



Non-Disabled Employee May Sue Employer for Retaliation under Section 504 and the ADA

The Ninth Circuit Court of Appeals recently held that an employee may sue an employer under Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and Title II of the Americans with Disabilities Act (“ADA”) for retaliation based on the employee’s attempts to advocate for disabled students. (Barker v. Riverside County Office of Education (9th Cir. 2009) ___ F.3d ___, 2009 WL 3401986.) This decision broadens the scope of individuals who are protected under the anti-retaliation provisions of Section 504 and the ADA to those who are not disabled, but who are acting on behalf of individuals with disabilities.

In May 2002, the Riverside County Office of Education (“County”) hired Plaintiff as a Resource Specialist Program teacher for students with disabilities. Plaintiff alleged that in 2003, she began expressing concerns to her supervisors that the County was not providing her disabled students with the special education services required under federal and state law. In 2005, Plaintiff filed a class discrimination complaint with the United States Department of Education’s Office for Civil Rights (“OCR”), alleging that the County denied disabled students their right to a free, appropriate public education under federal and state law.

Plaintiff alleged that, shortly after filing the discrimination complaint, her supervisors began retaliating against her by intimidating her, failing to respond to her emails and telephone calls, excluding her from important staff meetings, changing her work assignments to less desirable locations, reducing her caseload, and refusing to allow her to fill in for absent teachers. Plaintiff further claimed that she was constructively terminated in 2006 because her supervisors’ actions created an intolerable work environment.

In response, Plaintiff submitted a second complaint to OCR, alleging that the County retaliated against her for advocating on behalf of students with disabilities and for filing the discrimination complaint. OCR determined that the County had retaliated against Plaintiff in violation of Section 504 and Title II of the ADA. Plaintiff subsequently filed a complaint in federal district court, alleging that the County violated the anti-retaliation provisions of Section 504 and Title II of the ADA. The district court dismissed Plaintiff’s claim, finding that she did not have standing to sue under either statute because she was not disabled. Plaintiff appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit began its analysis of whether Plaintiff, a non-disabled individual, could sue her employer under Section 504 and/or Title II of the ADA by examining the plain language of both statutes. The Ninth Circuit determined that the broad language used in Section 504 and Title II of the ADA did not demonstrate that Congress intended to limit standing to individuals with disabilities. The Court noted that this interpretation was consistent with Congress’s statutory goal of protecting the rights of the disabled and that Congress recognized that disabled individuals might need assistance from others to defend their rights.

The Ninth Circuit concluded that because Plaintiff alleged that she was retaliated against based on her efforts to advocate for students with disabilities, she had standing under Section 504 and Title II of the ADA to sue her employer for the alleged retaliation.

Please note that this was a ruling on a pre-trial motion regarding the sole question of whether Plaintiff had the right to sue her employer under Section 504 or Title II of the ADA. The Court did not determine whether the County actually discriminated against Plaintiff. In ruling on the motion, the Court was required to assume all allegations in Plaintiff's complaint were true. To prevail on the underlying retaliation claim, Plaintiff will have to prove her case in federal district court.

This decision confirms that school districts must not retaliate against employees for advocating on behalf of students with disabilities.

Should you have any questions regarding this case and its impact, please contact one of our four offices.

*F3 NewsFlash prepared by Jonathan Read and Susan Winkelman.
Jonathan is a partner in the F3 San Marcos office.
Susan is an associate in the F3 San Marcos office.*

This F3 NewsFlash is a summary only and not legal advice. We recommend that you consult with legal counsel to determine how this case may apply to your specific facts and circumstances. Information on a free NewsFlash subscription can be found at www.fagenfriedman.com.

164322

6300 Wilshire Blvd., Suite 1700, Los Angeles, California 90048 Tel. 323.330.6300 Fax 323.330.6311
70 Washington St., Suite 205, Oakland, California 94607 Tel. 510.550.8200 Fax 510.550.8211
520 Capitol Mall, Suite 400, Sacramento, California 95814 Tel. 916.443.0030 Fax 916.443.0030
1 Civic Center Dr., Suite 300, San Marcos, California 92069 Tel. 760.304.6000 Fax 760.304.6011

© 2009 Fagen Friedman & Fulfroft, LLP

All rights reserved, except that the Managing Partner of Fagen Friedman & Fulfroft, LLP hereby grants permission to any client of Fagen Friedman & Fulfroft, LLP to use, reproduce and distribute this NewsFlash intact and solely for the internal, noncommercial purposes of such client.