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When Do “Reasonable Accommodations” Unreasonably Compromise Patient Care?

When patients seek treatment at hospitals, they trust that their physicians will be healthy and competent. In fact, most state courts have now recognized an independent cause of action for negligently credentialing impaired physicians. However, there is a disturbing trend developing as courts around the country, when enforcing the Americans with Disabilities Act (“ADA”), hold hospitals responsible for delivering quality healthcare while at the same time exposing hospitals to potential liability and patients to potential substandard care.

THE CONCERN

Although hospitals strive to deliver quality patient care, they are increasingly being subjected to lawsuits brought by physicians under the ADA. The definition of “employee” in Title I of the ADA, which was enacted to address employment claims, does not include independent contractors. Thus, the ADA traditionally has not been used by physicians who merely retain privileges at a hospital in order to challenge adverse determinations by hospital credentialing committees. Innovative plaintiffs’ attorneys, however, have expanded the protections of the ADA in recent years. Rather than use Title I, physicians have successfully brought suit under Title III of the Act, which prohibits places of “public accommodation” from discriminating against any individual on the basis of disability “in the full enjoyment of [its] goods, services, facilities, privileges, advantages or accommodations.” At least two federal courts have held that Title III may serve as the basis of a physician’s ADA claim because, under this theory, a physician should have the right to the “full enjoyment” of the hospital’s advantages, including the right to contract for staff privileges and use the hospital’s facilities for the benefit of the physician’s practice. While protecting disabled physicians from discrimination is laudable, courts must understand the significant adverse impact this expansion of the ADA may have on patient care.

CASE STUDY: THE RISKS

A recent Pennsylvania Federal District Court case highlights this issue. In that case, a young orthopedic surgeon with a history of bipolar disorder had a manic episode in the operating room during a procedure. After a leave of absence and treatment, the physician sought to have his privileges reinstated. As a condition of reinstatement, the credentialing committee required that the physician obtain clearance from a qualified psychiatrist certifying his fitness to practice medicine. The ambiguous clearances the physician obtained did not satisfy the committee, which imposed further conditions before he could obtain full privileges. The physician was required to apprise the committee of his ongoing treatment, confirm that he was abiding by his treatment plan, and find another privileged orthopedic surgeon to directly monitor him in the operating room for the first six months of his return. Given the relative inexperience of the surgeon, his history of failing to control his bipolar disorder and the serious threat to patient safety should he have a more severe episode, these recommendations certainly appear to be sound, fair and reasonable, right? Wrong.

The physician sued the hospital under Title III, claiming that since he had not been able to find an orthopedic surgeon to monitor him without

compensation, the proffered accommodation was in fact a termination. While the ADA provides an exception for those who pose a “direct threat” to others, the hospital, which was forced to produce many of its confidential credentialing files during the litigation, failed to convince the court to dismiss the case at the summary judgment stage. Although the court agreed that “[c]ertainly, a doctor who is significantly prone to hypomanic episodes poses a direct threat to those patients whom he or she treats,” it found that since the physician provided the hospital with a medical clearance from a psychiatrist, there was a genuine dispute as to whether the physician was actually a direct threat to patients. After the case proceeded to trial, the jury found in favor of the physician and awarded him significant damages.

Clearly, hospitals should not respond to these ADA suits by lowering credentialing standards. Thus, while state courts are enforcing hospitals’ duty to ensure patient safety, federal courts have become alternative forums for impaired physicians to challenge protective remedial measures implemented by hospitals.

THE ISSUE

This case and others generate perplexing questions for hospital management. What constitutes a reasonable accommodation of an impaired physician? What are reasonable limitations on a physician’s practice that ensure patient safety without impinging on a physician’s livelihood? The credentialing process may need to be re-examined, both from the patient-safety perspective as well as the risk of an ADA discrimination claim.

WHAT CAN PROVIDERS DO?

- First, a hospital should ensure that its credentialing policies and procedures are up to date, uniform, documented carefully and undertaken with an eye toward risk management.
- While judicial outcomes vary throughout the country, one successful strategy that hospitals have undertaken is to carefully draft their credentialing applications to include broad releases. Some hospitals now include releases in their applications for all credentialing-related claims as well as provisions that clearly place the burden on the applicant to meet all requirements of the credentialing process.
- A hospital’s policies and procedures with regard to impaired physicians should be updated to ensure that every procedural step necessary is taken and that all documents used in the process contain the appropriate notices and information.
- When medical clearances are required, a hospital should insist that the clearances be obtained from physicians of its choice to help ensure that these clearances meet the hospital’s standards.
- Hospitals should ensure that in-house or outside counsel review credentialing policies to appropriately balance patient-safety concerns with physician’s rights.

If you have a question or would like to discuss legal services, please contact us at healthcare@duanemorris.com.

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