No. 00-5224

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALEXIS KIM SCHRADER,

Plaintiff-Appellant

v.

DR. FRED A. RAY, P.C.,
an Oklahoma Professional Corporation,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(Hon. H. Dale Cook, United States District Judge)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

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STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether Section 504 of the Rehabilitation Act prohibits employment discrimination by programs that receive federal financial assistance even if they have too few employees to be covered by Title I of the Americans with Disabilities Act.

2. Whether an employee of a medical corporation that receives federal financial assistance can state a claim of disability discrimination under Section 504 of the Rehabilitation Act even though she was not an intended beneficiary of the federal financial assistance.

INTEREST OF THE UNITED STATES

This appeal involves whether small employers that receive federal financial assistance are prohibited from discriminating on the basis of disability under Section 504 of the Rehabilitation Act. Each federal agency disbursing federal financial assistance is charged with enforcing Section 504 through administrative measures (including termination of such federal assistance). See 29 U.S.C. 794a(a)(2). The Attorney General is charged with coordinating the implementation and enforcement of Section 504 by executive agencies. See Exec. Order 12250, 45 Fed. Reg. 72,995 (1980). The Court's decision concerning the scope of Section 504's coverage of employers will directly affect the United States' enforcement authority.

STATEMENT OF THE CASE

This is an action brought by Alexis Schrader, an employee of a medical corporation, alleging that her employer fired her on the basis of disability in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

1. According to the allegations of the complaint, plaintiff Schrader was fired by defendant, a professional corporation engaged in providing medical services, when she sought to return to work after treatment for kidney cancer and a brain tumor (App. 6 ¶¶ 12 & 14, 9 ¶¶ 30-31). Plaintiff brought suit under Section 504 of the Rehabilitation Act, alleging that defendant had received federal financial assistance through Medicare and Medicaid programs and had discriminated against her on the basis of her disability (App. 6 ¶ 8, 9-10 ¶¶ 36-39). Defendant moved to

dismiss on three grounds: (1) that it was not subject to Section 504 because it employed less than 15 employees and the definition of "employer" in Title I of the Americans with Disabilities Act of 1990 (ADA) had been incorporated into Section 504; (2) that plaintiff had not stated a claim because she was not an "intended beneficiary" of the federal financial assistance; and (3) that Section 504's coverage was limited to the "program or activity" that received the federal financial assistance (App. 15-20). Although not denominated a separate issue, defendant also disputed that it received federal financial assistance (App. 18, 19).

The district court referred the motion to a magistrate judge, who issued a Report and Recommendation that the motion be denied on all grounds (App. 38-48). Defendant filed an objection that raised only its contention that it was not covered because it employed less than 15 persons (App. 49-51). The district court rejected the magistrate judge's Report and Recommendation and permitted the parties limited discovery and supplemental briefing (R.13: 6/16/00 Order). In its various pleadings, defendant argued before the district court (1) that it was not subject to Section 504 because it employed less than 15 employees and Title I's definition of "employer" had been incorporated into Section 504; and (2) that plaintiff had not stated a cause of action because she was not an "intended beneficiary" of the federal financial assistance (App. 52-56, 95-98).

The district court granted defendant summary judgment. It held that Section 504(d) incorporates the definition of "employer" in Title I of the ADA, and because defendant did not employ 15 or more employees, it was not an "employer"

under Title I and thus was not subject to coverage under Section 504 as an employer (App. 102-104). This timely appeal followed (App. 106).

2. Congress has enacted two major statutes that grant individuals with disabilities causes of action against their employers for disability discrimination: the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990.

Section 501 of the Rehabilitation Act, 29 U.S.C. 791, requires *federal agencies* to engage in "affirmative action" to hire and promote individuals with disabilities. This provision has been interpreted not only to prohibit discrimination against persons with disabilities, but also to impose "an affirmative duty to meet the needs of disabled workers and to broaden their employment opportunities" in excess of that imposed on other employers. *Woodman* v. *Runyon*, 132 F.3d 1330, 1337-1338 (10th Cir. 1997). The Equal Employment Opportunity Commission (EEOC) has promulgated regulations implementing Section 501. See 29 C.F.R. Pt. 1614. Federal employees enforce their rights under Section 501 through the procedures available to federal employees under Title VII, including a court action. See 29 U.S.C. 794a(a)(1).

Section 504 of the Rehabilitation Act, 29 U.S.C. 794, prohibits "any *program or activity* receiving *federal financial assistance*" from subjecting any "otherwise qualified individual with a disability" to discrimination. The term "program or activity" is broadly defined. See 29 U.S.C. 794(b). Section 504's prohibition encompasses, but is not limited to, employment discrimination by such programs. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984). Each

agency awarding federal financial assistance has promulgated regulations to implement Section 504. See, *e.g.*, 45 C.F.R. Pt. 84 (Department of Health and Human Services). "[A]ny person aggrieved by any act or failure to act by any recipient of Federal assistance" can utilize the "procedures" and "remedies" available under Title VI of the Civil Rights Act of 1964, 29 U.S.C. 794a(a)(2), which includes an implied private right of action against the program. See *Roberts* v. *Progressive Independence, Inc.*, 183 F.3d 1215, 1222 n.6 (10th Cir. 1999); *Pushkin* v. *Regents of the Univ. of Colo.*, 658 F.2d 1372, 1380 (10th Cir. 1981).[1]

Title I of the Americans with Disabilities Act prohibits a "*covered entity*" from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual 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). A "covered entity" is defined to include an "employer," which is further defined as "a person engaged in an industry affecting commerce who has 15 or more

[1] Section 504 also applies to all programs or activities "conducted" by federal agencies. However, this Court has held that Congress intended Section 501 to be the exclusive avenue for federal employees to claim employment discrimination on the basis of disability, see *Johnson* v. *United States Postal Serv.*, 861 F.2d 1475, 1478 (10th Cir. 1988), and the Supreme Court has held that, unlike Section 501, Section 504 does not waive federal sovereign immunity for damage claims, see *Lane* v. *Peña*, 518 U.S. 187 (1996). In addition, while Section 503 of the Rehabilitation Act, 29 U.S.C. 793, prohibits employment discrimination by certain federal contractors, this Court has held that employees have no private right of action against the federal contractor under Section 503. See *Hodges* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 728 F.2d 414, 415-416 (10th Cir.), cert. denied, 469 U.S. 822 (1984).

employees for each working day in each of 20 or more calendar weeks," but excludes the United States, Indian tribes, and certain not-for-profit private clubs. 42 U.S.C. 12111(2), 12111(5)(A) & (B). Title I delineates various types of prohibited discrimination, see 42 U.S.C. 12112, and the EEOC has promulgated regulations to implement these provisions, see 29 C.F.R. Pt. 1630. Employees may enforce their rights under Title I through private actions. See 42 U.S.C. 12117(a).

3. Congress amended some of these provisions when it enacted the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344. The Act amended Sections 501 and 504 by adding to each a subsection that clarified the relationship between its non-discrimination requirements and those of Title I.

Section 501(g) provides:

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

29 U.S.C. 791(g).

Section 504(d) provides:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

29 U.S.C. 794(d).

SUMMARY OF ARGUMENT

It is undisputed that prior to 1992, Section 504 of the Rehabilitation Act of 1973 prohibited employment discrimination against persons with disabilities by any entity that received federal financial assistance, regardless of the number of employees. The district court read Section 504(d) – added to the statute by the Rehabilitation Act Amendments of 1992 – as reducing the scope of Section 504's coverage and thus permitting small employers that receive federal financial assistance to discriminate against persons with disabilities for the first time since the enactment of Section 504. This reading ignores the plain meaning of the statute as well as its legislative history and, if accepted, would lead to outcomes that Congress never intended. The district court's holding should be rejected and this Court should hold that all employers are covered by Section 504 if they receive federal financial assistance.

Nor is there any other ground for affirming the judgment. A medical corporation receiving federal financial assistance, such as defendant, is barred by Section 504 from discriminating in any of its operations against any "otherwise qualified individual with a disability." There is no basis to limit the statute's protection to those individuals who were the intended beneficiaries of the federal financial assistance. To the contrary, the text of the statute and the consistent holdings of this Court and the Supreme Court preclude such an interpretation of Section 504.

ARGUMENT

I

SECTION 504 OF THE REHABILITATION ACT PROTECTS ALL QUALIFIED INDIVIDUALS WITH DISABILITIES EMPLOYED BY ANY PROGRAM RECEIVING FEDERAL FINANCIAL ASSISTANCE

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, was one of the first federal "civil rights statute[s]" that "protect[ed] an individual with handicaps from discrimination." *Baker* v. *Board of Regents*, 991 F.2d 628, 631 (10th Cir. 1993) (internal quotation marks omitted). When Congress enacted the Americans with Disabilities Act of 1990 (ADA), it used Section 504 as a benchmark, directing that nothing in the ADA "be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973," 42 U.S.C. 12201(a), and preserving the existing rights and remedies of Section 504, see 42 U.S.C. 12201(b).

It is undisputed that prior to 1992, Section 504 prohibited employment discrimination against persons with disabilities by any entity that received federal financial assistance, regardless of the number of employees it employed. The district court held that, in enacting Section 504(d) in the Rehabilitation Act Amendments of 1992, Congress narrowed Section 504's established coverage, limiting it to employers with more than 15 employees. This holding is contrary to the text, structure, and legislative history of the provision.

1. Congress intended that Section 504 govern the employment practices of *any* program or activity that received federal financial assistance. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 632 (1984); cf. *Roberts* v. *Progressive Independence, Inc.*, 183 F.3d 1215, 1217 (10th Cir. 1999) (upholding award under Section 504 against employer with only five employees). The language of Section 504 admits of no exceptions. It provides that "*[n]o otherwise qualified individual* with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any* program or activity receiving Federal financial assistance." 29 U.S.C. 794(a) (emphases added). Section 504(d) did not alter the breadth of that coverage.

Section 504(d) provides that the "*standards* used to determine whether this section has been *violated* in a complaint alleging employment discrimination under this section shall be the *standards* applied under title I of the Americans with Disabilities Act." 29 U.S.C. 794(d) (emphases added). The word "standard" means "[a] measure or rule applicable in legal cases such as the 'standard of care' in tort actions." *Black's Law Dictionary* 1404 (6th ed. 1990). It refers to the rules regarding what constitutes a "violation." By its plain meaning, the provision does not incorporate the coverage provisions of Title I or anything other than standards of liability. This Court has already recognized that, even after the 1992 amendments, Section 504 cannot be read to incorporate Title I's "good faith

efforts" defense to compensatory damages. See *Roberts*, 183 F.3d at 1223 (declining to engage in "creative statutory construction").

2. The legislative history of the Rehabilitation Act Amendments makes clear that Section 504(d) and its companion provisions were simply intended to "ensure uniformity and consistency of interpretations," S. Rep. No. 357, 102d Cong., 2d Sess. 71 (1992), so that entities subject to both Section 504 and Title I would be assured of a uniform set of rules. Given that the various statutes and implementing regulations had been enacted using different language over the course of two decades, it was not surprising that differences had developed. For example, under Sections 501 and 504, a reasonable accommodation for an employee with a disability did not include reassignment to a vacant position; Title I expressly includes reassignment as a potential required accommodation. See *Woodman* v. *Runyon*, 132 F.3d 1330, 1339 & n.9 (10th Cir. 1997). By incorporating the "standards" of Title I into Section 504, Congress made sure that all employers governed by federal disability anti-discrimination law were subjected to the same requirements.

Senator Harkin thus explained during consideration of the Rehabilitation Act Amendments, after outlining the various components of the duty not to discriminate in Title I of the ADA, that "[n]ow those who are covered by title V of the Rehabilitation Act will know that these are the definitions of reasonable accommodation and discrimination that apply. They will also know that the standards governing preemployment inquiries and examinations, and inquiries of

current employees apply. Incorporating the ADA standards into the Rehabilitation Act will assure that there will be consistent, equitable treatment for both individuals with disabilities and businesses under the two laws." 138 Cong. Rec. 31522 (1992); see also *Freed* v. *Consolidated Rail Corp.*, 201 F.3d 188, 194 (3d Cir. 2000) ("The aim of these provisions is to achieve substantive conformity and to avoid duplication of effort.").

3. That Section 504(d) and its companion provision Section 501(g) are limited to the standard to impose liability, and do not extend to coverage, is confirmed by the irrational results that would follow from the district court's broader reading. For example, the court's reading of the statute would not protect small employers from suits. Unlike Title I, Section 504 prohibits *all* disability discrimination against individuals by entities receiving federal financial assistance, not just discrimination against employees. So even under the district court's reading of Section 504(d), which applies only to "a complaint alleging employment discrimination," an employer of fewer than 15 employees would still be subject to damage suits by individuals who are not employees (such as patients and independent contractors) who participate in or benefit from the programs and activities of that employer.

Perhaps the most incongruous result of the district court's reading is that it would mean Congress had effectively repealed federal employees' protection from disability discrimination under Section 501. As with Section 504(d), Section 501(g) incorporates the "standards" of Title I. Title I, however, excludes the

United States from its definition of "employer." If "standards" is considered to include statutory coverage, Section 501 would apply to nothing. Surely that is not what Congress intended. It is equally improbable that Congress intended to repeal the only protections employees with disabilities had from discrimination by small employers receiving federal financial assistance. There is no evidence that Congress intended such bizarre results or otherwise wished to limit coverage of the existing statutes.

4. The district court relied on this Court's discussion in *Butler* v. *City of Prairie Village*, 172 F.3d 736, 744 (1999), which explained that Title I's exclusion of employers with fewer than 15 employees from its coverage was intended to "strike[] 'a balance between the goals of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims.'" But the purpose and the text of the statute make clear that Congress reached a different balance in Section 504. All entities – large and small – that received federal support have to promise not to discriminate.[2] The differing treatment reflects the distinctive nature of the two statutes: Title I unilaterally imposes obligations on employers, while Section 504 imposes obligations only on those entities that voluntarily accept federal financial assistance. As the Supreme Court explained, Congress determined that not discriminating against persons with

[2] When Congress intended to impose different obligations under Section 504 for smaller entities, it did so expressly. See 29 U.S.C. 794(c) ("small providers" need not "make significant structural alterations to their existing facilities" if "alternative means of providing the services are available").

disabilities was the "*quid pro quo* for the receipt of federal funds," and that entities who chose to accept such funds had to "bear the costs" imposed by Section 504. *Darrone*, 465 U.S. at 633 n.13.[3]

II

EMPLOYEES OF A PROGRAM RECEIVING FEDERAL FINANCIAL ASSISTANCE ARE PROTECTED BY SECTION 504 OF THE REHABILITATION ACT FROM DISCRIMINATION ON THE BASIS OF DISABILITY EVEN IF THEY ARE NOT THE "INTENDED BENEFICIARIES" OF THE ASSISTANCE

In the district court, defendant made an additional argument that plaintiff did not state a claim because she was not an "intended beneficiary" of the federal financial assistance received by defendant. A prevailing party is normally permitted to press arguments made below as alternative grounds for affirmance. However, because the district court found (App. 103) that defendant had "only" objected to the Magistrate Judge's Report and Recommendation with regard to the issue of the 15 employee threshold, it appears the argument is barred by this Court's "firm waiver rule," which provides that when a motion is referred to a magistrate judge, a party's failure to raise a specific argument in its objections to the Report and Recommendation bars appellate review. *Whitehead* v. *Oklahoma*

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[3] It is true that the Sixth Circuit in *Hiler* v. *Brown*, 177 F.3d 542, 545 (1999), a case cited by the district court, relied on the incorporation of Title I standards in resolving the distinct question, not at issue here, of whether Section 504 permits suits against individuals in their individual capacities. *Hiler* appears to have simply assumed that the term "standards" incorporated Title I's definition of "employer" and did not engage in any independent analysis of the question. Its assumption should not be converted into a holding by this Court.

Gas & Elec. Co., 187 F.3d 1184, 1190 (10th Cir. 1999). Nevertheless, to provide the Court with a comprehensive analysis, we address this argument as well.

This Court has never adopted a requirement that the plaintiff be an "intended beneficiary" of the federal funds in order to bring suit under Section 504.[4] In describing a plaintiff's *prima facie* case under Section 504, this Court has required that plaintiff show only that the defendant received federal financial assistance, and has never required any additional showing linking the plaintiff and the funds. See, *e.g.*, *Powers* v. *MJB Acquisition Corp.*, 184 F.3d 1147, 1151 (10th Cir. 1999); *Johnson ex rel. Johnson* v. *Thompson*, 971 F.2d 1487, 1492 (10th Cir. 1992); see also *Baker* v. *Board of Regents*, 991 F.2d 628, 631 (10th Cir. 1993) (same for Title VI of the Civil Rights Act of 1964, the model for Section 504).

As properly understood and applied by this Court, Section 504 does protect "intended beneficiaries" – intended beneficiaries of the nondiscrimination requirement of Section 504. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 690, 694 (1979) (language in Title IX, a nondiscrimination statute similar to Section 504, "expressly identifies the class Congress intended to benefit" as "persons discriminated against on the basis of sex" and thus a woman "is clearly a member of that class for whose special benefit the statute was enacted"). That

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[4] Although some courts have identified such a limitation, see, *e.g.*, *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226, 1227 (7th Cir. 1980), the decisions predate the Supreme Court's decisions in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), and *Grove City College* v. *Bell*, 465 U.S. 555 (1984), as well as the Civil Rights Restoration Act of 1987, all discussed in the text, *infra*.

class of persons includes, but is not limited to, the intended beneficiaries of the federal funding. This interpretation has been confirmed by two Supreme Court decisions. First, in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), the Court was faced with the question whether, in a private suit for monetary relief, Section 504 prohibited employment discrimination even when the "primary objective" of the federal financial assistance was not employment. The Court concluded that it did, reasoning that the plain language of the statute – applying to "'*any* program or activity receiving Federal financial assistance'" – "suggests that its bar on employment discrimination should not be limited to programs that receive federal aid the primary purpose of which is to promote employment," *id*. at 632-633, and that the "legislative history, executive interpretation, and purpose of the 1973 enactment all are consistent with this construction," *id*. at 633.

Moreover, the Supreme Court made clear in *Grove City College* v. *Bell*, 465 U.S. 555 (1984) – a case decided the same day as *Darrone* – that when the federal financial assistance that was intended to benefit students was received by the financial aid program of a college, the employees that worked in the office that received and distributed the money were protected from discrimination. See *id.* at 571 n.21. Thus, as this Court explained, "[t]he *Darrone* Court rejected the 'primary objective' restriction" and "made clear that the *only* limitation contained in § 504 is that the discrimination occur under a 'specific program that receives federal funds.'" *Niehaus* v. *Kansas Bar Ass'n*, 793 F.2d 1159, 1162 (10th Cir. 1986) (emphasis added); see also *Frazier* v. *Board of Trustees of Northwest Miss. Reg'l*

Med. Ctr., 765 F.2d 1278, 1289 n.26 (5th Cir. 1985) ("It is of no consequence that Medicare and Medicaid funds are not distributed for the purpose of providing employment for the handicapped."), cert. denied, 476 U.S. 1142 (1986).[5]

In response to *Darrone* and *Grove City*, Congress enacted the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). That statute did not affect the holding that Section 504 applied to employment, but it overruled the Court's holding that Section 504 and other non-discrimination statutes tied to the receipt of federal financial assistance were "program specific" and provided only limited coverage. See *Bentley* v. *Cleveland County Bd.*, 41 F.3d 600, 603 (10th Cir. 1994). As amended by the Restoration Act, Section 504(b) provides that a "program" includes "all of the operations" of an "entire corporation" if the corporation is "principally engaged in the business of providing * * * health care." 29 U.S.C. 794(b)(3)(A)(ii). Thus, applying the holding of *Darrone* in combination with the new definition of "program" in Section 504(b), it is clear that Congress

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[5] Before the district court, defendant did not renew its argument (rejected by the magistrate judge (App. 46)) that the funds it received under the Medicare and Medicaid programs did not constitute "federal financial assistance." Any such contention would, in any event, be meritless. As the Fifth Circuit explained in its comprehensive opinion in *United States* v. *Baylor University Medical Center*, 736 F.2d 1039, 1042-1049 (1984), cert. denied, 469 U.S. 1189 (1985), the statutory language, legislative history, regulations, consistent executive branch interpretation, and case law all confirm that such funds trigger coverage. This Court cited *Baylor* with approval in *United States* v. *LaHue*, 170 F.3d 1026 (10th Cir. 1999), but declined to extend its holding to a criminal statute, 18 U.S.C. 666(b), because that statute did not share the same purpose of Section 504 – "to prevent the use of federal funds to support discrimination." *Id*. at 1029. The Supreme Court, however, subsequently applied 18 U.S.C. 666(b) to a participant in the Medicare program. See *Fischer* v. *United States*, 529 U.S. 667 (2000).

intended that all employees working for a medical corporation that receives any federal financial assistance would be protected from discrimination on the basis of disability. See S. Rep. No. 64, 100th Cong., 1st Sess. 15-16 (1987) (describing private lawsuits brought under Section 504 alleging employment discrimination that were dismissed because of "program specific" holding of *Darrone* and *Grove City* and that would be reversed by Restoration Act). As plaintiff has alleged all these elements, she has stated a claim.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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