

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-00807-REB-CBS

JULIANNA BARBER, by and through her next friend, MARCIA BARBER, et al.,

Plaintiffs,

v.

STATE OF COLORADO, DEPARTMENT OF REVENUE, et al.,

Defendants.

**PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S RULING DISMISSING THE
CLAIMS OF JULIANNA AND MADELINE BARBER**

Plaintiffs, by and through their attorneys, hereby respectfully request that this Court reconsider its ruling dismissing the claims of Julianna and Madeline Barber.

Plaintiffs opposed Defendants' motion to dismiss the claims of Julianna and Madeline Barber on two theories: (1) that the girls themselves were the targets of discrimination based on their association with their mother, who was disabled; and (2) that the girls were harmed by discrimination targeted at their mother. The undersigned apologizes that her Memorandum in Opposition to Defendants' Motion to Dismiss ("Opposition Brief") may have failed sufficiently to distinguish the two separate theories. This Court's Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("Order") addressed only the former theory. Plaintiffs do not challenge the Court's decision on this theory, but respectfully request the Court to address the latter theory and, on that theory, deny Defendants' motion to dismiss the girls' claims.

FACTS

Marcia Barber, her daughters Julianna and Madeline, and two organizations brought suit to challenge Defendants' refusal to make reasonable modifications permitting Ms. Barber -- who is legally blind -- to designate another adult to accompany her daughters as they learned to drive. Plaintiffs brought their challenge under title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 *et seq.*, and section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"). 29 U.S.C. § 794.

On October 17, 2005, this Court issued its ruling on Defendants' Motion to Dismiss, denying the motion as to the claims of Marcia Barber and the two organizations, and granting the motion as to Julianna and Madeline Barber on the grounds that there is no private right of action to enforce 28 C.F.R. § 35.130(g), the regulation prohibiting discrimination against nondisabled people based on their association with people with disabilities. (Order at 5-6.)

ARGUMENT

I. This Court's Order Addressed Only One of the Two Theories Asserted to Support the Claims of Julianna and Madeline Barber.

Julianna and Madeline Barber -- who are not themselves disabled -- opposed the motion to dismiss under two separate theories: (1) that they themselves suffered discrimination -- under 28 C.F.R. § 35.130(g) -- as individuals with an association or relationship with a person with a disability;¹ and (2) that they were injured by the

¹ Opposition Brief at 19-20.

discrimination against their mother, a person with a disability.² While the two theories appear similar, an illustration may help differentiate them. Imagine a child whose mother is HIV positive. The mother and child attempt to patronize a city-run swimming pool.

- It would be an example of the first theory if the pool employees told the child she could not use the swimming pool because her mother was HIV positive. That is, the child is the target of the discrimination, based on her association with a person who is HIV positive.
- It would be an example of the second theory if the pool employees told the mother she could not use the swimming pool, and the child suffered injury because -- requiring parental supervision -- she was unable to swim. That is, the child was injured by discrimination against her mother.

Only the first theory is based on section 35.130(g), which reads:

A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

The use of the phrase “exclude or otherwise deny equal services . . . to an individual . . . because of” the disability of an associate demonstrates that this prohibits discrimination targeted against people without disabilities who are associated with those with disabilities.

² Id. at 18-19.

This Court's discussion of the matter addressed only this first theory, holding that "plaintiffs provide no argument or authority to suggest that [§ 35.130(g)] creates a cause of action in the absence of express statutory authorization." (Order at 5.) The Court also noted correctly that the question of standing does not illuminate the question whether section 35.130(g) creates a private right of action. (*Id.* at 5 n.3.) The upshot of the Court's ruling is that Julianna and Madeline do not have a private right of action -- under section 35.130(g) -- to challenge discrimination against themselves on the basis of their association with their mother.

Plaintiffs do not challenge this ruling, but respectfully urge that this Court did not address the separate question whether Julianna and Madeline have standing to challenge discrimination against their mother that caused them injury. Plaintiffs respectfully request that this Court consider and rule on this basis supporting Julianna's and Madeline's claims.

II. Julianna and Madeline Barber have a Private Right of Action and Standing to Challenge Discrimination Against Their Mother, A Person With A Disability.

A. There Is a Private Right of Action under Title II and the Rehabilitation Act to Challenge Discrimination Against a Person with a Disability.

Julianna and Madeline bring claims under Title II and the Rehabilitation Act based on the fact that they were injured by discrimination against their mother. These claims are not based on section 35.130(g). Rather, they challenge conduct that is prohibited by the language of the statutes themselves: discrimination against a person with a disability. See 42 U.S.C. § 12132 (prohibiting discrimination against qualified

individuals with disabilities by public entities); 29 U.S.C. § 794 (prohibiting discrimination against qualified individuals with disabilities by recipients of federal financial assistance). The Tenth Circuit has held that there are private rights of action under Title II and the Rehabilitation Act, and that these rights of action extend to claims for disparate treatment, disparate impact and failure to make reasonable modifications. Chaffin v. Kansas State Fair Board, 348 F.3d 850, 859-60 (10th Cir. 2003); see also 42 U.S.C. § 12133 (establishing a private right of action under Title II); 29 U.S.C. § 794a(a)(2) (establishing a private right of action under the Rehabilitation Act).

The leading case on creation of private rights of action, Alexander v. Sandoval, stands for the proposition that a regulation cannot create private right of action to challenge conduct that the statute in question permits. 532 U.S. 275, 285 (2001). In that case, because Title VI of the Civil Rights Act³ prohibited only intentional discrimination, the Court held that regulations prohibiting disparate impact discrimination could not create a private right of action. Id.

As the Court recently made clear, however, this analysis does not apply where the conduct in question is prohibited by the language of the statute itself. Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497, 1506 (2005). The plaintiff in Jackson was a teacher who sued his employer under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., alleging that the employer retaliated against him for complaining about sex discrimination in the school's athletic program. Id. at 1502. The

³ 42 U.S.C. § 2000d.

defendant argued, under Sandoval, that the teacher had no private right of action to enforce the Title IX regulation barring retaliation. The Court rejected this argument based on its holding that the challenged conduct -- retaliation -- was a type of discrimination prohibited by the language of the statute itself, and was, therefore, included in that statute's private right of action. Id. at 1506.

The claims of Julianna and Madeline Barber are in a situation similar to those of the plaintiff in Jackson: They challenge conduct explicitly prohibited by the statutes at issue, that is, discrimination against a person with a disability. See 42 U.S.C. § 12132, 29 U.S.C. § 794. Because the Tenth Circuit has held that private rights of action exist to enforce these statutes, there is no question that private rights of action exists to challenge discrimination against Marcia Barber. The only remaining question is whether Julianna and Madeline have standing to bring those claims.

B. Julianna and Madeline Barber Have Standing To Bring A Claim Under Title II and the Rehabilitation Act.

Under Tenth Circuit precedent, Julianna and Madeline Barber have standing to raise claims for injuries caused by Defendants' discrimination against their mother. That court has held that standing under Title II and the Rehabilitation Act extends to the full limits of Article III. Tandy v. City of Wichita, 380 F.3d 1277, 1287 (10th Cir. 2004). Any individual or entity -- disabled, nondisabled or corporate -- may raise claims under those statutes if he, she or it satisfies the requirements of Article III. Because Julianna Barber has suffered -- and Madeline will suffer -- injury caused by Defendants' discrimination against their mother, which injuries will be redressed by the relief they

request, they have Article III standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Because standing under Title II and the Rehabilitation Act extends to the full limits of Article III, Julianna and Madeline Barber may bring suit despite the fact that they are not disabled and were not the target of the discrimination.⁴ This is demonstrated by, for example, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972), in which the Court recognized that white tenants had standing under the Fair Housing Act (“FHA”)⁵ based on the fact that they lived in a building in which the owner had discriminated against African-Americans. The white tenants were not the targets of discrimination but had been injured by the discrimination because they had missed out on the advantages of an integrated community. Id. at 208-12. The Trafficante Court based its expansive reading of standing under the FHA on that statute’s broad enforcement provision, which permitted a “person aggrieved” to bring suit to challenge prohibited practices. Id., at 209. The Rehabilitation Act uses that same language, permitting enforcement by “any person aggrieved by any act or failure to act by any recipient of Federal assistance.” 29 U.S.C. § 794a(a)(2). Title II is similarly broad, permitting enforcement by “any person alleging discrimination on the basis of disability.”

⁴ Where standing “extend[s] to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury as a result of the defendant’s conduct, he is permitted to prove that the rights of another were infringed.” Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979).

⁵ 42 U.S.C. § 3401 et seq.

42 U.S.C. § 12133 (emphasis added).⁶ In addition, Defendants and Plaintiffs agree that “the Rehabilitation Act is materially identical to and the model for the ADA.”⁷

The Tenth Circuit relied on the breadth of Title II’s enforcement provision in determining that standing under both that statute and the Rehabilitation Act extended to the full limits of Article III. See Tandy, 380 F.3d at 1287. The similarity of the enforcement language of both statutes to that of the FHA at issue in Trafficante demonstrates that, as the Supreme Court held in that case, members of a non-protected class (such as Julianna and Madeline) have standing to challenge discrimination against a member of the protected class (their mother) when they are injured by that discrimination.

Julianna and Madeline Barber have properly alleged claims under Title II and the Rehabilitation Act because they were (or, in Madeline’s case, will be) injured by Defendants’ discrimination against their mother, Marcia Barber.

⁶ As the Supreme Court made clear in Jackson, it is crucial that the statute reads “on the basis of disability,” rather than “on the basis of the individual’s disability.” In Jackson, the Court rejected the defendant’s argument that the plaintiff, a man, could not sue under Title IX, which bars sex discrimination. The Court relied on the fact that the statute provided that “no person shall be subject to discrimination on the basis of sex” and not “discrimination on the basis of such individual’s sex.” Id., 125 S.Ct. at 1507 (emphasis in original). The Court concluded, “The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.” Id. Title II’s enforcement provision is similarly broad and does not require that the injured party also be the victim of the discrimination.

⁷ See Mem. in Support of Defs.’ Mot. to Dismiss at 5 (citation omitted).

III. Under the Standard of Review for Motions to Dismiss, The Claims of Julianna and Madeline Barber Should Not Have Been Dismissed.

“A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”

Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 507 (2002); see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Julianna and Madeline Barber have alleged facts sufficient to meet this standard:

- The Court has recognized that Plaintiffs have stated a claim for discrimination against Marcia Barber, who is a person with a disability (see Order at 4-5, see also Amd. Cmplt. ¶¶ 6, 35-44);
- Plaintiffs have alleged that Julianna was harmed, and Madeline will be harmed, by this discrimination. (Amd. Cmplt. ¶¶ 32-34, 61, 65).

The undersigned regrets any confusion caused by the lack of clarity in the Amended Complaint and/or Opposition Brief, and respectfully requests the opportunity to replead Plaintiffs’ complaint to clarify that Julianna and Madeline are now not proceeding under 28 C.F.R. § 35.130(g), but only on the theory that they were harmed by discrimination against their mother.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court reconsider its Order, and deny Defendants’ Motion to Dismiss with respect to the claims of Julianna and Madeline Barber, on the grounds that they have a private right of action -- and standing to bring it -- to challenge the discrimination against their mother.

CERTIFICATION PURSUANT TO LOCAL RULE 7.1A

_____The undersigned certifies that she conferred with counsel for Defendants' who indicated that Defendants oppose this motion.

Respectfully submitted,

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Certificate of Service

I hereby certify that on October 25, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

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