochelle Flynn, worked as a contract pediatrician first for Spectrum Healthcare Resources, Inc. and later Distinctive Home Care Inc., federal contractors providing services to the United States Air Force. After the companies raised concerns about Flynn's performance, Flynn contended that her disability was the reason for her performance concerns and sought an accommodation for the disability. Flynn, however, was removed from her duties as an independent contractor without accommodation. Flynn subsequently sued in federal district court for employment discrimination under the Rehabilitation Act, among other claims. The district court granted summary judgment in Distinctive's favor concluding that Flynn could not sue for employment discrimination under the Rehabilitation Act because she was an independent contractor, not an employee.

On appeal, the Fifth Circuit vacated summary judgment and remanded the case to the district court for further proceedings, finding that Section 504(d) of the Rehabilitation Act does not incorporate the ADA Title I's prohibition on discrimination suits brought by independent contractors.

The Fifth Circuit noted the circuit split regarding whether an independent contractor could bring an employment discrimination lawsuit under Section 504 against an entity with which no employer-employee relationship existed. The court first explained that since Section 504 "bars discrimination only in programs that receive federal financial assistance" Congress enacted the ADA in 1990 to cover disability "discrimination in the private sector." To assuage concerns over inconsistencies between the Rehabilitation Act and the ADA, Congress amended the Rehabilitation Act to incorporate portions of the ADA by reference.

The Fifth Circuit noted that "other federal circuit and district courts overwhelmingly agree that a plaintiff may only sue a defendant under Title I of the ADA if the plaintiff is an employee, rather than an independent contractor, of the

defendant.” The court then addressed whether the ADA’s prohibition extends to Rehabilitation Act claims, through the Act’s incorporation provision in Section 504(d).

The Fifth Circuit dismissed the reasoning of the Eighth Circuit (which held that the Rehabilitation Act’s incorporation of Title I of the ADA requires that a defendant be the plaintiff’s “employer”), and followed the Ninth and Tenth Circuits in holding that the Rehabilitation Act does not incorporate Title I’s requirement that the defendant be the plaintiff’s “employer” as that term is defined in the ADA. The Fifth Circuit explained that unlike Title I of the ADA, Section 504 of the Rehabilitation Act is not limited to the employment context. Rather, the text of Section 504, the court noted, prohibits discrimination “under any program or activity receiving federal financial assistance.” Section 504 defines “program or activity” as including “all of the operations of ... an entire corporation, partnership, or other private organization, or an entire sole proprietorship.” As such, the Fifth Circuit reasoned, Section 504 covers “all of the operations of covered entities, not only those related to employment.” Thus, “importing Title I’s requirement that the plaintiff and the defendant have an employee-employer relationship would therefore conflict with the plain language of the Rehabilitation Act, which broadly authorizes discrimination suits against a wide variety of entities, including non-employers.”

The court further agreed with the Ninth and Tenth Circuits that the Rehabilitation Act adopts from the ADA “only the substantive standards for determining what conduct violates the Rehabilitation Act, not the definition of who is covered” under that law. Because the Rehabilitation Act does not incorporate Title I’s standards for determining which entities may be held liable for employment discrimination, the court found it does not incorporate Title I’s requirement that the defendant be the plaintiff’s employer. Consequently, the court held that an independent contractor could bring a viable claim under the Rehabilitation Act.

Until the Supreme Court rules otherwise, independent contractors are not precluded from bringing disability discrimination suits—at least in the Fifth, Ninth, and Tenth Circuits—against federal contractors, even though the ADA would prohibit such actions.

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