

ADA, DISCRIMINATION, AND THE NEVADA PHYSICIAN

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The Americans With Disabilities Act (“ADA”) and the (Federal) Rehabilitation Act (FRA) prohibit discrimination against individuals who have (qualifying) disabilities, individuals who have had such past disabilities, or individuals who are deemed, but in actuality don’t have such disabilities. In the context of employment, the employer may not discriminate against employees and potential employees in violation of the ADA or the FRA. The ADA and FRA apply to employers with 15 or more employees. Employers must provide “reasonable accommodations” to employees when those reasonable accommodations are not “unduely burdensome.”ⁱ

The ADA also prohibits discrimination against protected individuals in places of public accommodations. Both the ADA and the Rehabilitation Act apply to physicians and hospitals in Nevada. The intent of the federal legislation is to ensure that employees and patients are neither discriminated against, nor denied benefits or opportunities, based on their physical or mental disabilities. Since 2008, discrimination on the basis of genetic information has been prohibited by health plans and health insurance with passage of the Genetic Information Nondiscrimination Act (GINA). This law also applies to prohibit discrimination in employment based on genetic information.

Nevada physicians need to be aware of these laws prohibiting discrimination in the workplace from the standpoint of an employer, as well as that of an employee. Medical care facilities, including physicians’ offices, have been deemed places of public accommodation, thus protecting patients with disabilities from discrimination in those facilities. Physician’s owning or leasing office space should be aware of the requirements to comply with the public accommodations prong of the ADA.

The Americans With Disabilities Act, the (Federal) Rehabilitation Act, and the Genetic Information Nondiscrimination Act have many similarities, but each addresses specific areas of the law. The ADA primarily addresses disability-based employment discrimination, and discrimination in public accommodations, public transportation or telecommunications. The (Federal) Rehabilitation Act addresses discrimination by individuals or organizations participating in government funded programs. The Genetic Information Nondiscrimination Act, passed in 2008 addresses inappropriate use of genetic information to discriminate against

individuals in insurance and employment by private sector employers, federal, state and local governments, and labor-management training organizations. Like the ADA, GINA applies to employers with more than 15 employees.

AMERICANS WITH DISABILITIES ACT (ADA)

The ADA protects persons that meet the three criteria (note below). The ADA was extended under the ADA Amendments Act of 2008 (ADAAA) to provide broader protections to disabled persons. Under the ADA and the ADAAA, a person is disabled, and thus protected by these laws, if the person (1) has, or (2) has a record of having, or (3) is regarded as having, a physical or mental impairment that “substantially limits” one or more of the person’s major life activities. A “record” of impairment is sufficient to qualify a person as “disabled,” regardless of the person’s actual condition.

A “physical or mental impairment is any physiological condition, cosmetic disfigurement, or anatomical abnormality affecting one or more body systems, or any mental or psychological disorder. Age itself is not an ADA disability, but diseases associated with age could constitute a disability. Common personality “traits” such as uncooperativeness in following physician directions, abusiveness to the physician or office staff, or generally obnoxiousness are not ADA protected disorders that must be reasonably accommodated. However, if these disorders are a manifestation of a recognized psychiatric or psychological disorder, the patient must receive reasonable accommodations under the protections of the ADA and its amendments.

A “major life activity” now includes caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing, learning and working, along with eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating. Our 9th Circuit Federal Appeals Court has included “major life activities” to include sexual relations and “interacting with others.” The 1st Circuit Court of Appeals in a Maine case has disagreed with the 9th Circuit, stating that the term “interacting with others” is unconstitutionally vague. Resolution of the difference among the Appellate Courts awaits a United States Supreme Court decision or further clarification by Congressional law.

While the ADA applies to and protects individuals who are, for instance, HIV positive, it does not apply to all abnormal conditions. The ADA specifically does not consider as qualifying disabilities those with homosexuality or bisexuality, transvestism, transsexualism, pedophilia,

exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, or pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs. As will be seen below, a recent Nevada law, effective October 1, 2011, does protect individuals in our State with transsexual or transgender characteristics from discrimination in employment.

Individuals that pose a “direct threat” are generally not protected under the ADA. Direct threat is defined a person who presents a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” Such persons do not have to be treated by a physician. Prudence dictates that the physician’s assessment of an individual as a “direct threat” will be based on objective evidence documented in medical records, employment records, or in some other writing, in case that person mounts a legal challenge to the physician’s decision to refuse treatment. In determining whether a “direct threat” situation is present, the ADA specifies that the physician must make an individual assessment considering the following objective factors: the durations of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. However, if the “direct threat” would be eliminated or adequately reduced by “reasonable accommodation” that does not impose an “undue hardship” on the physician’s practice, the individual is protected from discrimination under the ADA. Several attorneys opine that courts will likely respect a physician’s judgment in acting with “safety” as the determining consideration, but evidence of written compliance with the law will be of paramount importance in a contested case.

The ADA does not apply, and the employer may discriminate, against individuals who pose a threat to their own health or safety. The U.S. Supreme Court ruled that an individual with hepatitis could be refused employment at a chemical plant where exposure to solvents might pose a danger of worsening the patient’s liver disease. *Chevron USA v. Echazabal*, 536 US 73 (2002). The Supreme Court noted that the burden of establishing the threat of worsening the condition rests with the employer. Similarly, certain jobs in health care could risk worsening an applicant’s specific medical condition justifying employment discrimination.

In addition to the protections afforded under the ADA, the Rehabilitation Act prohibits discrimination by individuals receiving federal funds or financial assistance. This is especially significant to physicians involved in federally funded programs such as Medicare and Medicaid.

The Rehabilitation Act provides that “no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The courts have interpreted this statute to include payment of Medicare and Medicaid funds to physicians. Bernard B. v. Blue Cross and Blue Shield of Greater New York, 528 F. Supp 125 (S.D.N.Y. 1981). The federal Rehabilitation Act applies to discriminatory practices in the workplace, as well as to programs receiving federal funds through grants and similar programs. Any physician who treats patients covered under Medicare or Medicaid will be in violation of this law if the physician discriminates against patients who are disabled, or if he discriminates in his employment practices where the physician employs more than 15 employees. In addition to injunctive relief, victims of discrimination can receive monetary damages, punitive damages, back pay and benefits from an employer, and also receive their plaintiff’s attorney’s fees.

The Genetic Information Nondiscrimination Act of 2008 (GINA) was passed to address discrimination in health insurance and employment. GINA covers genetic information involving DNA and RNA, including tests for genetic diseases. Title I of GINA prohibits health plans and health insurance companies from using genetic information for underwriting purposes. Title II of GINA prohibits employers from using genetic information to discriminate, harass or retaliate in employment. If an employer requests medical information for a Family and Medical Leave Act determination, the employer must warn the employee not to supply any genetic information.

LIABILITY

Individual physicians, as well as their companies or organizations, may be liable for discriminatory practices under these laws. Liability for discrimination may occur under either the “employment” prong of the ADA, or under the “public accommodations” prong of the Act. Under the “public accommodations” section of the ADA, individuals that own, lease, or operate places of public accommodation, including physicians’ offices, may be liable to patients for violations of the ADA.

For ADA purposes, an employer is “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” Physicians maintaining an office with fewer than 15 employees, as defined, are not liable as employers for disability discrimination under the ADA.

Similarly, under Nevada law, physician employers are not liable for ADA-type discrimination when employing less than 15 employees.

An individual discriminated against in employment because of a disability may sue for injunctive relief, as well as monetary damages under the ADA, and may sue for punitive damages. Punitive damages, however, are not available if an individual sues for discrimination in public accommodations. Reasonable attorney's fees can be awarded to the prevailing party in a civil action under either prong.

Penalties for violations of the Rehabilitation Act include fines and removal from Medicare and Medicaid health insurance programs. Penalties for violation of GINA depend on the Title involved. Violations of Title I involve fines prosecuted by the Secretaries of Treasury, Labor or HHS. Violations of Title II are entitled to the same remedies as those available under the Civil Rights Act (Title VII) – a maximum of \$50,000 for employers of 15 to 100 employees; up to \$300,000 for employers with more than 500 employees. The E.E.O.C. (Equal Employment Opportunity Commission) routinely prosecutes these violations.

If a physician-employer has any doubt as to whether his or her current employment practices comply with the ADA, he or she should consult local legal counsel skilled in employment law.

DETAILS

“Qualified individuals with a disability” are protected under the ADA employment discrimination prong. A “qualified individual with a disability” is one who satisfies the prerequisites and requirements for the job or position and can perform the “essential functions” of the jobⁱⁱ, with or without accommodations. If a person does not meet both of these criteria, the person is not protected under the ADA. The term “essential job functions” is a somewhat vague term. It includes such considerations as the degree of skill required to do the job, the degree to which employees are actually required to do the function, whether the function is critical to the basic elements of the job, and the belief by the employer that the function is critical. If the disabled employee or potential employee can perform the “essential job function,” with or without “reasonable” accommodations (that are not unduly burdensome), the employer cannot discriminate against that employee or applicant.

“Reasonable accommodations” are those that an employer can be expected or required to make available so that disabled employees and applicants can compete fairly for jobs,

promotions, and opportunities. These accommodations include accessible facilities, employer-provided transportation, modified equipment, and assistants. Employers can be found liable if they refuse to make reasonable accommodations for disabled employees. However, employers do have the option, in most instances, to choose between two options for accommodations, if both meet the needs of the employee.

These laws attempt to strike a balance between the needs and rights of the employees, and those of the employer. Careful attention to the requirements and the intent behind the statutes and regulations is critical to a successful relationship between an employer and a disabled employee. Failure to comply with these laws may result in an injunction against the physician as well as monetary penalties in the form of back pay and compensatory damages. Again, consultation with a competent employment attorney should be considered whenever there is any question governing the applicability of the ADA, FRA or GINA.

PATIENTS' RIGHTS UNDER PUBLIC ACCOMMODATIONS

In addition to the requirements imposed on physicians as employers, the ADA and Rehabilitation Act provide guidelines and requirements for persons, including physicians, who own or operate public accommodations. It is illegal for persons who own or operate public accommodations to discriminate against persons with a disability, with regard to providing services, goods, or accommodations. Discriminatory acts include failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities where such removal is readily achievable.

Only if a physician or other provider of public accommodations can show that provision of the accommodation would be unreasonable because it would create an "undue burden" can the physician or provider of public accommodation be relieved of the requirement to make accommodations for the disabled. The ADA defines "undue burden" as an effort that is so expensive and difficult as to make the accommodation impractical or impossible.ⁱⁱⁱ The responsibility to show the accommodation would create an "undue burden" falls upon the provider of the services. Careful review of the needs of the disabled (all patients as well as employees if the physician employs more than fifteen employees), to include such things as facilities upgrades, removal of barriers, and facilitating access to the office and bathrooms must be considered, and weighed against the cost of the accommodation before it can be claimed to be an "undue burden."

NEVADA LAW

Nevada has embraced the tenets and focus of the ADA through the implementation of several statutes. Although federal law serves to control most, if not all, of the actions of employers and those owning or operating public accommodations, Nevada has further addressed discrimination against disabled persons both in employment and in health care.

NRS 233.010 addresses the public policy of the state regarding discrimination, including discrimination based on disability, as follows:

It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all the people of the state, and to foster the right of all persons reasonably to seek, obtain, and hold employment and housing accommodations, and reasonably to seek and be granted services in places of public accommodation without discrimination, distinction or restriction because of race, religious creed, color, age, sex, disability, national origin or ancestry.

Disability is defined as a physical or mental impairment that substantially limits one or more major life activity, a record of such an impairment, or being regarded as so impaired. This definition parallels that of the ADA and the Rehabilitation Act.

Prevention of employment discrimination makes it unlawful to discriminate on the basis of a disability with regard to employment, compensation, training, or involvement in labor organizations. For the purposes of Nevada law, an employer is defined as a person who has 15 or more employees working for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. This is the same definition as used in the ADA. This law was tested in 2002 when the Nevada Supreme Court, in *Chavez v Sievers*, 118 Nev. 288 (2002), held that there was no public policy exception for alleged racial discrimination against small employers with less than 15 employees.

Nevada also follows the federal ADA regarding places of public accommodation to include the office a provider of health care. Nevada prohibits discrimination in any place of public accommodation on the basis of race, color, religion, national origin, disability or sexual orientation (now including transgender individuals). Nevada makes it a criminal misdemeanor for a person to withhold, deny, deprive or attempt to withhold, deny or deprive another person any right or privilege secured by its public accommodation statutes – NRS 651.070 thru NRS 651.075. Such a violating individual is also subject to civil court action for damages and/or equitable relief. However, our Courts have held that only money damages, and no punitive

damages, are available in cases involving structural deficiencies in places of public accommodation.

Under Nevada law, organizations for managed health care are specifically prohibited from discriminating against providers of health care with regard to participation in the organization's plans, based on, among other things, disabilities. Nevada law provides protection to those health care providers who are disabled, ensuring that those disabled physicians have equal access to the managed care system.

CONCLUSION

The federal statutes prohibiting discrimination against disabled individuals, including patients and employees of physician, provide detailed guidelines to employers and owners or operators of public accommodations. Reasonable steps must be taken to ensure that disabled employees have equal access to employment, promotion, and opportunity, and that disabled patients have equal access to medical services. Reasonable accommodations may be required, as long as the accommodations do not impose an undue burden on the physician employer. Both federal and Nevada State statutes apply only to employers with 15 or more employees.

ⁱ The factors to be considered in determining whether an accommodation is unduly burdensome include:

- i. The nature and cost of the accommodation needed;
- ii. The overall financial resources of the facility or facilities involved; the number of persons employed at the facility; the effect on expenses and resources; or the impact otherwise up the facility's operation;
- iii. The overall financial resources of the parent/covered entity; the overall size of the parent's/covered entity's business with respect to the number of its employees; the number, type and location of its facilities; and
- iv. The type of operation or operations of the parent/covered entity, including the composition, structure, and function of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the parent/covered entity.
- v.

ⁱⁱ The EEOC suggests the following factors may be used to determine if a job function is essential:

- i. The job exists for the purpose of performing the function;
- ii. How many other employees are available to perform the function;
- iii. How much expertise or skill is required to perform the function;
- iv. The function is on the job description for the position. The employer should carefully prepare detailed job descriptions clearly describing the essential job functions when possible.
- v. Whether employees in that position are actually required to perform the function;
- vi. If the function were eliminated, the job would be fundamentally altered;
- vii. How much time is spent performing the function;
- viii. The work experience of past employees in the job or of current employees in similar jobs;
- ix. The consequences of failing to require the employee to perform the function;
- x. The employer believes the function is essential; and
- xi. The terms of a collective bargaining agreement.
- xii.