



LEGAL BRIEFS

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NURSE ANESTHETISTS AND THE AMERICANS WITH DISABILITIES ACT

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A recent case reminded me that it has been almost 15 years since Congress passed the Americans with Disabilities Act at the urging of President George Herbert Walker Bush. While everyone supported the goals of the Act, some lawyers were unclear about the changes that the Act would bring and the effect they might have. In anesthesia, what disabilities would be protected by the Act and what kinds of accommodation would hospitals and employers have to make for anesthetists with disabilities? I recently looked through the reported legal cases involving nurse anesthetists to find those that dealt with the Americans with Disabilities Act.

The Americans with Disabilities Act prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against a “qualified individual with a disability.” A “disability” is defined as: (a) a physical or mental impairment that substantially limits one or more major life activities; (b) a record of such an impairment; or (c) being regarded as having such an impairment. A “qualified individual with a disability,” the person protected by the Act, is defined as an individual with a disability who, with or without “reasonable accommodation,” can perform the essential functions

of the employment position that such individual holds or desires.

The Act was not entirely clear about what it meant by a “reasonable accommodation,” but the Act gave 2 examples. The first was making existing facilities used by employees readily accessible and the second was job restructuring. Examples of changes to existing facilities might include installing wheelchair ramps or elevators. Examples of job restructuring might be having 2 part-time employees cover what used to be 1 full-time position or providing breaks or rest periods. In what ways might the Act affect anesthesia?

Motion to Dismiss

Before discussing the cases, we have to note the manner in which many of them come to court. Not only is litigation expensive but it also is time consuming. And it takes the time, not only of the parties, but of the judges and court officers as well. Consequently, the law provides various steps during the process of litigation when the expensive, time-consuming process can be stopped, a winner can be declared, and the parties can go home and deal with their situations. The first opportunity to end litigation is the Motion to Dismiss. After a complaint has been filed starting the case, a defendant can say to the court that even if you assumed the truth of everything the plaintiff claimed was true, there

was still no way the plaintiff could win the case. For example, Smith is walking on a sidewalk just behind Jones. Jones detours from his path because of a hole in the sidewalk. Smith, whose mind is busy on something else, does not notice that Jones moved to the side, steps into the hole, and injures himself. Smith sues Jones for failure to warn him about the hole in the sidewalk. Jones is entitled to a Motion to Dismiss because, generally, a pedestrian on a sidewalk has no duty to warn other pedestrians of hazards. Even if all of the facts Smith recited were true, Jones would not be liable for Smith’s injury.

A Motion to Dismiss can only be filed by a defendant and only works 1 way. If you assume everything in the plaintiff’s complaint to be true, and if true, it would entitle the plaintiff to a victory, the plaintiff still has to go through the entire litigation process to prove his case. So, if the Motion to Dismiss fails, the process goes on, and the plaintiff and defendant gather their evidence and go to trial.

Not every fact will be contested. The parties may agree on certain facts and disagree on others. At some point during the process, one of the parties (it may be either the plaintiff or the defendant) may file a motion that on the basis of facts that are not contested he or she is entitled to win. An example might be a case where the dispute relates to the interpretation of a statute.

The parties agree on the facts and the only question is the meaning of the statute. Interpreting statutes is usually a question for a judge. If the facts are not disputed, the judge can interpret the statute and end the case.

The Americans with Disabilities Act is still a relatively new Act. Its provisions have not been fully explored. This column has noted before the creative ability of lawyers to take laws intended to cover one type of situation and try to make them apply in situations no one ever expected them to apply to. Thus, for any new Act, there will be a number of cases that test the limits of its coverage. With new statutes, defendants frequently file a Motion to Dismiss claiming that the Act was not intended to cover the factual situation alleged by the plaintiff. Consequently, many of the cases involving the Americans with Disabilities Act are published decisions responding to Motions to Dismiss or Motions for Summary Judgment rather than jury verdicts. It is very important to remember that the “facts” we will read in these cases may not be facts at all and are being assumed to be true only to enable the courts to decide the motions.

Example number 1

One of the cases I found involved Dr A, an anesthesiologist, who was working under a contract at a hospital. There was some concern about the way in which he provided anesthesia services, and these concerns became heightened when Dr A began to suffer heart problems. Dr A was forced to take time off. After a 6-month absence, Dr A was able to return to work and resume his normal activities. Shortly thereafter, he was advised that his contract would not be renewed. As is the case for a number of personnel

in the healthcare field, Dr A’s contract with the hospital said he was an independent contractor. The Americans with Disabilities Act, however, has numerous requirements relating to employment. Healthcare personnel, including nurse anesthetists, have to exercise independent judgment. Hospitals commonly have extensive policies binding on all practitioners. Except for the tax implications, there are few practical differences between healthcare personnel who are independent contractors and those who are legal employees. Did Congress mean to make the Act applicable to the general workplace or did it intend to limit the Act to only those workers who were employees? The court briefly considered whether Dr A met the requirements of a common-law employee and determined that he was not an employee. The court then ruled that Dr A was not covered by the Act and his termination could not have violated it.

At the same time, the hospital advertised for a new anesthesiologist to replace Dr A. Dr A applied for the job, probably knowing he would not get it. Part of his lawsuit was a claim that he was discriminated against when he applied for his old position. The hospital answered that it had decided to hire a board certified anesthesiologist and that it did not hire Dr A because he did not meet the advertised criteria. Dr A was unable to provide any evidence that the hospital’s action in requiring attributes that he did not have was merely a pretext to keep him from applying for the job, and the case was dismissed.

Example number 2

The next case involved Mr B, a nurse anesthetist, who was clearly an employee of the hospital. There apparently had been some complaints that Mr B was late for sur-

geries, did not make proper patient status reviews, and failed to review electrocardiogram and laboratory results in a timely manner. One day Mr B attended 2 operations for one of the surgeons. Mr B had great difficulty intubating the patients and, to adopt the technical legal term used by the court, “lost his cool.” Unfortunately, Mr B “lost his cool” where the surgeon could see him. In fact, after Mr B started to drop devices on the floor, it was the surgeon who intubated the patient. Naturally, Mr B’s behavior was the main topic in the physician’s lounge the next morning. There was at least some discussion among the doctors that drug use might be involved, and a surgeon who was known to be a recovering drug addict decided to have a talk with Mr B. Over a period of several days, the consensus emerged between the hospital chief executive officer (CEO) and the surgeons that Mr B required additional training. The CEO made some effort to find appropriate training but could not find anything that would satisfy the surgeons. Consequently Mr B was suspended, and when another hospital in town refused to let Mr B relieve their nurse anesthetists, Mr B was fired. Mr B brought suit against the hospital on grounds that his firing violated the Americans with Disabilities Act.

What is interesting about the case is that Mr B showed that he was not, in fact, taking drugs. If he was not taking drugs, then what was his disability? Interestingly, the Americans with Disabilities Act defines “disability” to include “(c) being regarded as having such an impairment.” That is, if a hospital thinks an employee has a disability, it cannot discriminate against him or her because of the disability, even if the employee is not disabled. Mr B claimed that the Americans with

Disabilities Act was applicable because the hospital CEO *thought* that he was using drugs. The court held that there was sufficient evidence that a reasonable jury might infer that the CEO believed that the nurse anesthetist was illegally using drugs and, therefore, that Mr B was entitled to the protection of the Americans with Disabilities Act. On the other hand, there was ample evidence that Mr B was fired merely as a result of his own incompetence and not because of the misperceived drug problem. Mr B had claimed that the charge that he was incompetent was a pretext and that he was actually being discriminated against because of the perception that he was drug dependent. The court held that there was insufficient evidence that the CEO's explanation of the firing, that he was unable to find a suitable method for certifying the Certified Registered Nurse Anesthetist's (CRNA's) competence that would meet all demands of the parties, was unrefuted, and the court upheld the firing as justifiable.

Example number 3

The next case is more illustrative of the limitations of a Motion to Dismiss than it is of the Americans with Disabilities Act. Mr C, a student in a nurse anesthetist school, was having a great deal of trouble getting through the program. At some point Mr C's performance level in the clinical portion of the program began to decline due to extreme anxiety. The medical director of the program met with Mr C. They agreed that Mr C would take a leave of absence. After Mr C returned to the program, he was dismissed. Mr C complained that he was not offered any type of professional counseling, and therefore the failure to accommodate him when he

returned to the program constituted a violation of the Americans with Disabilities Act. Although a lot of issues were raised, the one that is most interesting is whether the Americans with Disabilities Act applied. As we saw in the suit brought by Dr A, the anesthesiologist, the Act requires an employment relationship. In this case, the school filed a Motion to Dismiss saying that a student is not an employee, and Mr C should not be protected by the Americans with Disabilities Act. Because it was a Motion to Dismiss, everything claimed by the plaintiff had to be accepted as true. Mr C's complaint sometimes referred to Mr C as a student and sometimes as an employee. The court appeared skeptical but ruled that it could not predict the nature of Mr C's proof. It had to accept the pleadings as true. Mr C was entitled to have an opportunity to prove that he was, in fact, an employee of the school. Mr C's case could not be dismissed until his proof was presented.

Example number 4

In the next case, Mr D was a nurse, but not a nurse anesthetist. Mr D had observed some of his coworkers in some wrongdoing and had reported them to his supervisors. As a result, his coworkers stopped talking to him, and Mr D felt that he was under a lot of pressure. He developed severe depression that interfered with his work. His complaint charged that instead of offering him medical and psychological treatment, he was given warnings and treated so badly that any reasonable employee would resign.

The question was whether Mr D was "disabled" for purposes of the Americans with Disabilities Act. While Mr D's activities were substantially limited and significantly restricted by his depression, the

court had to consider whether the limitations and restrictions affected him generally or were they only restrictions at the specific hospital where he had been a whistleblower. If, as a result of his whistleblowing, working at the hospital made Mr D depressed but he would not be depressed working elsewhere, then he was not "disabled" for purposes of the Americans with Disabilities Act. The Americans with Disabilities Act requires that the individual be significantly restricted, not just have problems at a particular place.

Example number 5

Another area of disability where nurse anesthetists have turned to the Americans with Disabilities Act for protection is in cases of addiction. Ms E was a nurse anesthetist who had held a variety of positions in her hospital. She became addicted to fentanyl. Eventually, the hospital became aware that Ms E seemed to be wasting a lot of fentanyl. During the investigation, Ms E was caught returning a syringe marked fentanyl but filled with saline. After initially denying it, Ms E admitted her addiction.

The hospital placed Ms E on a medical leave of absence and helped her attend a drug rehabilitation facility. After Ms E completed her rehabilitation, she was notified that she was being terminated from the hospital for gross misconduct involving the diversion of controlled substances. A few weeks later she obtained employment at another hospital but within 2 weeks, she used fentanyl while on duty and her nursing license was revoked.

Ms E sued the hospital under the Americans with Disability Act claiming that the hospital discriminated against her on the basis of her addiction to fentanyl when it terminated her employment. Under the

Americans with Disability Act, drug usage is a disability but it is in a very special class. Under the Act, a “qualified individual with a disability,” the person who is protected by the Act, does not include anyone who is “currently engaging in the illegal use of drugs.” Former drug addicts can, however, again become entitled to the protection of the Act if they successfully complete a supervised drug rehabilitation program or they are participating in a supervised drug rehabilitation program and they are no longer engaging in the illegal use of drugs. Employers may adopt reasonable policies or procedures, including drug testing, designed to ensure that employees are no longer engaging in the illegal use of drugs. Employers may prohibit the use of drugs or alcohol at the workplace.

While Ms E had admitted her addiction, she pointed out that the hospital did not terminate her until she had completed the rehabilitation program. Therefore, argued Ms E, at the time she was fired, she was entitled to the protection of the Act because she was not “currently engaging in the illegal use of drugs.” The court was thus faced with a type of definitional problem. How “current” is “currently”? The court goes through a lengthy analysis and concludes that “currently” means a periodic or ongoing activity that has not permanently ended. So, an employee “illegally using drugs in a periodic fashion during the weeks and months prior to discharge ‘is currently engaging in the illegal use of drugs.’” The court’s decision is that it is not necessary for the employee to be taking drugs at the precise moment of termination. Ms E’s case was dismissed. I wonder, however, if the court might have found the case more difficult if Ms E had not been

caught using fentanyl again so soon after she was terminated? Did this make it easier to conclude that no matter what definition of “currently” you used, Ms E had not ended her use of drugs?

Example number 6

Mr F, a nurse anesthetist, was employed by a hospital that had a long-term disability plan. One of the provisions of the long-term disability plan was that benefits for individuals suffering a disability due to mental, nervous and emotional disorders were payable only for a maximum of 2 years. Mr F stopped working due to morphine addiction and clinical depression. He applied for and received long-term disability benefits and underwent rehabilitation for his drug addiction. A year later, the insurance company terminated his benefits asserting that since he had undergone rehabilitation, he was no longer disabled. Mr F sued the hospital on the grounds that providing a disability policy that had a shorter term for individuals with mental disabilities than those with physical ones, discriminated against a “qualified individual with a disability” and was illegal under the Americans with Disabilities Act.

The court determined, without a lot of reasoning, that the Act did not prohibit an employer from providing different types of disability coverages for persons with physical and mental disabilities. Moreover, Mr F could not bring suit under the Americans with Disabilities Act because Mr F’s complaint said that he was totally disabled. Someone totally disabled cannot perform the essential functions of being a nurse anesthetist. Therefore, Mr F could not have been a “qualified individual with a disability” and was not protected by the Act.

Example number 7

In another case, Ms G was a registered nurse who was diagnosed with multiple sclerosis. At the suggestion of her treating physician, she took 2 weeks off. When she returned to work, she received good evaluations. In one case, however, where Ms G was working as the circulating nurse, she prepared a local anesthetic containing adrenaline for a patient allergic to adrenaline. Fortunately, a CRNA in the operating room spotted the error and kept Ms G from administering the wrong anesthetic. The nurse anesthetist reported Ms G to administration. Ms G was admonished, and a note was placed in her personnel file. Other more general complaints were also brought to Ms G’s attention as well. There was a claim that she had been slow to respond to a scrub technician’s need for supplies. In addition, Ms G seemed to have difficulty organizing her thoughts, remembering things, and communicating with others. Following this review, Ms G was assigned to the sterile supply room where Ms G essentially worked as an orderly. She was subsequently assigned to the surgery room as a circulating nurse, but Ms G took this as a threat because her actions would be closely scrutinized. Ms G left the hospital and brought suit under the Americans with Disabilities Act.

To be disabled, the impairment must affect a major life activity. Ms G argued that the hospital thought she was unable to engage in “cognitive thinking.” Cognitive thinking is a major life activity. The hospital agreed that an inability to engage in cognitive thinking was a disability under the Act but said that it did not think Ms G’s multiple sclerosis had a substantial affect on her ability to think. The hospi-

tal tried to make a distinction. It considered her performance below the appropriate standard for a surgical nurse, but it did not think she was a below average thinker. The court upheld the jury verdict against the hospital because the court felt that Ms G's supervisors were using stress as an excuse to get her out of the surgical unit. Her

employers did not try to find Ms G a less stressful nursing position. They simply moved her to a position where her only responsibilities were clerical. The court said that this evidence was sufficient to justify the jury's determination that she had been discriminated against in a manner prohibited by the Americans with Disabilities Act.

Conclusion

We will have to continue to monitor the application of the Americans with Disabilities Act to see how it will affect nurse anesthesia. At the moment, it is being applied and tested and it is still hard to see where the boundaries of its protection will be drawn.