



Medical Center Faces Liability for Alleged Disability Discrimination by Physician Independent Contractor

By Paul Duvall, King & Ballow Partner and Healthcare Practice Member

pduvall@kingballow.com

An independent contractor anesthesiologist may proceed with his discrimination claim against a Phoenix medical center for not accommodating his operating room and call schedules due to his disability from sickle cell anemia. On November 19, 2009, the U.S. Court of Appeals for the Ninth Circuit in San Francisco determined the disability discrimination provisions in the Rehabilitation Act of 1973 apply to independent contractors as well as employees and reversed a federal district court decision dismissing the case.

The Rehabilitation Act of 1973, 29 U.S.C. 794, (“the RA”) precedes the Americans with Disabilities Act of 1990, 42 U.S.C. 12101, (“the ADA”) both of which contain disability discrimination prohibitions. The RA applies to federal agencies under the Executive Branch and programs or entities receiving federal financial assistance. Persons who prevail under the RA may receive monetary damages as well as injunction relief requiring reasonable accommodations for their disability. Although Title I of the ADA (which addresses disability discrimination in employment) provides that it applies to employers with 15 or more workers, the RA does not contain any restrictions for coverage as to size.

The anesthesiologist’s discrimination claim was brought under the RA. Previously, an Arizona federal district court had adopted the medical center’s argument that his claim must be denied because the RA covers only employees and does not include independent contractors. The Court of Appeals decision allows the case to proceed to trial.

There is a split among the federal circuit courts as to whether independent contractors are covered by the discrimination prohibitions under the RA and Title I of the ADA. The impact of this decision covers entities receiving financial funds under federal programs in the following states and territories: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marianas, Oregon, and Washington. The U.S. Courts of Appeals for the Sixth Circuit (including federal districts for Michigan, Ohio, Kentucky and Tennessee), the Seventh Circuit (Wisconsin, Illinois and Indiana) and the Eighth Circuit (North Dakota, South



Dakota, Nebraska, Minnesota, Iowa, Missouri and Arkansas) have held that independent contractors are not covered under Title I of the ADA. The Courts of Appeal for the Sixth and Eighth Circuits have also held that the RA does not cover independent contractors. The Court of Appeals for the Tenth Circuit (covering Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) has held independent contractors are covered under the RA.

The RA specifies that the standards used to determine whether a violation has been committed “shall be the standards applied” under Title I of the ADA. The Court of Appeals for the Ninth Circuit adopted the anesthesiologist’s argument that Section 504 of the Act only incorporates the standards in Title I of the ADA as to standards for “what” conduct constitutes a violation and does not incorporate the definition as to “who” is covered. It noted that the amendments to the RA incorporating the ADA standards addressed only standards for violative conduct and did not include standards as to who is covered. Additionally, the amendments did not incorporate into the RA the ADA coverage limitation applying to employers with 15 or more employees.

All providers who operate within states covered by the Court of Appeals for the Ninth Circuit should be aware of the holding of this decision which provides disability discrimination protection under the RA extends to both employees and independent contractors.

Fleming v. Yuma Regional Medical Center, No. 07-16427, 2009 U.S. App. LEXIS 25406 (9th Cir. Nov. 19, 2009)

For more information contact: Paul Duvall, King & Ballow Partner and Health Care Practice Member, La Jolla, California, pduvall@kingballow.com, phone (858) 597-6000.

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