VEDDER PRICE
Labor Law

A newsletter designed to keep clients and other friends informed on labor and employment law matters

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In This Issue:

PREGNANCY-RELATED COMPLICATIONS MAY BE A DISABILITY UNDER THE ADA

Until recently, many assumed that an employee's request for reasonable job accommodations related to the employee's pregnancy did not trigger the Americans with Disabilities Act ("ADA"). That assumption is too broad,

according to a recent decision of the federal district court in Chicago, *Gabriel v. City of Chicago*.

The seed for this decision (so to speak) was the Supreme Court's holding in *Bragdon v. Abbott*, discussed in our July 1998 issue. *Bragdon* held that asymptomatic HIV constitutes a disability under the public accommodation section of the ADA, because reproduction is a "major life activity" and is substantially limited by HIV. Accordingly, the defendant dentist who refused the HIV patient in-office treatment was subject to an ADA suit. In our July newsletter, we warned that *Bragdon* could have sweeping implications under the employment provisions of the ADA as well. The *Gabriel* case bears out this warning.

Gabriel was a Chicago Police Department data entry operator. In July 1995, she told her supervisor she was pregnant. Later, after complaining of back and stomach pain, swollen feet and fatigue, she submitted a disability certificate restricting her to light work duties for the duration of her pregnancy. The employer initially accommodated her request that she no longer lift boxes, pull cabinets or carry heavy folders.

However, in October 1995, Gabriel got a new supervisor who, in effect, lifted her job restrictions because he believed her disability certificate was "vague." After giving Gabriel negative reviews, he fired her for poor attendance in November 1995. (Gabriel had missed five days over a six-month period, allegedly due to her condition.) Five days after she was terminated, Gabriel went into premature labor and gave birth two months before her due date.

Gabriel alleged ADA violations based on the City's refusal to accommodate the physical limitations arising from her pregnancy-related impairments and on her termination for pregnancy-related absences. The City's defense was that Gabriel had no protected "disability" under the ADA.

The district court held that Gabriel was entitled to a trial on her complaint. Recognizing *Bragdon*'s holding that reproduction is a major life activity, the court held that *complications* related to pregnancy (although not pregnancy itself) may be considered physical impairments covered by the ADA. Such complications, said the court, must be the product of a "physiological disorder," that is, "an abnormal functioning of the body or a tissue or organ."

The court held that Gabriel would be given the opportunity to prove that her back and stomach pain, foot swelling and premature birth were functions of an abnormal pregnancy, and therefore "impairments." But the court stressed that Gabriel would have to present expert testimony on: whether or not her condition was the result of a "normal" pregnancy; what separates a normal from an abnormal pregnancy; and when a particular condition can be considered a physiological disorder of the reproductive system.

Gabriel was also entitled to a trial on whether her condition was a substantial limitation on the major life activity of *standing*. Although intermittent or episodic impairments are not considered substantial limitations, Gabriel's claim that her condition lasted for six of the seven months of her pregnancy was considered sufficient to meet that hurdle.

Under *Gabriel*, a prudent employer faced with a reasonable accommodation request based on an employee's pregnancy must determine whether the request relates to complications caused by a physiological disorder. While *Gabriel* does not spell out all the potential complications which must be accommodated, it at least tells us that pregnancy-related problems such as foot-swelling, back pain, and stomach pain can fit within that category.

If you have any questions about the *Gabriel* decision, please call Vedder Price (312/609-7500).

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DISCHARGE FOR SUBMITTING FRAUDULENT WORKER'S COMPENSATION CLAIM IS UNLAWFUL

You have videotape of an employee mowing her lawn after she files a worker's compensation claim for a back injury that she says prevents her from returning to work. You suspend and then discharge her for misrepresenting the nature of her worker's compensation claim. She responds by suing you for retaliatory discharge. Who wins? She does, according to a recent disturbing Illinois appellate decision, *Clark v. Owens-Brockway Glass*

Container, Inc.

In Illinois and most states, it is illegal for an employer to discharge an employee because he or she has filed a worker's compensation claim. These so-called retaliatory discharges expose the employer to substantial liability, including punitive damages. In *Clark*, the court held that an employer is liable for retaliatory discharge if its decision is based on a dispute concerning the nature or extent of a compensable injury. A contrary ruling, according to the court, would allow all employers to discharge employees whom they believe are exaggerating their claims.

This decision must have come as a shock to the employer since the same court, ten years earlier, had upheld a discharge for filing a fraudulent worker's compensation claim when an employer showed that an employee had submitted false doctor's notes in support of his claim. The *Clark* court unconvincingly distinguished (but did not overrule) its prior decision, stating that it involved "bogus doctor's slips and outright lies to the employer." In other words, the evidence was more compelling that the employee there was misrepresenting his injury and claim.

Employers, beware. It has always been risky to discharge an employee because you believe he or she has filed a fraudulent worker's compensation claim. Now it is foolhardy to even consider that action where there is any dispute whatever about whether the claim is fraudulent.

If you have any questions about the *Clark* case, or about retaliatory discharge in general, please contact Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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COURTS DEFER TO HEALTH CARE EMPLOYERS IN DISABILITY CASES

Courts deciding two recent cases involving nurses' disability discrimination claims have shown deference to the needs of health care employers. In both cases, the courts upheld the employer's determination of essential job functions and refused to provide accommodations sought

by the nurses in the face of more realistic accommodations offered by the employers.

Extra Supervision Not Reasonable

In *Webster v. Methodist Occupational Health Centers, Inc.*, a contract industrial nurse suffered a stroke. After she completed rehabilitation therapy, Webster's doctors had continuing concerns about her ability to sustain attention and concentration, her visual and spatial skills, and other problems. Her employer gave her a clinical work trial, after which it concluded that Webster could "probably function effectively in an environment where she had support and the resources of other staff members." The employer decided it could not risk allowing Webster to hold a nursing position without the assistance of a full-time nurse-escort who could take over if Webster's disability prevented her from caring for a patient. But this alternative was considered too expensive because it would require paying two salaries for a one-person job. Webster's employer was willing to consider an assignment to a non-nursing position, but Webster refused to consider any such position and she was terminated. Webster sued her employer under the ADA, claiming it was unwilling to provide reasonable accommodation for her.

The Seventh Circuit Court of Appeals disagreed. Webster's employer had the legal right to define the job's essential functions and qualifications. An industrial nurse had to be able to work alone and unsupervised, something Webster could not do. The court noted that Webster's employer would not have hired another industrial nurse who had Webster's symptoms, a fact that alone made Webster unqualified under ADA law.

The court further found that Webster was insisting upon unreasonable accommodations in the face of her employer's willingness to consider reasonable ones. Her refusal to accept a non-nursing position was coupled with her adamant demand to be placed on the day shift, where she would be closely monitored and supervised. But the court accepted the employer's requirement that its industrial nurses be able to work without supervision. Finally, the court stated that Webster's willingness to consider other positions after her termination came too late. An employee cannot refuse reasonable accommodations during the interactive process and then suggest something different after dismissal.

Permanent Shift Assignment Not Required

In *Laurin v. Providence Hospital*, the First Circuit Court of Appeals rejected an ADA claim by a maternity unit nurse who sought a permanent assignment to the day shift.

All non-senior nurses on the maternity unit were required to rotate among the day, evening and night shifts, so that the burden of working the less desirable shifts would be spread among all staff. After a fainting episode, Laurin's doctor recommended that she "keep to a regular schedule of work hours" or "one consistent shift," preferably days, since she had small children who needed her attention. The hospital refused, stating that a rotating schedule was an essential job function for nurses on the maternity unit. Her union polled her co-workers, who refused to volunteer to cover her evening and night shifts. But the hospital was willing to place her on a days-only shift for six weeks during which she could search for a permanent day shift assignment in another position in the hospital. Laurin subsequently suffered a seizure. Her diagnosis was changed to seizure disorder and her doctor stated "a daytime position is absolutely necessary." The hospital again refused to give her a permanent day shift assignment on the maternity unit, and her union refused to pursue a grievance for her, finding no violation of the collective bargaining agreement in the hospital's decision. When Laurin refused to work evenings, she was terminated and then filed an ADA suit, claiming the hospital refused to reasonably accommodate her.

The court denied the claim. It held that rotating shifts was an essential function of a nurse on the maternity unit. Otherwise, the hospital asserted and the court agreed, there would be insufficient nursing staff for the evening and night shifts. Laurin also argued that the hospital's willingness to assign her to days-only while she undertook a job search showed that the hospital could accommodate her. The court rejected this assertion, calling it "perverse to discourage employers from accommodating employees with a temporary breathing space during which to seek another position." And as a matter of law, an employer does not concede a job function is non-essential by voluntarily assuming the limited burden associated with a temporary accommodation.

Both decisions extend deference to a health care employer's operating needs and judgment. But they do so

consistent with established ADA obligations and common sense. Thus they recognize the employer's right to determine essential job functions and qualifications. In deciding reasonable accommodation, both decisions refuse to penalize an employer who provides a temporary accommodation that meets the employee's situation, as would happen by making the temporary accommodation permanent. Health care employers, and employers in general, should take some solace from the common-sense approach these two courts have taken in deciding employers' ADA obligations.

If you have any questions about the *Webster* or *Laurin* cases, or reasonable accommodation under the ADA, please contact Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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MENTAL ILLNESS DID NOT "SUBSTANTIALLY LIMIT" TEACHER'S ABILITY TO WORK

A recent decision by the Seventh Circuit Court of Appeals has further refined what it means for an individual to be "disabled" under the Americans with Disabilities Act ("ADA"). In *Patterson v. Chicago Association for Retarded Persons*, the court found that a terminated teacher did not produce enough evidence that she was "substantially limited" in her ability to work because she was not barred from all jobs in the teaching profession. Therefore, she was not protected by the ADA.

Under the ADA, a person may be deemed disabled if he or she is "substantially limited in one or more major life activities." In *Patterson*, the plaintiff, a teacher of severely retarded children, claimed that her mental illness substantially limited her ability to work (a qualifying major life activity). She had begun working for the employer in 1982, and had for years suffered from paranoia, for which she was prescribed anti-psychotic and anti-depressant medication. During her first eleven years of employment, she was hospitalized on two separate occasions for paranoia.

Between 1993 and her 1995 termination, the plaintiff repeatedly exhibited "strange behavior," including staring

into space, speaking in a monotone, having paranoid delusions, making sexual advances toward male employees, and calling employees at late hours during the night. Examinations by several doctors showed that she was not in compliance with her medication orders. The plaintiff was eventually terminated when her doctor informed the director of the school that she had "fired" him as her doctor and had accused him of trying to "poison" her.

Despite these delusional episodes, the court found that the plaintiff's mental illness did not substantially limit her ability to work. The court relied on the ADA's definition of "substantially limited" (for the purpose of working) as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." Significantly, in granting the employer's motion for summary judgment, the court stated that, in order to meet this standard, the plaintiff's "impairment must render her incapable of performing *any* teaching job, not just a specific sort of teaching job" (emphasis added). The plaintiff, however, had been employed in the Chicago Public Schools as a substitute teacher since her termination. Because she was able to teach in some capacity, the court found she was not "substantially limited."

Other court decisions have suggested that a plaintiff may establish a substantial limitation on the ability to work by proving that he or she is foreclosed from some significant subset of a job class. The court in *Patterson*, by finding that a plaintiff must prove he or she is unable to practice his or her chosen profession altogether, may have raised the definitional bar for plaintiffs.

If you have any questions about the *Patterson* case, or about the ADA in general, please call Vedder Price (312/609-7500).

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ARE "FLEXIBLE" AND "ENERGETIC" CODE WORDS FOR "YOUNG"?

The Seventh Circuit Court of Appeals recently ruled that an employer who eliminated a job category because the

employees holding the job were not "flexible" or "energetic" was not using those terms as a euphemism for "over 40." *Blackwell v. Cole Taylor Bank*. Taking an approach contrary to that adopted by the Second Circuit, as reported in our July, 1998 issue ("Is 'Overqualified' a Code Word for Too Old?" at p. 9), the Seventh Circuit affirmed summary judgment in the Bank's favor.

In *Blackwell*, five former branch managers claimed they were constructively discharged because of their age in violation of the Age Discrimination in Employment Act. The Bank eliminated the branch manager position after concerns arose that the individuals holding the positions were not "flexible" or "energetic." The former employees claimed that the use of such phrases was a code for "over 40." The Court disagreed. In granting the Bank's motion for summary judgment, Judge Posner wrote that it is a considerable insult to millions of older workers to assume that they are generally lacking in flexibility or energy. He said, "[T]o evaluate an individual worker or a group of workers as lacking energy, initiative, commitment, imagination, flexibility, or other desired characteristics is not to indulge in age stereotypes, and is indeed the kind of evaluative approach that the antidiscrimination laws seek to encourage."

The Court also noted that although five of the branch managers were over 40, two were not, yet all were treated the same. Further, their replacements included two persons in the protected class. Thus, the Seventh Circuit's holding may later be limited to cases where evaluative terms relating to characteristics such as energy, initiative and flexibility are not accompanied by any other evidence suggesting that these characteristics are a pretext for age discrimination.

If you have any questions about the *Blackwell* case, or age discrimination issues in general, please call Vedder Price (312/609-7500).

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NLRB AGREES RULE BANNING DISTRIBUTION OF LITERATURE IN WORK AREAS DOES NOT APPLY TO MEDICAL CENTER'S SUPERVISORS

With union efforts to organize hospital employees on the rise, a recent decision of the National Labor Relations Board should be of interest to hospital managers concerned about employees distributing pro-union material while on duty (*Beverly Enterprises-Hawaii and United Public Workers, AFSCME, Local 646*).

A rehabilitation and nursing center (the "Center") maintained a valid rule banning solicitation during working time and at all times in immediate patient-care areas. The rule also prohibited the distribution of written material at all times in immediate patient-care areas "and any other work areas of the facility." After losing a Board-conducted election, the union objected that the Center's ban on distribution in *any other work areas* was overly restrictive and therefore invalid, in the absence of evidence that it was necessary to avoid disruption of health care operations or the disturbance of patients. The union also objected that, prior to the election, the Center had allowed supervisors to pass out anti-union literature in a time clock area and in its dietary, housekeeping and laundry departments. The Board overruled both objections.

Historically, the Board has permitted greater restrictions on distributions than on solicitations. Being oral in nature, solicitation (in the Board's view) impinges on an employer's interest only to the extent it occurs during working time. Thus, a valid no-solicitation rule may not extend to an employee's own time, such as meal periods, scheduled breaks, time before or after a shift, and personal clean-up time (except that a hospital's immediate patient-care areas may be insulated from solicitation at all times). Distribution, on the other hand, carries the potential of littering the employer's work areas and creating a hazard to production, whether it occurs on working time or non-working time. As a result, the Board has repeatedly held that a rule (like the Center's rule) that prohibits employee distribution in work areas is presumptively valid. Because a presumptively valid rule requires no justification, the Board easily overruled the union's objection that the Center had not shown its rule was necessary to avoid disruption or disturbance.

The union's second objection – that the Center improperly allowed its supervisors to pass out anti-union materials while enforcing the no-distribution rule against its employees – presented a more difficult issue for the Board. The issue had come before the U.S. Supreme Court

in a case decided forty years ago. Although finding for the employer, the Court had cautioned that, in certain circumstances, an employer could not legally enforce a valid no-distribution rule while at the same time distributing, through supervisors, clearly anti-union literature. One circumstance would be where the employer had denied a union's request for an exception to the rule when exceptions had been granted in the past for charitable causes. Another would be where the rule's application meaningfully diminished the union's ability to carry its message to the employees because no alternative channels of communication existed.

Analyzing the facts in the light of the Supreme Court's decision, the Board overruled the union's second objection. Because the Center's employees were able to distribute literature in non-working areas, the Board said it had no basis for finding that enforcement of the rule created "to any considerable degree" an imbalance in the relative abilities of the union and Center to communicate with the employees. The Board also noted that there was no evidence the union had requested an exception to the rule. Concluding that the facts in this case did not support a finding of objectionable conduct, the Board observed that it would continue to review the circumstances of particular cases "as they affect opportunities for employees to communicate in the workplace about unionization."

The Board's decision is both helpful and troublesome. On the plus side, it reinforces forty years of precedent for the proposition that a valid rule against employee distribution is not rendered unlawful merely because the employer exercises its right to engage in free speech on its own property. On the other hand, the decision leaves wide open, for Board assessment on a case-by-case basis, the degree to which a union's and an employer's ability to communicate with employees are in balance. This raises the disquieting prospect that unions will now seek parity of communication opportunity by routinely asking employers to allow employees to distribute union propaganda in work areas. The Board does not explain why the denial of such a request would be relevant when (as is nearly always the case) alternative avenues of communication are readily available to the union.

If nothing else, the Board's decision serves as a reminder that an employer subject to possible union organizing

should have a valid no-solicitation/no-distribution rule in place. If you have any questions about how to implement and maintain such a rule, call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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BENEFIT PLANS

Two trends in employee benefits matters merit your attention. The first involves enlarging the scope of fiduciary conduct. The second involves increased scrutiny of health plan claim procedures. Plan sponsors should be alert to these developments.

The Expanding Scope of Fiduciary Conduct

The U.S. Supreme Court decision in *Varity Corp. v. Howe* (1996) left open the question of how far the courts would expand the scope of fiduciary conduct. In *Varity*, employees were offered an election to participate in the benefit plans of a new employer that later went bankrupt. Employees alleged they had been misled by company officials regarding this plan transfer in violation of ERISA. The Supreme Court agreed, holding that the company officials had acted as plan fiduciaries when they informed employees about the new benefit plans.

Since the *Varity* decision, lower courts have been expanding the scope of fiduciary duty. However, it is also important to note that, even though the scope of fiduciary duties is widening, ERISA may not provide relief in all situations. These developments can be illustrated by two recent cases.

In *Farr v. U.S. West Communications* (9th Cir. 1998), employees retired under an early retirement window program. Some later claimed that the plan sponsor failed to inform them that certain excess distributions would, under the tax rules, not be eligible for rollover into IRAs and would be taxed immediately. The court examined materials distributed in connection with the program, as well as the summary plan description, and concluded that the plan sponsor had in fact provided incomplete and misleading information, and had breached its fiduciary

duty. However, the Court also found that there was no ERISA remedy for this breach of fiduciary duty because the former employees sought only monetary relief in the form of compensatory damages (the payment of the unexpected taxes). The Court ruled that such monetary relief was not available under ERISA.

In the second case, *Allinder v. Inter-City Products Corporation* (6th Cir. 1998), a participant alleged that she suffered a debilitating toxic reaction to pesticides sprayed at work. She further charged that company personnel had intentionally misled her regarding forms to be filed for a long-term disability claim that resulted from the incident. While the employee eventually received her benefits under the disability plan, she nevertheless pursued a lawsuit seeking compensatory and punitive damages for the delaying tactics.

The Court noted that *Varity* allows individuals to bring fiduciary suits for their own benefit, but that compensatory and punitive damages are not available in such a suit. Because no claim was made for benefits under the plan (they had been paid), and equitable relief was not involved, the employee could not recover.

These cases illustrate two important lessons for plan sponsors. First, more aspects of plan administration are now being called into question as fiduciary actions. This is a tougher standard to satisfy than the business judgment standard that applies to general corporate actions. Thus, more emphasis needs to be placed on establishing a clear, supportable record for actions taken by plan officials. But the second lesson is equally important once litigation ensues. Even if the plan administrator's actions are vulnerable under the higher fiduciary standard, damages may not be available under ERISA, particularly if the participant received all the benefits provided for under the plan.

Emerging Issues with Regard to Health Care Plans

Complaints regarding health plans and their claim processing are approaching a crescendo. Restrictive legislation is being considered in Congress and may be passed. But other related developments are occurring at the same time.

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Service Provider as Fiduciary

On the fiduciary front, many service providers have defended themselves in health claim cases by arguing that they cannot be sued under ERISA because they are not plan fiduciaries. Plaintiffs' lawyers have sought to assault that barrier. A recent case of note is *Hendrich v. Lori Pegram, M.D.* (7th Cir. 1998), where the claimant charged the health maintenance organization's cost containment features were improperly used to increase bonuses for the defendant physicians, a breach of fiduciary duty.

The plaintiff had sought medical care for abdominal pain. The HMO required her to wait eight days for an ultrasound at its facility. In the meantime, her appendix ruptured, resulting in peritonitis. At the district court level, the court awarded her damages for medical malpractice but dismissed the ERISA fiduciary complaint, holding that the defendants were not plan fiduciaries. The Court of Appeals reversed.

The Court of Appeals noted that the board of directors of the HMO consisted of the physicians who were in control of their own year-end bonuses. Moreover, they had the exclusive right to decide all disputed claims. The court (with a dissent) held that this level of control was sufficient to establish that the defendants were plan fiduciaries. Further, if the claimant could show that the physicians had acted in their own interests when deciding the timing of the diagnostic test, such conduct would establish a breach of fiduciary duty. Since this case was sent back to the trial court, we cannot yet assess the significance of the decision. But it represents an important development that bears watching.

New Health Plan Claim Regulations

On September 9, the Department of Labor issued proposed revised claim procedure regulations. Although these proposed regulations, if adopted, would not become effective until the plan year 2000 at the earliest, plan sponsors must react now to develop an appropriate response. These regulations would dramatically shorten the time periods for processing health plan claims. Under present law, health plans have at least 90 days to respond to a claim. Critics have long argued that this is simply too long a period in the context of medical treatments, where decisions often require immediate action. The proposed regulations address those concerns.

Under the Proposed Regulations:

- Urgent care claims must be processed as soon as possible. But in any case, an initial decision must be rendered within 72 hours. Further, a decision on appeal from the initial decision must be rendered in no more than an additional 72 hours;

- Non-urgent claims must be processed within a reasonable period of time, which is no later than 15 days for the initial decision and no more than an additional 30 days for an appeal.

The proposal would also require plans to provide participants with more timely information about the plan's claims procedures and more information about the claim decision when a claim has been denied. Further, the proposal would require that appeals must be decided by a party who is neither the initial claim reviewer nor a subordinate. Moreover, where decisions are based on medical judgments, the reviewer of a denied health care claim would be required to consult with a medical professional. The proposal would ensure that claimants have access to judicial review when plans fail to establish or to follow reasonable claims procedures that comply with the new rules.

These changes, if incorporated into final regulations, would be significant. Compliance will require significant administrative changes and new methods of communication. Many plans do not always clearly identify who decides initial claims and how to appeal denied claims. That approach will have to change if a plan is to maintain effective control over plan benefits and costs.

More importantly, successful defense of claim decisions in court has always relied on careful compliance with existing claims procedures. For example, the record on review in court is now generally limited to the record established in the claims procedure process. If plan administrators fail to adjust their procedures in accordance with these regulations when finalized, they may impair the record in court along with the ultimate claim decision.

Vedder Price benefits attorneys are preparing comments with regard to these proposed regulations. Please take time to review these proposed regulations and send your comments either directly to the Department of Labor or to

us to incorporate in our comments.

If you have any questions about these or other benefit issues, please contact John Jacobsen (312/609-7680) or any other Vedder Price attorney with whom you have worked.

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MEDICAL STAFF PRIVILEGE DECISIONS COVERED BY ADA

In the first decision of its kind, a federal appellate court has held that a hospital's decision to extend staff privileges to a physician is covered under the ADA. *Menkowitz v. Pottstown Memorial Hospital*.

From 1973 to 1997, Dr. Eliot Menkowitz held an appointment to the medical staff of Pottstown Memorial Hospital, a private community hospital in Pennsylvania. In 1995, Dr. Menkowitz was diagnosed as having attention-deficit disorder, although his physician stated the condition would not affect his job performance. Some time later the hospital accused Dr. Menkowitz of various policy violations and, in March 1997, suspended him from the medical staff for six months. Menkowitz claimed that his suspension was due to his disability, in violation of the ADA.

The case would not be significant if Menkowitz had been an employee of the hospital alleging an adverse employment action under Title I of the ADA, which prohibits employment discrimination. Since he was not an employee, he brought his claim under Title III of the ADA on the theory that the hospital, as a place of "public accommodation," could not discriminate against him. But although Title III clearly prohibits hospitals from disability discrimination when providing medical services to the public, it is far from clear whether Title III also covers a private hospital's decision to extend or revoke staff privileges. That was the issue before the court.

The Third Circuit Court of Appeals ruled in favor of the physician. Title III makes it unlawful for an "individual" to be discriminated against on the basis of a disability "in the full and equal enjoyment of the goods, services,

facilities, privileges, advantages, or accommodations of any place of public accommodation." Noting the broad scope Congress intended for the ADA, the court rejected the argument that the term "individual" was limited to customers or clients of the covered public accommodation. However, consistent with prior decisions interpreting Title III, the court stated that there must be some nexus between the place of public accommodation and the services discriminatorily denied. Under that analysis, the court said it "cannot imagine a greater nexus between the privileges, advantages, or services denied and physical access to hospital facilities simply because of the nature of medical staff privileges – privileges that lie at the very core of a hospital's facilities." In short, the court found that the privilege to practice medicine at a hospital is directly related to the hospital's *raison d'etre.*

The bottom line for hospitals? While *employment* discrimination laws may not apply to medical staff privileging decisions, the *Menkowitz* case puts hospitals on notice that privileging decisions are subject to other proscriptions against disability discrimination and, most likely, race and sex discrimination as well under other statutes which mirror the language of Title III in prohibiting discrimination by places of public accommodation.

If you have any questions about the *Menkowitz* case, or the ADA in general, please call Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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ODDs & Ends

Look for the Union Bagel

When employees at three Noah's Bagels/Einstein Shops in California voted for representation by the United Food and Commercial Workers union, they joined the ranks of what union organizers call "nontraditionals" seeking union affiliation. According to BNA's September 14, 1998 Labor Relations Reporter, California has witnessed unionization among hypnotherapists (OPEIU), bicycle messengers (ILWWU), exotic dancers and bouncers (SEIU), and body

piercers (UFCW), as well as "bagel pushers." A union spokesman was quoted as saying, "[E]verything is up for grabs as far as we're concerned." We assume that this was not a union slogan in organizing the hypnotherapists, exotic dancers or body piercers.

Court Rejects Rash FMLA Claim

An Alabama federal court recently granted summary judgment to Rheem Manufacturing Company on an employee's claim that he should have been granted FMLA leave for treatment of poison ivy. The court noted that the employee had been treated only once for the condition, received no prescription therefor, and did not appear to have been incapacitated by it.

"Scalpel…Forceps…ZZZZZZ"

The U.S. Court of Appeals for the Sixth Circuit recently affirmed a lower court's holding that the Jewish Hospital of Shelbyville did not violate the Kentucky Civil Rights Act or the FMLA when it fired an anesthesiologist for sleeping during surgical operations. Although the doctor submitted evidence that he suffered from severe chronic sleep deprivation, the Court found that he was not fired because he had a disability. As the Court concluded, in a gracious display of understatement, "[The doctor's] conduct of sleeping while administering anesthetics severely diminished his ability to perform his job." (With special thanks to a wide-awake Janet Hedrick for suggesting this and the preceding item).

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