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Federal Contractor Alert From the 5th Circuit: Disability Plaintiffs Need Not Be Employees

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In a case of first impression, the Fifth Circuit Court of Appeals held that Section 504 of the Rehabilitation Act of 1973 permits employment discrimination suits by independent government contractors. In *Flynn v. Distinctive Home Care, Inc.*, the court held that unlike the Americans with Disabilities Act (ADA), the Rehabilitation Act did not require that the defendant be the plaintiff's "employer."

In a case of first impression, the Fifth Circuit Court of Appeals held that Section 504 of the Rehabilitation Act of 1973 permits employment discrimination suits by independent government contractors. In *Flynn v. Distinctive Home Care, Inc.*, the court held that unlike the Americans with Disabilities Act (ADA), the Rehabilitation Act did not require that the defendant be the plaintiff's "employer."

Dr. Rochelle Flynn was a contract pediatrician at Lackland Air Force Base in San Antonio. She provided her services pursuant to an independent contractor agreement with Distinctive Home Care (DHC). DHC, in turn, contracted with the United States Air Force to provide medical services at Lackland.

A government contracting officer expressed concerns to DHC about Dr. Flynn's performance around the same time that Dr. Flynn was diagnosed with Autism Spectrum Disorder–Mild (ASD–M), which was formerly referred to as Asperger's Syndrome. Dr. Flynn cited her condition as the reason for many of her performance issues and requested accommodation from DHC and from its subcontractor. The contracting officer responded that the government could not accommodate her and directed DHC to terminate their employment relationship with Dr. Flynn, which it did. Dr. Flynn filed suit against DHC and the subcontractor, alleging claims of disability discrimination, hostile work environment, and failure to accommodate under Section 504 of the Rehabilitation Act. Notably, Dr. Flynn did not invoke the ADA, which was passed several years after the Rehabilitation Act. The ADA applies to any private employer with at least 15 employees. Although the Fifth Circuit has never addressed the issue directly, most federal courts have agreed that

applicability of the ADA requires the existence of an employer-employee relationship. Consequently, Dr. Flynn —who never disputed her independent contractor status—could not have brought suit under the ADA.

Following the passage of the ADA, however, Congress amended the Rehabilitation Act to incorporate the ADA's standards as the basis for determining whether Section 504 had been violated. Relying on this amendment to the Rehabilitation Act, DHC and the subcontractor successfully argued before the district court that Dr. Flynn could not sue for discrimination under Section 504 because the amendments to the act required that there be an employment relationship between the plaintiff and defendant. The district court agreed and granted summary judgment in DHC's and the subcontractor's favor.

On appeal, the Fifth Circuit held that Section 504, as amended, did not incorporate the ADA's requirement that the defendant be the plaintiff's employer. Whereas the ADA's prohibition on discrimination was limited to the employment context, it said, Section 504 broadly prohibits discrimination "'under *any program or activity*' receiving [f]ederal financial assistance,' and 'program or activity' is defined to include '*all of the operations* of…an entire corporation, partnership, or other private organization, or an entire sole proprietorship.'" In other words, the Rehabilitation Act applies to all operations of a federally assisted program, not just those related to employment.

The court further reasoned that the act did not incorporate the ADA in its entirety. Rather, it adopted "only the substantive standards for determining *what* conduct violates the Rehabilitation Act, not the definition of *who* is covered" by the act. Accordingly, Dr. Flynn's independent contractor status did not preclude her claims under the act. The Fifth Circuit vacated the district court's grant of summary judgment and remanded Dr. Flynn's discrimination claims for further proceedings.

Key Takeaways

Despite the Rehabilitation Act's broader reach, a plaintiff under the act must carry a heavier burden of proof than the ADA requires. In particular, Section 504(a) of the act "explicitly provides that discrimination is actionable only if it occurs '*solely by reason of*' the plaintiff's disability." In contrast, under the ADA, "discrimination *need not be the sole reason* for the adverse employment decision" so long as the discrimination "actually play[s] a role in the employer's decision making process and ha[s] a determinative influence on the outcome."

The *Flynn* decision is significant in that it gives independent contractors the right to sue federal contractors for disability discrimination. Moreover, because government officials sometimes direct contractors' personnel actions, as in Dr. Flynn's case, a federal contractor may be faced with a dilemma: refuse to satisfy your customer (the government) or risk liability under Section 504. The primary takeaway is that contractors must consider the potential consequences of any contemplated personnel decision, instead of assuming that there can be no liability due to the independent contractor relationship.

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