

## APPENDIX

### Table of Contents

Appendix A	
Arkansas Supreme Court opinion (March 12, 2026) .....	1a
Appendix B	
Arkansas Supreme Court opinion (November 9, 2023) .....	24a
Appendix C	
Arkansas Circuit Court order granting plaintiff's motion for summary judgment as to liability (November 22, 2021) .....	36a

**APPENDIX A**

Supreme Court of Arkansas

BENTON SCHOOL DISTRICT; LORI BACON, IN  
HER INDIVIDUAL AND OFFICIAL CAPACITY;  
AND LITA GATTIS, IN HER INDIVIDUAL AND  
OFFICIAL CAPACITY APPELLANTS

v.

BRANDI GREER APPELLEE

No. CV-25-11

Opinion Delivered: March 12, 2026

APPEAL FROM THE SALINE COUNTY CIR-  
CUIT COURT [NO. 63CV-20-522]

HONORABLE BRENT DILLON HOUSTON,  
JUDGE

REVERSED AND REMANDED.

Taylor & Taylor Law Firm, P.A., by: Jennifer Wil-  
liams Flinn, Tory H. Lewis, Andrew M. Taylor, and  
Tasha C. Taylor, for appellants.

Sutter & Gillham, P.L.L.C., by: Lucien Gillham  
and Luther Sutter, for appellee.

SHAWN A. WOMACK, Associate Justice

This case arises from Brandi Greer's claim that the Benton School District, Lori Bacon, and Lita Gattis unlawfully retaliated against her and prevented her from working as a substitute teacher in the district after she filed an ethics complaint against a teacher in the district concerning the treatment of her child. The circuit court granted summary judgment to Greer on her retaliation

claims and the jury awarded her \$7,000 in damages.<sup>1</sup> The court also entered a permanent injunction barring the District from prohibiting her from serving as a substitute. Because Greer's claims fail as a matter of law, we reverse the circuit court's summary-judgment ruling and enter judgment for the appellants. As a result, we likewise reverse the jury's award of damages and the circuit court's order granting a permanent injunction.

### *I. Facts and Procedural Background*

The appellants in this case are the Benton School District, Lori Bacon, and Lita Gattis. Bacon is the former principal of the Angie Grant Elementary School. Gattis is the former assistant superintendent of the District. The appellants were sued by Brandi Greer, a substitute teacher employed by Kelly Services, Inc. The District contracted with Kelly Services, Inc., for the placement of substitute teachers in the school district.

In 2017 and 2018, Greer's child attended the Angie Grant Elementary School. Greer frequently served as a substitute teacher there during this time period. In the fall of 2017, a dispute arose between Greer and her child's teacher, Holly Fite. Greer then filed an ethics complaint against Fite in November of 2017 with the Arkansas Department of Education's Professional Licensure Standards Board (State Board), alleging that Ms. Fite had violated the Code of Ethics for Arkansas Educators due to her treatment of the Appellee's child. In February of 2018, the District informed Kelly Services, Inc., that Greer

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<sup>1</sup> Greer's retaliation claims are brought under 29 U.S.C. § 794, 42 U.S.C. § 1983, and Ark. Code Ann. § 16-123-105.

could not substitute at Angie Grant until the investigation was complete. After further discussions with Greer, the District ultimately decided that it was best that Greer not substitute at any school within the District. This did not prevent Greer from substituting for any of the other schools within Saline County that Kelly Services, Inc., contracted with. In 2018, the State Board found that Greer's complaint was baseless.

In June 2020, Greer filed a lawsuit against her employer, Kelly Services, Inc., Benton School District and Lori Bacon. She claimed discrimination and retaliation in violation of the federal Rehabilitation Act of 1973, the First Amendment of the U.S. Constitution, and article 2, section 6 of the Arkansas Constitution. Kelly Services, Inc., was dismissed from the case without prejudice the next month. In August 2020, the District and Bacon filed their joint response to the complaint. In response, Greer filed an amended complaint, adding Lita Gattis as a defendant.

In her amended complaint, Greer alleged that (1) the District violated § 504 of the Rehabilitation Act by retaliating against her for requesting accommodations for her child and for complaining about discrimination against her child; and (2) Ms. Bacon and Ms. Gattis, both in their individual and official capacities, violated 42 U.S.C. § 1983 and the Arkansas Civil Rights Act by retaliating against her for exercising her First Amendment rights. The appellants filed their motion to dismiss the case, which was denied by the circuit court in December 2020.

In July 2021, Greer filed a partial motion for summary judgment on liability. The appellants filed

a response to the motion as well as a cross-motion for summary judgment, arguing that (1) the District was entitled to summary judgment on the appellee's § 504 claim because Greer was not the District's employee and she had not suffered an adverse employment action; and (2) Ms. Bacon and Ms. Gattis were entitled to summary judgment on the § 1983 and ACRA claims because: (a) Greer did not engage in constitutionally protected speech because she did not speak on a matter of public concern; (b) Ms. Bacon and Ms. Gattis were entitled to qualified immunity on the individual-capacity claims; (c) Greer's rights were not violated due to the policy, custom, or practice of the District, thus defeating the official-capacity claims; (d) Greer did not suffer an adverse employment action; and (e) Greer failed to mitigate her damages.

In November 2021, the circuit court granted Greer's partial motion for summary judgment against the District, Lori Bacon, and Lita Gattis in both their official and individual capacities and granting in part and denying in part the defendants' motion for summary judgment with respect to qualified immunity of separate defendants Lori Bacon and Lita Gattis. The appellants filed an interlocutory appeal from this order, arguing that the circuit court erred in ruling that Ms. Bacon and Ms. Gattis were only immune from liability above their insurance limits and not immune from suit. In an opinion dated November 9, 2023, this court affirmed in part and remanded in part, holding that Ark. Code Ann. § 21-9-301 (Repl. 2022), which states that certain government officials are immune from suit except to the

extent that they are covered by liability insurance, applied to ACRA claims but not to § 1983 claims.

On remand, the circuit court entered an order that, in effect, dismissed the § 1983 individual-capacity claims against Ms. Bacon and Ms. Gattis on qualified-immunity grounds. The court also reaffirmed its ruling that both are immune from liability on the ACRA individual-capacity claims except to the extent of any applicable insurance coverage.

As noted above, in November of 2021 the circuit court had granted summary judgment in Greer's favor on the issue of liability on her Rehabilitation Act § 504 claims against the District, her § 1983 official capacity claims against Bacon and Gattis (which the circuit court found were claims against the District), and her individual capacity ACRA claims against Bacon and Gattis. A jury trial was held on the issue of damages for these claims on August 27, 2024.<sup>2</sup> Over the appellants' objection, the circuit court ruled that the jury could consider the issue of punitive damages. The jury returned a verdict awarding \$3,500 to Greer in compensatory damages and \$3,500 in punitive damages.

On September 6, 2024, Greer filed a motion for injunctive relief, arguing that the District should be permanently enjoined from preventing her from

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<sup>2</sup> The jury instructions provided: "Defendants have violated Ms. Greer's right not to be retaliated against under the Arkansas Civil Rights Act and the Arkansas Constitution, which forbid retaliation against citizens for exercising speech rights and the right to petition the government. Thus, Defendants have violated Ms. Greer's right not to be retaliated against for opposing disability discrimination, a protected activity under the Rehabilitation Act."

serving as a substitute teacher within the District. The appellants filed their response on September 13, 2024, arguing that cases involving the loss of employment do not impart the kind of irreparable harm necessary to justify injunctive relief because a loss of employment can be adequately compensated by money damages. On September 26, 2024, the circuit court entered its final order and judgment, incorporating the jury award of damages and granting the Greer’s motion for a permanent injunction. The appellants now appeal the order granting summary judgment, the jury award of damages, and the order granting a permanent injunction.<sup>3</sup>

## II. *Standard of Review*

The law is well settled regarding the standard of review used by this court in reviewing a grant of summary judgment. Indeed, our law is clear that summary judgment is to be granted only when there are no genuine issues of material fact to be litigated, and the movant is entitled to judgment as a matter of law.<sup>4</sup> When parties file cross-motions for summary judgment, which is what happened here, they agree that there are no disputes as to the facts of the case and that summary judgment is an appropriate means of resolving the dispute.<sup>5</sup> Thus, we simply determine whether Brandi Greer or, alternatively, the

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<sup>3</sup> Brandi Greer did not cross-appeal any of the rulings made by the circuit court.

<sup>4</sup> See Ark. R. Civ. P. 56(c)(2); see also *Boyle Ventures, LLC v. City of Fayetteville*, 2025 Ark. 71, at 4, 711 S.W.3d 280, 283; *Cherokee Nation Bus., LLC v. Gulfside Casino P’ship*, 2023 Ark. 153, at 4, 676 S.W.3d 368, 371.

<sup>5</sup> *Cherokee Nation Bus., LLC*, 2023 Ark. 153, at 5, 676 S.W.3d at 371–72.

appellants were entitled to judgment as a matter of law.<sup>6</sup> As always, we review summary judgment *de novo*.<sup>7</sup>

### III. *Discussion*

#### A. The Circuit Court Erred in Granting Summary Judgment on Greer’s Federal Rehabilitation Act Claim

Greer alleges that the District retaliated against her (i.e., prohibited her from serving as a substitute teacher), in violation of § 504 of the Rehabilitation Act, after she complained about disability-related discrimination involving her child. Greer’s § 504 retaliation theory fails at the threshold. The claim she presses is an employment-retaliation claim, and Congress has made plain that such claims under § 504 are governed by the standards applicable to Title I of the Americans with Disabilities Act.<sup>8</sup> Those standards presuppose an employer–employee relationship. Because no such relationship existed here between Greer and the District, the claim cannot proceed.

Section 504(a) broadly prohibits disability-based discrimination in federally funded programs.<sup>9</sup> But

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<sup>6</sup> *Id.* at 5, 676 S.W.3d at 371.

<sup>7</sup> *Corbitt v. Ark. State Univ.*, 2024 Ark. 44, at 3, 685 S.W.3d 901, 903; *Cherokee Nation Bus., LLC*, 2023 Ark. 153, at 5, 676 S.W.3d at 372.

<sup>8</sup> We assume without deciding that Congress’s decision to incorporate these Title I ADA standards means it has decided to incorporate its claims as well. But that threshold issue is far from clear.

<sup>9</sup> “No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or

Congress drew a critical distinction when the alleged discrimination is employment-based, as is the case here. Section 504(d) provides that “[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination ... shall be the standards applied under title I of the Americans with Disabilities Act.<sup>10</sup> Title I, in turn, regulates discrimination by employers against employees.<sup>11</sup> By expressly incorporating Title I’s standards, Congress tethered § 504 employment claims—including retaliation claims arising from employment—to the same threshold requirement: an employment relationship between the plaintiff and the defendant. If that relationship is absent, the claim fails at the outset.

Federal courts have repeatedly treated the ADA and the Rehabilitation Act as materially alike in this respect.<sup>12</sup> Because Title I of the ADA protects employees—not independent contractors or other

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be subjected to discrimination under any program or activity receiving Federal financial assistance[.]” 29 U.S.C. § 794(a).

<sup>10</sup> “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 to 12204 and 12210), *as such sections relate to employment.*” 29 U.S.C. § 794(d).

<sup>11</sup> See 42 U.S.C. § 12112(a).

<sup>12</sup> The Eighth Circuit Court of Appeals has explained that the same standards that apply to the Americans with Disabilities Act of 1990 (hereinafter, “ADA”) are to be used when analyzing claims under § 504. See *Hill v. Walker*, 737 F.3d 1209 (8th Cir. 2013); *Wojewski v. Rapid City Reg’l Hosp., Inc.*, 450 F.3d 338 (8th Cir. 2006).

nonemployees—courts applying § 504(d) have required the same employment relationship.<sup>13</sup> The Eighth Circuit’s decision in *Wojewski v. Rapid City Regional Hospital, Inc.*, 450 F.3d 338 (8th Cir. 2006) is directly on point. There, a physician whose hospital privileges were revoked sued under both Title I of the ADA and the Rehabilitation Act. The court held that his claims failed because he was not an employee but an independent contractor. Emphasizing the parallel structure of the statutes, the court concluded that, “[g]iven the similarity between Title I and the Rehabilitation Act, absent authority to the contrary, we construe both to apply to an employee-employer relationship” and declined to extend coverage to independent contractors.<sup>14</sup> Other courts have reached the same conclusion, reasoning that § 504’s incorporation of ADA employment standards necessarily imports Title I’s employee-status requirement.<sup>15</sup>

Greer urges a broader reading and points to decisions from other circuits that have allowed certain nonemployees to pursue § 504 discrimination claims.<sup>16</sup> But that approach cannot be squared with the statute’s text. Section 504(d) does not merely suggest that ADA principles may be informative; it commands that the standards used to determine violations in employment-discrimination complaints

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<sup>13</sup> *Wojewski*, 450 F.3d at 344–45.

<sup>14</sup> *Id.* at 345.

<sup>15</sup> See *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999).

<sup>16</sup> The circuit court relied on *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016) in making its decision on the Rehabilitation Act retaliation claim below. We note that *Flynn* didn’t involve a retaliation claim under the Act. Instead, the claim there was purely a discrimination claim.

“shall be” those applied under Title I. Congress thus made a deliberate choice to channel § 504 employment claims through the ADA’s employment framework. And that framework regulates discrimination by employers against employees. Had Congress wished to extend § 504’s employment-retaliation protections to independent contractors or other nonemployees, it could have said so. It did not.

The undisputed record confirms that Greer was not the District’s employee. She was hired, paid, and managed by Kelly Services, Inc., a third-party staffing company that supplied substitute teachers to the District. Greer applied to Kelly Services, interviewed with that company, passed its background check, and received assignments through its system. She could accept substitute assignments in multiple districts served by Kelly Services and was paid solely by that company. The circuit court expressly found that Greer was an employee of Kelly Services—not of the District. No party disputes that finding.

Even so, the circuit court allowed Greer’s § 504 employment-retaliation claim to proceed against the District. That ruling cannot be reconciled with § 504(d)’s text or with our on-point federal precedent. Because § 504 employment claims incorporate Title I standards, and because Title I requires an employer–employee relationship between the plaintiff and the defendant, Greer cannot maintain an employment-retaliation claim against a non-employer. The circuit court therefore erred in granting summary judgment in her favor on this theory. We reverse and enter judgment for the appellants.

### B. Section 1983 and ACRA Claims

Next, we turn to Greer's federal and Arkansas Civil Rights Act Claims. On remand, the circuit court entered an order that, in effect, dismissed the federal § 1983 individual-capacity claims against Ms. Bacon and Ms. Gattis on qualified-immunity grounds.<sup>17</sup> The court also reaffirmed its ruling that both are immune from liability on the ACRA individual-capacity claims except to the extent of any applicable insurance coverage. What remains, then, are (1) the § 1983 and ACRA official capacity claims against the District and (2) the ACRA individual capacity claims against Bacon and Gattis.

*i. The circuit court erred in granting summary judgment in favor of Greer on her § 1983 and ACRA official-capacity claims*

Section 1983 creates a private cause of action against a person acting under color of state law who deprives another of rights secured by the Constitution or federal law.<sup>18</sup> It does not create substantive rights; it provides a vehicle for enforcing rights found elsewhere. To prevail, a plaintiff must show that a state actor violated a right guaranteed by the U.S. Constitution or a federal statute.<sup>19</sup>

The Arkansas Civil Rights Act operates in parallel. It authorizes suits for violations of rights secured by the Arkansas Constitution, and courts interpret it

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<sup>17</sup> Greer did not file a cross-appeal challenging the dismissal of her federal § 1983 individual capacity claims and so that ruling is not before us.

<sup>18</sup> See 42 U.S.C. § 1983.

<sup>19</sup> See, e.g., *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999).

in light of federal § 1983 precedent.<sup>20</sup> Thus, the same defects that defeat Greer’s official-capacity § 1983 claim defeat her official-capacity ACRA claim as well.

Greer sued District officials in their official capacities. Such claims are, in substance, claims against the District itself. Official-capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.”<sup>21</sup> A governmental entity, however, is not liable under § 1983 or the ACRA on a respondeat superior theory.<sup>22</sup> Liability attaches only when the alleged constitutional violation was caused by an official policy, custom, or usage of the entity.<sup>23</sup>

A custom or usage, for purposes of § 1983 or the ACRA, is demonstrated by (1) a continuing, widespread, and persistent pattern of unconstitutional conduct by the government entity’s employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity’s policy-making officials after notice to the officials of that misconduct; (3) the plaintiff’s injury by acts pursuant to the governmental entity’s custom, i.e., proof that the custom was the moving force behind the constitutional violation.<sup>24</sup> This court has recognized that isolated incidents of misconduct by government

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<sup>20</sup> Ark. Code Ann. § 16-123-105(a) (Repl. 2016); *Harmon v. Payne*, 2020 Ark. 17, 592 S.W.3d 619.

<sup>21</sup> *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

<sup>22</sup> *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

<sup>23</sup> *Repink v. Lokey*, 2010 Ark. at 6; 377 S.W.3d at 217 (quoting *Ware v. Jackson County, Mo.*, 150 F.3d 873 (8th Cir. 1998)).

<sup>24</sup> *Id.*

employees are insufficient to establish governmental policy or custom.<sup>25</sup> Local governments are not liable simply because an employee acts in a way that deprives the constitutional rights of another. Local governments can be liable under § 1983 or the ACRA only when their official policies and customs cause their employees to violate another person's constitutional rights.<sup>26</sup>

Greer neither pled nor proved the existence of any District policy or custom that caused a constitutional deprivation. She identified no written policy excluding substitutes for filing complaints and offered no evidence of a widespread pattern of similar conduct. Nor did she show that a final policymaker caused or ratified the alleged actions. Under Arkansas law, the school board—not individual administrators—is the District's final policymaker.<sup>27</sup> The record contains no allegation or proof that the Board authorized, directed, or even knew of the decision at issue.

The circuit court nonetheless imposed official-capacity liability based solely on the conduct of District employees. That is precisely what *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978) forbids. Because Greer failed to establish that any District policy, custom, or final-policymaker decision caused a constitutional violation, summary judgment in her favor on the § 1983 and ACRA official-capacity claims was error. We reverse and enter judgment for the appellants.

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<sup>25</sup> *Id.*

<sup>26</sup> See *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

<sup>27</sup> Ark. Code Ann. § 6-13-620 (Repl. 2010).

ii. *The circuit court erred in granting summary judgment in favor of Greer on her individual-capacity ACRA claim*

Greer's individual-capacity claim fails under the Arkansas Civil Rights Act because she did not establish the elements of a First Amendment retaliation claim. The ACRA provides a cause of action for deprivations of rights secured by the Arkansas Constitution, and courts construing the statute are guided by federal § 1983 precedent.<sup>28</sup>

Generally, to prevail on a free-speech retaliation claim, a plaintiff must show that (1) she engaged in constitutionally protected speech; (2) the defendant took an adverse action that would deter a person of ordinary firmness from exercising that right; and (3) the protected speech was a substantial or motivating factor in the adverse action.<sup>29</sup> When the alleged retaliation arises in a government employment or contractor relationship, however, the court must first determine whether the speech is constitutionally protected under the *Pickering-Connick* framework.

Put simply, in government-employment and contractor cases, the *Pickering-Connick* inquiry determines whether the plaintiff engaged in constitutionally protected speech at all; only if that threshold is met does the court proceed to the ordinary retaliation elements.

Government contractors, like employees, may bring First Amendment retaliation claims against

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<sup>28</sup> Ark. Code Ann. § 16-123-105(a), (c) (Repl. 2016); *see also Smith v. Britt*, 363 Ark. 126, 132, 211 S.W.3d 485, 490 (2005).

<sup>29</sup> *Bennie v. Munn*, 822 F.3d 392, 397 (8th Cir. 2016); *Naucke v. City of Park Hills*, 284 F.3d 923, 927 (8th Cir. 2002).

the government.<sup>30</sup> But such claims require the plaintiff to show: (1) she was speaking as a private citizen, rather than pursuant to her official duties; (2) her speech involved a matter of public concern, and (3) her interest in commenting on the matter outweighed the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>31</sup> If the speech does not involve a matter of public concern, the First Amendment does not protect it, and the claim fails at the threshold.<sup>32</sup>

The circuit court declined to apply the *Pickering-Connick* framework on the ground that Greer was not a District employee. That was error. Independent contractors who perform government work are subject to the same First Amendment analysis as public employees. As the Eighth Circuit has explained, for free-speech retaliation claims, “the same framework and analysis apply to government contractors as to government employees.”<sup>33</sup> This case fits squarely within that category. The alleged retaliation—Greer’s inability to obtain substitute-teaching assignments from the District—arose from her role as a government contractor, not from her

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<sup>30</sup> *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 684–85 (1996); *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996); see also *Heritage Constructors, Inc. v. City of Greenwood*, 545 F.3d 599, 602–03 (8th Cir. 2008).

<sup>31</sup> *Hicks v. Benton Cnty. Bd. of Educ.*, 222 F. Supp. 3d 613, 627 (W.D. Tenn. 2016); see also *Connick v. Myers*, 461 U.S. 138, 146–47 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>32</sup> *Connick*, 461 U.S. at 147.

<sup>33</sup> *Heritage Constructors, Inc. v. City of Greenwood*, 545 F.3d 599, 602 (8th Cir. 2008).

status as a private citizen. When the claimed injury is tied to a government contracting relationship, the *Pickering-Connick* framework governs.

Under that framework, Greer’s ethics complaint was not protected speech. Whether speech addresses a matter of public concern depends on its content, form, and context.<sup>34</sup> Speech driven by a personal grievance—even if touching on matters of public interest—is generally not protected.<sup>35</sup> Greer’s complaint alleged mistreatment of her own child and demanded redress for him alone. It did not purport to expose systemic wrongdoing or advocate on behalf of other students. Courts consistently hold that advocacy on behalf of a single student is a private matter, not speech on a matter of public concern.<sup>36</sup> The circuit court’s conclusion that the complaint implicated a public interest conflated the subject matter with the speaker’s purpose. In this context, the First Amendment protects speech intended to inform the public, not speech aimed solely at resolving a private dispute. Because Greer’s complaint advanced only her personal interests, it was not constitutionally protected within the scope of our analysis here.

Because Greer failed to establish that her speech was protected (i.e., a nonprivate matter of public concern), her ACRA individual-capacity claims against Bacon and Gattis cannot survive as a matter of law. The circuit court’s grant of summary judg-

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<sup>34</sup> *De Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002).

<sup>35</sup> *Id.*

<sup>36</sup> See *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009); *Hicks v. Benton Cnty. Bd. of Educ.*, 222 F. Supp. 3d 613 (W.D. Tenn. 2016).

ment in Greer's favor on those claims is reversed, and judgment is entered for the appellants

iii. *The circuit court erred in granting Greer a permanent injunction*

Because Greer's substantive claims fail as a matter of law, the permanent injunction cannot stand. An injunction is a remedy, not a freestanding cause of action. Without a valid underlying violation, there is nothing to enjoin. Accordingly, because we reverse the summary-judgment rulings, we also vacate the order granting the injunction.

IV. *Conclusion*

Because Greer's claims fail as a matter of law, we reverse the circuit court's summary-judgment rulings. We likewise reverse the jury's award of damages and vacate the circuit court's order granting a permanent injunction. We remand for entry of judgment in favor of appellants consistent with this opinion.

Reversed and remanded.

Baker, C.J., and Hudson, J., concur in part and dissent in part.

Courtney Rae Hudson, Justice, concurring in part and dissenting in part.

I agree with the majority that the circuit court erred in granting summary judgment in favor of appellee Brandi Greer on her § 1983 and official-capacity Arkansas Civil Rights Act (ACRA) claims. I would also reverse the grant of permanent injunctive relief as explained below. However, I would affirm

the circuit court's grant of summary judgment on the remaining claims. Accordingly, I concur in part and dissent in part.

Appellants contend that Greer cannot assert a claim under the Rehabilitation Act of 1973 because the District was not her employer. No such employment relationship is required. Section 504 of the Rehabilitation Act broadly prohibits disability-based discrimination in federally funded programs:

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from 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). Nothing in this provision limits relief to the employment context. Another subsection provides as follows:

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 to 12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794(d). Clearly, subsection (d) relates to employment-discrimination allegations and provides that the standards of certain parts of the Americans with Disabilities Act of 1990 (ADA) are applicable to

the Rehabilitation Act as such sections apply to employment. This is far from a wholesale incorporation of the ADA for all purposes.

I would follow the well-reasoned decisions of the Courts of Appeal for the Fifth, Ninth, and Tenth Circuits and hold 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. *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016); *Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938 (9th Cir. 2009); *Schrader v. Fred A. Ray, M.D., P.C.*, 296 F.3d 968 (10th Cir. 2002). As the Ninth Circuit has explained, to reduce the express scope of the Rehabilitation Act by wholesale adoption of the ADA, "we would have to conclude that Congress narrowed the Rehabilitation Act by adopting the ADA. That conclusion contradicts the plain import of those acts, and we decline to go down that road without a clearer indication that Congress wanted us to." *Fleming*, 587 F.3d at 944. I would reject appellants' argument that an employment relationship is required to state a claim under the Rehabilitation Act.

In addition, appellants argue that Greer failed to show an adverse employment action under the Rehabilitation Act. As explained above, an employment relationship is not required under section 504 of the Rehabilitation Act. Here, there is no dispute that Greer was barred from working in the District because of her ethics complaint to the Arkansas Department of Education. Greer's inability to continue working at the same school her children attended was materially adverse to her, in that she sought to have the same schedule as her children and to avoid

paying for childcare, as was the resulting loss in pay. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) (recognizing that a change in schedule may make little difference to many workers, but may matter enormously to a mother with school-age children). In my view, Greer stated a claim under the Rehabilitation Act, the material facts were undisputed, and she was entitled to judgment as a matter of law. Appellants have failed to make a convincing argument for reversal on this point, and therefore I would affirm.

I would also affirm the grant of summary judgment in favor of Greer on her individual-capacity ACRA claim. Appellants argue that Greer was neither an employee nor an independent contractor of the District; rather, she was an employee of a third party who is nonetheless subject to the test set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and further developed in *Connick v. Myers*, 461 U.S. 138 (1983), for her free-speech retaliation claim. Accepting that the *Pickering* analysis applies, Greer was required to show that (1) she was speaking as a private citizen, rather than pursuant to her official duties; (2) her speech involved a matter of public concern, and (3) her interest in commenting on the matter outweighed the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. The majority holds that the ethics complaint Greer lodged with the Arkansas Department of Education's Professional Licensure Standards Board was not protected speech because it did not involve a matter of public concern. I disagree. Greer acted as a private citizen seeking to expose matters affecting

the public interest when she filed the ethics complaint against her son's public school teacher. It is significant that Greer made the ethics complaint after her son had been removed from that teacher's class, indicating a desire to protect other students from undergoing a similar experience.

Although there was clearly an element of personal interest involved, the public always has an interest in whether a public employee—here, a school teacher—is acting unethically in the performance of his or her job. The speech or petitioning at issue need not be exclusively a matter of public concern to satisfy *Pickering*. *E.g.*, *Connick*, 461 U.S. at 149 (“Because one of the questions in [the plaintiff’s] survey touched upon a matter of public concern, and contributed to her discharge we must determine whether Connick was justified in discharging [the plaintiff].”) (emphasis added); *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (“[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”). Greer’s complaint was not that of a personal workplace grievance but one emanating from concern over a teacher’s alleged disability discrimination and mistreatment of her son. In my view, the ethics complaint constituted speech over a matter of public concern. Further, the circuit court noted a “lack of any articulable non-discriminatory reason for the directive keeping [Greer] from substitute teaching in the entire school district.”

Because Greer’s claim may move forward under *Pickering*, I would address the analysis employed by the circuit court. To establish a First Amendment

retaliation claim, the plaintiff must show (1) she engaged in a protected activity, (2) the government official took adverse action against her that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity. *See Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004). As the circuit court correctly held, these elements were met in this case. I would affirm on this point.

Finally, Greer is not entitled to permanent injunctive relief. Irreparable harm is “the touchstone of injunctive relief.” *Bentonville Sch. Dist. v. Sitton*, 2022 Ark. 80, at 13–14, 643 S.W.3d 763, 772 (citing *Thurston v. Safe Surgery Ark.*, 2021 Ark. 55, at 19, 619 S.W.3d 1, 13). Further, harm is normally considered irreparable only when it cannot be adequately compensated by money damages or redressed in a court of law. *Id.* Loss of income and damage to one’s reputation are not the type of irreparable harm that can justify injunctive relief because even a wrongful and illegal loss of employment can be fully compensated by money damages. *See Doe v. Ark. Dep’t of Hum. Servs.*, 357 Ark. 413, 182 S.W.3d 107 (2004) (loss of ability to work was not irreparable harm, and thus, employees were not entitled to preliminary injunction); *see also Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980) (a physician who lost a six-figure salary when his employment contract with a hospital was terminated was not entitled to temporary injunctive relief, even if his reputation was damaged and he was forced to relocate to find suitable employment, because the harm he suffered could be compensated by money damages); *Minnesota*

*Ass'n of Nurse Anesthetists v. Unity Hosp.*, 59 F.3d 80, 83 (8th Cir. 1995) (holding that the loss of a job is “quintessentially reparable by money damages”). Accordingly, I would reverse the circuit court’s grant of injunctive relief.

I respectfully concur in part and dissent in part.

Baker, C.J., joins.

**APPENDIX B**

Supreme Court of Arkansas

BENTON SCHOOL DISTRICT; Lori Bacon, in Her Individual and Official Capacity; and Lita Gattis, in Her Individual and Official Capacity, Appellants

v.

Brandi GREER, Appellee

No. CV-22-143

Opinion Delivered: November 9, 2023

Affirmed in part, reversed in part, and remanded in part; motion to dismiss appeal denied.

Womack, J., filed concurring opinion in which Webb, JJ., joined.

APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. 63CV-20-522], HONORABLE BRENT DILLON HOUSTON, JUDGE

RHONDA K. WOOD, Associate Justice

This interlocutory appeal reaches us after the circuit court denied, in part, two school-district employees’ motion for summary judgment for qualified immunity. The immunity at issue comes from an Arkansas statute, Ark. Code Ann. § 21-9-301 (Repl. 2022). This statute provides immunity from both suit and liability for certain officials “except to the extent that they may be covered by liability insurance.” *Id.* § 21-9-301(a). The circuit court ruled that this statute applied to both a federal claim under 42 U.S.C. § 1983 and a state claim under the Arkansas Civil Rights Act. We hold this immunity statute does not apply to a federal § 1983 cause of action. But we hold

it does apply to the claims brought under the Arkansas Civil Rights Act.

### I. *Factual Background*

The underlying lawsuit stems from a complaint filed by Brandi Greer against the Benton School District, Lori Bacon (a principal in the district), and Lita Gattis (an assistant superintendent). The complaint lodged several causes of action against these defendants. The federal claims were under 42 U.S.C. § 1983 and the Rehabilitation Act of 1973. The state claims were under the Arkansas Civil Rights Act, Ark. Code Ann. §§ 16-123-101 et seq. (Repl. 2016 & Supp. 2023). Bacon and Gattis were sued in both their individual and official capacities. We are reviewing only the partial denial of immunity on the claims against Bacon and Gattis as individuals.

The circuit court's order on summary judgment recited the relevant undisputed facts. Brandi Greer had been a substitute teacher at Angie Grant Elementary School, working through Kelly Services USA, LLC, a temporary agency. Greer's child also attended this school. Greer claimed another teacher at the school had mistreated her child, who has a form of attention deficit hyperactivity disorder. Greer eventually removed her child from Angie Grant Elementary and then filed an ethics complaint with the Arkansas Department of Education against her child's teacher.<sup>37</sup> Because of this ethics report, Bacon told Kelly Services that Greer could no longer work at Angie Grant Elementary. Then Lita Gattis,

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<sup>37</sup> This complaint was deemed unfounded.

the assistant superintendent, told Kelly Services that Greer could no longer work in the district at all.

The court's summary-judgment order then addressed liability. The court concluded all defendants—the district, Gattis, and Bacon—were liable under § 1983 and the Arkansas Civil Rights Act for violating Greer's rights to free speech and to petition the government under the First Amendment.<sup>38</sup> The court then addressed a motion asking that Bacon and Gattis be given qualified immunity in their individual capacities. The court granted the motion in part and denied the motion in part. The court reasoned that Bacon and Gattis were entitled to individual-capacity qualified immunity; even so, the court concluded that, under Ark. Code Ann. § 21-9-301, this immunity would not apply to the extent the defendants were covered by liability insurance.

Gattis and Bacon now appeal from the court's partial denial of their motion for qualified immunity. They assert this is an appeal from "an order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official." Ark. R. App. P.–Civ. 2(a)(10). To begin, we must decide whether we have appellate jurisdiction.

Greer filed a motion to dismiss the appeal arguing that Bacon and Gattis cannot appeal because the circuit court *granted* their motion for qualified immunity. But that's not how the court's order reads. The order states that the immunity "request is ... granted in part and *denied in part*." (Emphasis added.) Ba-

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<sup>38</sup> The court also found liability under the federal Rehabilitation Act, but that claim is not at issue on appeal.

con and Gattis challenge only the partial denial on appeal—that is, they limit their argument to whether they are subject to suit to the extent covered by insurance.<sup>39</sup> Should we agree with their argument on appeal, they could be dismissed from the lawsuit and no longer face trial on the question of damages. This is precisely the reason a party can appeal on an interlocutory basis a ruling denying entitlement to immunity. *See Ark. State Claims Comm’n v. Duit Constr. Co.*, 2014 Ark. 432, at 5, 445 S.W.3d 496, 501. We accordingly deny Greer’s motion to dismiss the appeal.

Greer also filed a partial motion to dismiss her own federal section 1983 claims against Bacon and Gattis in their individual capacities. But we lack jurisdiction beyond determining whether the circuit court erred in denying summary judgment on immunity. *City of Malvern v. Jenkins*, 2013 Ark. 24, at 6, 425 S.W.3d 711, 715. Accordingly, we dismiss Greer’s motion for partial dismissal of her section 1983 claims.

## II. *Law and Analysis*

### A. Section 1983 Claims

The first issue involves the circuit court’s ruling on the section 1983 claims against Bacon and Gattis

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<sup>39</sup> On appeal, the parties have not contested the existence of insurance or whether it would cover any imposed liability. Those issues are not before us. Nor do we address the merits of the remainder of the court’s rulings on summary judgment or its findings on the granting, in part, of qualified immunity to Bacon and Gattis. The sole question before the court is whether Ark. Code Ann. § 21-9-301 should apply to Greer’s section 1983 and Arkansas Civil Rights claims.

in their individual capacities. Citing state law, the court granted Bacon and Gattis's motion for summary judgment on qualified immunity but ruled that their motion was limited to the extent that they may be covered by liability insurance. The circuit court appears to have concluded that the state-law statutory immunity contained in Ark. Code Ann. § 21-9-301 limited appellants' qualified immunity under federal law, making them subject to suit even though any liability would be covered by insurance.

We review this issue *de novo* because entitlement to immunity from suit is a purely legal question. *City of Fayetteville v. Romine*, 373 Ark. 318, 321, 284 S.W.3d 10, 13 (2008). We have adopted the United States Supreme Court's test for qualified immunity from lawsuits based on section 1983. *Robinson v. Langdon*, 333 Ark. 662, 671, 970 S.W.2d 292, 296 (1998) (citing *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987)). We are guided by federal courts in this area of law. *Romine*, 373 Ark. at 322, 284 S.W.3d at 13.

One case from the United States Supreme Court is instructive. See *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). In *Howlett*, a Florida appellate court had ruled that the state's sovereign immunity protected a school board from being sued under section 1983 in state court. *Id.* at 360, 110 S.Ct. 2430. The *Howlett* court reversed this decision. It concluded the supremacy clause barred a state-law rule "that governmental entities subject to § 1983 liability enjoy an immunity over and above those already provided in § 1983." See *id.* at 375, 110 S.Ct. 2430. And, the court held, "[t]he elements of, and the defenses to, a federal cause of action are de-

fined by federal law.” *Id.* (emphasis added). *Howlett* suggests that federal claims filed in state court are subject to federal defenses. We decline to depart from *Howlett*’s federal-defense holding for this federal action.

Thus, Ark. Code Ann. § 21-9-301 does not impact a claim brought under section 1983. Section 1983 establishes a federal cause of action that can be filed in either state or federal court. *Newton v. Etoch*, 332 Ark. 325, 334, 965 S.W.2d 96, 100 (1998). “As such, it is the supreme law of the land, and any state claim of immunity must yield to it.” *Id.* We have before “recognized [that] immunity under state law is not dispositive of a § 1983 claim against state actors in their individual capacities, despite being brought in state court.” *Early v. Crockett*, 2014 Ark. 278, at 10 n.5, 436 S.W.3d 141, 14 n.5.

We therefore reverse and remand the ruling denying in part the request by Bacon and Gattis for qualified immunity against the section 1983 claims. Arkansas Code Annotated section 21-9-301 does not apply to these federal claims. On remand, the court should confine its ruling exclusively to the federal doctrine of qualified immunity and without reference to Ark. Code Ann. § 21-9-301.

#### B. Arkansas Civil Rights Claim

The second issue involves the claims under the Arkansas Civil Rights Act. Appellants argue that Ark. Code Ann. § 21-9-301 should not apply to these claims because it covers only “typical torts,” and to do so would make bad public policy. Thus, they ask us to provide them with the fuller protection of federal qualified immunity, which protects them both

from liability and from suit without an insurance exception.

The statutory language in Ark. Code Ann. § 21-9-301 has gone through several changes since its inception. While the law started with immunity from tort claims, it was later expanded to encompass immunity from “suit” in general. The legislature first enacted immunity for political subdivisions through Act 165 of 1969. This Act provided immunity from liability for damages and provided that no tort action would lie against municipal corporations, counties, school districts, and other political subdivisions of the State:

It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees.

Act 165 of 1969, § 1.

The legislature expanded this immunity in 1991 with Act 542. While retaining the language that “no tort action shall lie,” it also added an additional “immunity from suit.” Here is the relevant language:

[S]chool districts ... shall be immune from liability *and suit* for damages. No tort action shall lie against any such political subdivision because of the acts of their agents and employees.

Act 542 of 1991, § 7 (emphasis added). Then, in 1993, the legislature carved out an exception to this immunity from liability and suit “except to the extent

... covered by liability insurance.” Act 292 of 1993, § 2.

Today, these Acts are codified at Ark. Code Ann. § 21-9-301, which now reads as follows:

Tort liability—Immunity declared

(a) It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, law enforcement agencies for and certified law enforcement officers employed by a public or private institution of higher education, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies *shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.*

(b) No tort action shall lie against any such political subdivision because of the acts of its agents and employees.

(Emphasis added.)

The statute’s progression, therefore, encompassed three movements. The first movement was the 1969 Act, which provided immunity from liability. The second movement was the broader 1991 Act, which provided immunity from liability and suit. The third movement was the 1993 Act, which retained immunity from liability and suit “except to the extent ... covered by liability insurance.”

Greer disputes this understanding of the statute, pointing to its heading, which reads “Tort liability—Immunity declared.” She maintains that the immu-

ity was meant to cover typical torts rather than civil-rights claims. But the language does not have this limitation, and civil rights violations are considered a type of tort. And the 1991 Act encompassed a broader range of immunity beyond torts. Other sections of this Act provided immunity from suit for those reporting adult maltreatment, reporting child drug abuse, reporting child maltreatment, and providing information about child-support enforcement. *See* Act 542 of 1991, §§ 1–4.

And the plain text of the statute does not indicate that claims arising under the Arkansas Civil Rights Act fall outside this statute’s ambit. While the heading can sometimes shed light on a statute’s meaning, it “should never be allowed to override the plain words of a text.” Antonin Scalia & Bryan A. Garner, *Reading Law* 221 (2012). Here, the plain words of the statute apply to a suit for damages, like the one brought by Greer under the Arkansas Civil Rights Act.

Finally, we have looked to and applied section 301 as the basis for qualified immunity for claims brought under the Arkansas Civil Rights Act. *See, e.g., Graham v. Cawthorn*, 2013 Ark. 160, at 17, 427 S.W.3d 34, 46 (finding qualified immunity under section 301 for claim against city police officer); *City of Farmington v. Smith*, 366 Ark. 473, 480, 237 S.W.3d 1, 6 (2006) (finding no qualified immunity under section 301 because the official violated clearly established law); *Smith v. Brt*, 363 Ark. 126, 132, 211 S.W.3d 485, 490 (2005) (affirming a finding of qualified immunity under section 301 from claim against city official). These cases show that this court has consistently applied section 21-9-301 as the basis for

qualified immunity to civil-rights claims rooted in state law. We would be effectively overruling these cases were we to now hold the statute was inapplicable to claims under the Arkansas Civil Rights Act.

Appellants also maintain such a reading of the statute makes bad public policy. They argue it requires employees with liability insurance to defend themselves in court while allowing those without insurance to reap the full benefits of the immunity. But this court cannot rewrite legislation that may have unintended real-world results. The General Assembly sets policy for the state, not this court. *Shelter Mut. Ins. Co. v. Lovelace*, 2020 Ark. 93, at 9, 594 S.W.3d 84, 88. Should the General Assembly decide to alter the immunity structure for municipalities and school districts, it can amend the statute. As discussed, it has not held back from reconsidering immunity in the past.

We affirm the circuit court's ruling that section 21-9-301 immunity, subject to the insurance exception, applies to claims arising under the Arkansas Civil Rights Act.

Affirmed in part; reversed and remanded in part; motion to dismiss appeal denied; motion for partial dismissal dismissed.

Womack and Webb, JJ., concur.

Shawn A. Womack, Justice, concurring.

I agree with the majority in reversing and remanding as to the 42 U.S.C. § 1983 claim. Likewise, I agree it is proper to deny Appellee's motion to dismiss the appeal and her partial motion to dismiss her federal § 1983 claim. Finally, I also agree with

the majority that the circuit court's order should be affirmed as to the Arkansas Civil Rights Act claim. Yet, I write separately because I take issue with the majority's characterization of Ark. Code Ann. § 21-9-301. Contrary to the majority's assertion, Ark. Code Ann. § 21-9-301 does not grant political subdivisions "immunity from 'suit' in general." The majority over-emphasizes the language from subsection (a) of the relevant statute and effectively reads it in isolation to reach such a conclusion. When the statute is read in its entirety, including the title and subsection (b), it is clear from the plain text that political subdivisions are only entitled to statutory immunity from tort claims. The title reads "Tort liability—Immunity Declared." Subsection (b) provides in part, "No tort action shall lie ...." Thus, the majority's claim that § 21-9-301 grants political subdivisions immunity from suit in general, rather than immunity from suit sounding in tort, is at clear odds with a plain reading of the statute.

Although this court has held in the past that Ark. Code Ann. § 21-9-301 provides political subdivisions immunity from claims under the Arkansas Civil Rights Act, it has never provided any articulable reason for doing so.<sup>1</sup> It has not reasoned that Arkansas Civil Rights claims are tort claims, nor has it stated that § 21-9-301 provides political subdivisions immunity from suit in general. Instead, this court has merely cited § 21-9-301 as the basis for a political subdivision's or its employees' immunity. Thus,

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<sup>1</sup> To support its proposition, the majority cites *Graham v. Cawthorn*, 2013 Ark. 160, 427 S.W.3d 34; *City of Farmington v. Smith*, 366 Ark. 473, 237 S.W.3d 1 (2006); and *Smith v. Brt*, 363 Ark. 126, 211 S.W.3d 485 (2005).

the majority's reliance on these cases to support its characterization of the relevant statute as providing immunity from suit in general is unavailing. As it is written, § 21-9-301 does not provide general immunity from suit. Should the General Assembly wish to provide general immunity from suit, rather than immunity from tort claims, it can amend the statute. Nevertheless, because civil rights claims are considered a type of tort, the circuit court's order should be affirmed on this issue.<sup>2</sup>

For these reasons, I cannot join the majority's opinion in full.

I respectfully concur.

Webb, J., joins.

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<sup>2</sup> The Supreme Court of the United States has repeatedly explained that civil rights suits are analogous to personal injury tort actions. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987); *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

**APPENDIX C**

IN THE CIRCUIT COURT OF  
SALINE COUNTY ARKANSAS  
CIVIL DIVISION

BRANDI GREER PLAINTIFF  
VS.

BENTON SCHOOL DISTRICT;  
LORI BACON, in her Individual  
and Official Capacity; and  
LITA GATTIS, in her Individual  
And Official Capacity DEFENDANTS

CASE NO. 63CV-20-522-3

Filed 2021-Nov-22

ORDER GRANTING PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AS TO LIABILITY  
AGAINST THE BENTON SCHOOL DISTRICT,  
LORI BACON AND LITA GATTIS IN BOTH THEIR  
OFFICIAL AND INDIVIDUAL CAPACITIES  
AND  
GRANTING IN PART AND DENYING IN PART  
THE DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT WITH RESPECT TO THE QUALI-  
FIED IMMUNITY OF SEPARATE DEFENDANTS  
LORI BACON AND LITA GATTIS

Now on this the 1st day of November 2021 comes on for hearing the Plaintiffs Motion for Summary Judgment along with the Defendants' Counter Motion for Summary Judgment in the above captioned matter; the Plaintiff being represented by attorney Lucien Gillham and the Defendant being represented by attorney Jennifer Williams Flinn; and after all

things considered, the Court does find and order as follows, to-wit:

1. This Court has jurisdiction over the parties and subject matter and venue is proper.

2. The Plaintiff has brought this cause of action seeking damages pursuant to 42 U.S.C. §1983 (§1983); A.C.A. §16-123-105 commonly known as the Arkansas Civil Rights Act (ACRA); and the Rehabilitation Act for violating certain of her rights contained therein.

3. Based upon the pleading, motions, briefs and the various exhibits filed in support of these motions, the Court finds there is not a material question of fact in this case with respect to the issues raised in the motions for summary judgment.

4. With respect to the facts of the case, the Plaintiff in 2018 was the mother of a student who had attended Angie Grant Elementary within the Benton School District (District). At the times relevant herein, the Plaintiff also worked as a substitute teacher for the District through Kelly Services USA, LLC (Kelly Services) which is a temporary agency which as a part of its services provides substitute teachers to numerous school districts in the state.

5. During the 2017-2018 school year, the Plaintiff had expressed issues to separate defendant Lori Bacon (Ms. Bacon), who was the principal at Angie Grant Elementary, concerning how her son, who has either ADHD or ADD, was being treated by his teacher, who shall be referred to herein as the Angie Grant School Teacher (AGST) who is not a party to these proceedings. These issues pertained to migraines, reflux and needing to use Tums. In addition,

the Plaintiff complained about AGST's treatment of her son. One example being that the Plaintiff complained about AGST stating to her that she was tired of her son's behavior being excused by medication. The child was eventually taken out of AGST's class by the Plaintiff. Prior to the time of the issues with AGST, there had not been any behavioral issues with the child according to Lori Bacon, principal at Angie Grant (Ms. Bacon).

6. After the child had been removed from AGST's class by the Plaintiff, the Plaintiff filed a Code of Ethics Complaint with the Arkansas Department of Education's Professional Licensure Standards Board (Ethics Board) against AGST. The ethics complaint contained various allegations of mistreatment by AGST which included complaints pertaining to the child's diagnosis of either ADHD or ADD which is defined as a disability under the Americans with Disabilities Act (ADA). While other issues are raised within the ethics complaint, the complaint does raise issues of disability discrimination. The ethics complaint was later determined to be unfounded by the Ethics Board; however, the board's determination of whether or not the complaint was founded or unfounded is irrelevant for consideration of either of the parties' motions and the underlying causes of action. Had the Ethics Board determined that the complaint was founded, various administrative review procedures would have continued which could lead to some form of admonishment, punishment and/or penalty assessed against AGST. The operative issue for the Court's analysis of this matter is that a petition had been filed with a governmental agency which sought to address grievances the

Plaintiff had as a parent with a District teacher. These grievances included issues which pertained to the child's disability. At the time the decision was made to not allow the Plaintiff to work within Angie Grant school and later the District as a whole as stated below, no decision had been reached by the Ethics Board concerning the merits of the complaint.

7. It is undisputed that within four (4) days of being notified of the Plaintiffs Code of Ethics Complaint against AGST, separate defendant Ms. Bacon contacted Kelly Services and instructed that the Plaintiff was not to return to Angie Grant as a substitute teacher. Sometime after this occurrence separate defendant Lita Gattis, the Assistant Superintendent of the District over Human Resources (Ms. Gattis) also contacted Kelly Services. She directed that the Plaintiff was not to be assigned as a substitute teacher in any of the District's schools. There is no proof before the Court that any time frame was ever provided to Kelly Services for how long this directive was to be in effect nor is there any proof that the directive has ever been rescinded by the District. The testimony of Ms. Bacon indicated that it might be revisited after the Ethics Board had completed its investigation. There is no proof that the decision was ever revisited by the District.

8. Ms. Bacon testified in her deposition that the reason for the call to Kelly Services was because several teachers expressed concern about the Plaintiff being at the school and her potentially making ethics complaints against them as well which was disruptive to her operation of the school. Ms. Bacon however did not recall the name of any such teacher and the complaints were not documented. Neither the

District nor Ms. Bacon provided any proof to this Court that the supposed disruption among the Angie Grant teachers of what is a confidential matter under state law (the Code of Ethics Complaint) was in any way caused by the Plaintiff. While not contained in any of the facts submitted to the Court as part of the dueling motions, counsel for the Defendants opined at the summary judgment hearing that the disclosure of the Code of Ethics Complaint was due to statements of AGST to her fellow teachers and not anything attributable to the Plaintiff. Whether or not AGST did so does not affect this Court's ruling in this case in that there is no proof submitted that the Plaintiff personally caused any disruption among the teachers at Angie Grant which is the operative question.

9. With respect to the testimony of Ms. Gattis, she could not remember many details about the underlying facts of this case. Most importantly, she could not remember the reason why she called Kelly Services about the District directive that the Plaintiff was forbidden to be used as a substitute teacher in any of its' schools. Thus, Ms. Gattis could not articulate any reason for the action she took as Assistant Superintendent for the District.

10. With respect to the Plaintiffs service to the District through Kelly Services, it is not disputed that the District had no issues with her services prior to her being terminated from working in the District. The Defendants have argued that for purposes of the § 1983 action for violating her First Amendment rights, she is a governmental employee. However, with respect to the Rehabilitation Act, the Defendants assert that she was not an employee of the

District but an employee of a third-party contractor. Based upon the facts and arguments presented the Court finds that the Plaintiff was not a governmental employee for purposes of the § 1983 and ACRA claims. With respect to the claims under the Rehabilitation Act, the Court also finds that she is not an employee but that she is none the less protected under the Act.

11. The Court also makes the necessary findings which are undisputed that the District is a governmental organization created pursuant to Arkansas law. During the time periods in question the District accepted federal funds.

12. The Plaintiffs motion for summary judgment requests that this Court determine that under the facts of this case, the Defendants are liable to the Plaintiff under several different causes of action. The Defendants likewise dispute that the Plaintiff is entitled to Summary Judgment on the issues of liability and assert that they are entitled to summary judgment in their favor which would extinguish all of the liability issues present in the case. The Court will address these issues with respect to each cause of action below.

13. The first cause of action the Court will consider is that of liability under 42 U.S.C. §1983. The Plaintiff is asserting that a violation of her constitutional rights to freedom of speech and freedom to petition the government has occurred in this case. This violation stems from her filing a Code of Ethics Complaint with the Ethics Board and as a direct result of that filing, the Defendants effectively terminated her employment as a substitute teacher within the District.

14. First the Court must consider whether or not the Plaintiff has met her burden of proof in the § 1983 cause of action for violation of her First Amendment rights. The law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speaking out. To establish a First Amendment retaliation claim under 42 U.S.C. §1983, the Plaintiff must show (1) she engaged in a protected activity, (2) the government official took adverse action against her that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity. Under the third prong, a plaintiff must show that the retaliatory motive was a substantial factor or but-for cause of the adverse action. In other words, the plaintiff must show she was singled out because of her exercise of constitutional rights. When nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, retaliation is subject to recovery as the but-for cause of official action offending the Constitution. See *Peterson v. Kopp*, 754 F.3d 594 (2014).

15. With respect to the first prong, the Plaintiff must show that she engaged in a constitutionally protected activity. In making the Code of Ethics Complaint the Plaintiff utilized the procedures established by the laws of this state to petition the government to address what she perceived as a wrong by a public-school teacher. The concerns expressed in her complaint are of a public interest. The public certainly has a right to have teachers who abide by the laws of this state and the federal laws

pertaining to those with disabilities. If a teacher should fall short in these areas it is also in the public's interests that these shortcomings are addressed by the appropriate state agency and hopefully corrected. Her conduct in petitioning the government and making the Code of Ethics Complaint was in fact protected speech under the First Amendment.

16. With respect to the second prong, the Plaintiff must establish that the government official took adverse action against her that would chill a person of ordinary firmness from continuing the activity. The actions taken in this case were by Ms. Bacon and Ms. Gattis, both of whom acted on behalf of the District. The directive to Kelly Services to not allow the Plaintiff to substitute teach in any of the District's facilities most certainly affected her economically which in the Court's opinion is an adverse action or injury. The question then becomes would this type of adverse action chill a person of ordinary firmness from continuing the activity. The essence of what occurred is that the District through its employees punished an individual who made a complaint against it and they did so through her pocketbook. This type of retaliatory conduct certainly would chill any person of ordinary firmness from speaking out against the District for fear of some form of a reprisal aimed at the speaker. Such a reprisal could take many forms depending upon the individual and his/her connection to the District.

17. Lastly, the Plaintiff must also establish that the retaliatory motive was a substantial factor or but-for cause of the adverse action. The testimony of Ms. Bacon is very clear that the directive to Kelly Services was due to the filing of the Code of Ethics

Complaint. The Defendants have offered no non-discriminatory basis for the action terminating the Plaintiffs ability to work in any of its facilities. The reason provided in the form of complaints from unknown teachers at Angie Grant is no more than a pretext for the action with no factual basis provided to this Court to support it. If the limitation had been that she could not substitute teach in AGST's room or even the same grade level as AGST during the time of the investigation, the District could potentially have a legitimate reason to limit the time and scope of her work which would have been constitutionally permissible. But this is not what occurred. The time and scope of her banishment from the school district as a substitute teacher exceeded any reasonable expectation. The directive has no direct connection to the Plaintiff working as a substitute teacher in Howard Perrin Elementary, Ringgold Elementary, Caldwell Elementary, Benton Middle School, Benton Junior High or the Benton High School. The timing of the directive is also suspect since it occurred only four days from the time the District was notified of the complaint. The evidence presented indicates that the Plaintiff had never been disciplined by the District prior to this action and there is no proof presented that her work was unsatisfactory. What is most telling regarding this issue is the deposition testimony of the Plaintiff that when she was informed she could no longer be a substitute teacher at Angie Grant and her upcoming assignment had been terminated, she went to the teacher *who had personally requested that the Plaintiff substitute in her room for a one-week period of time* to see if she knew why she was not being allowed to teach in the school. This undisputed fact indicates to

the Court that the Plaintiff was competent in her job if she was specifically being requested to fill in for a teacher during the teacher's extended absence. These facts along with the lack of any articulable non-discriminatory reason for the directive keeping the Plaintiff from substitute teaching in the entire school district leads to only one conclusion and that is the Defendants singled out the Plaintiff because of her filing the Code of Ethics Complaint.

17. With respect to the *Pickering* balancing test which the Defendants assert is at issue, the balancing test is only relevant when the individual who has asserted a violation of their First Amendment rights is a public employee. See *Connick v. Myers*, 461 U.S. 138 (1983). Here the Plaintiff is not a public employee and there is no need for a *Pickering* analysis.

18. Next, the Plaintiff has asserted a claim under the ACRA for a violation of her rights to free speech and her rights to petition the government. The ACRA and the analysis for the §1983 are identical. See *Muntaqim v. Payne*, 2021 Ark. 162. The same findings of undisputed fact and conclusions of law apply to this separate cause of action.

19. With respect to the Rehabilitation Act, Section 504 prohibits anyone from interfering with the exercise of rights granted by the law to individuals with disabilities. Section 504 incorporates the anti-retaliation provision of Title VI of the Civil Rights Act of 1964, which "prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege ... or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hear-

ing under this part.” 34 C.F.R. §104.61 and 34 C.F.R. §100.7(e). The ADA provides, “no person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by” the ADA. 42 U.S.C. § 12203(a). Because section 504 uses an anti-retaliation clause that is functionally identical to the ADA, they are generally analyzed together. Non-disabled individuals who have “opposed any act or practice made unlawful” by Title II of the ADA have standing to sue under the anti-retaliation provisions of the ADA. *See Barker v. Riverside Cty. Office of Educ.*, 584 F.3d 821, 827 (9th Cir. 2009). This includes the Plaintiff as a parent of a student protected under the ADA and therefore she has standing to raise retaliation claims under the Rehabilitation Act.

20. The Court declines to follow the reasoning in *Wojewski v. Rapid City Regional Hospital, Inc.*, 450 F.3d 338 (8th Cir. 2006) for the same reasons the court in *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016) declined to follow it, as it pertains to whether or not an employment relationship is required in order for a person to bring a retaliation claim under the Rehabilitation Act. The Court finds that a plain reading of the statutes and regulations do not support this interpretation.

21. A three-step test has been implemented for determining whether a plaintiff has stated a sufficient prima facie case for retaliation under the ADA: the plaintiff must allege that 1) she “engaged in protected activity,” 2) she “was subjected to adverse action by” the defendant and 3) there is a causal connection “between the adverse action and the protected activity.” *See Mayers v. Laborers’ Health and Safety Fund*

of *N Am.*, 375 U.S. App. D.C. 134, 478 F.3d 364, 369 (D.C. Cir. 2007) (quoting *Smith v. District of Columbia*, 368 U.S. App. D.C. 361, 430 F.3d 450, 455 (D.C. Cir. 2005)). The same test applies under the Rehabilitation Act. See *Duncan v. Wash. Metro. Area Transit Auth.*, 214 F.R.D. 43, 49-50 & n.8 (D.D.C. 2003). The Court finds that there is no dispute that the Plaintiff filed an Ethics Complaint against a District teacher which is a protected activity as stated herein. As a result of filing the Ethics Complaint the District through the action of Ms. Bacon and Ms. Gattis, the Plaintiff suffered an adverse action in that she was not allowed to substitute teach in the District. There is no proof before this Court that this directive has ever been rescinded by the District over the past three (3) years. The denial of the ability to work in the District is an adverse action in that it has affected the Plaintiff economically. Therefore elements (1) and (2) have been met by the Plaintiff.

22. With respect to the third element, the Plaintiff must establish retaliatory intent. This may occur through either direct evidence or through what has been referred to as the *McDonald Douglas* burden shifting structure. With respect to direct evidence, the Court is satisfied for the reasons stated herein that the Plaintiff has established that the actions of the District to remove her from substitute teaching in any classroom in District was due to the fact she had filed an Ethics Complaint against AGST. The testimony of Ms. Bacon, Ms. Gattis as well as the timing of the District directive substantiate the Court's opinion.

23. Even if the Plaintiff failed to produce direct evidence, she still prevails under the *McDonald*

Douglas burden shifting structure. In this structure, the Plaintiff must first establish a *prima facie* case of retaliation, shifting the burden to the defendant to show a legitimate, non-retaliatory reason for the relevant adverse employment action, which then returns the burden to the plaintiff to establish such asserted reason is mere pretext for impermissible retaliation. As found previously by this Court in the analysis of the §1983 claim, the Plaintiff has met her burden establishing a prima facie case of retaliation through her filing of an Ethics Complaint and her removal from the District as a substitute teacher some four days later. After having met this burden, the Defendants have asserted that as a legitimate, non-retaliatory reason for the relevant adverse action that the Plaintiff had created a disruptive work environment among the teaching staff at Angie Grant. The Defendants however have not produced the names of any teachers making this claim or any documentation which would substantiate this claim. Additionally, the District has not produced any evidence that the Plaintiff was the actual cause of any supposed disruption in the workplace. The Court is of the opinion that the reasons given for the adverse action are nothing more than pretextual and the Plaintiff has met her burden under *McDonald Douglas*.

24. For these reasons, the Court grants the Plaintiffs motion for summary judgment as to liability for her claims under § 1983, ACRA, and the Rehabilitation Act. The Court denies the Defendant's motion for summary judgment as to liability.

24. Lastly, the Defendants have asserted that the separate defendants Ms. Bacon and Ms. Gattis are

entitled to qualified immunity in their individual capacities. As to this request, the Court grants these separate Defendants motion up to the extent that they may be covered by liability insurance pursuant to A.C.A. §21-9-301. The request is therefore granted in part and denied in part.

IT IS SO ORDERED.

/s/ Hon. Brent Houston

11/22/2021