AHLA

VOLUME 17 ISSUE 1 April 2018

Labor & Employment

A Publication of the American Health Lawyers Association
Labor and Employment Practice Group

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The Rising Tide of ADA Litigation Against Health Care Entities

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Over the past several years, health care entities have increasingly become the target of private and government plaintiffs complaining of disability discrimination. A crescendo of litigation has engulfed the health care industry—and most notably of late, "drive-by" litigation attacking the perceived failure of health care entity facilities and websites to accommodate the needs of persons with disabilities consistent with the requirements of the Americans with Disabilities Act (ADA).

Disability rights advocates seem to perceive ADA-based litigation against health care entities as low-hanging fruit. But why? Do health care entities discriminate against disabled person at a higher rate than other employers and businesses? Or is it that government agencies and plaintiffs can make an easy example out of health care entities because of the ostensible irony of a health care entity refusing to accommodate the needs of someone with health challenges? Comments by an Equal Employment Opportunity Commission (EEOC) attorney in the context of one case the EEOC filed against a health care organization seem to support the latter explanation:

> Sometimes it looks like organizations engaged in the health care field or in the performance of other "good works" consider it impossible for them to have discriminated—or to be challenged for having discriminated—particularly when it comes to the ADA.[1]

The Americans with Disabilities Act

Passed in 1990 and amended in 2008, the ADA prohibits discrimination on the basis of disability in employment, services offered by public entities (including public transportation), public accommodations (including commercial facilities), and telecommunications.[2] In addition to its nondiscrimination requirements, the ADA affirmatively requires employers and businesses to provide reasonable accommodations to qualified individuals with a disability. Title I applies to employers; Title III applies to places of public accommodation and commercial facilities (including many health care entities such as medical offices, hospitals, and nursing homes). The ADA

also importantly protects people against discrimination because they are regarded as disabled or have a record of a disability.

Title I prohibits employment discrimination on the basis of disability. It also requires employers to provide reasonable accommodations to employees who can perform the essential functions of a job with the aid of such an accommodation. Some examples include providing scheduling accommodations to a nurse that is undergoing chemotherapy for breast cancer or offering a nursing home janitor with diabetes extra breaks to ensure his insulin levels remain healthy through the day. Often, these accommodations cost the employer very little.

A reasonable accommodation is one that does not place an undue burden on the employer; while cost is not the only factor in determining whether an accommodation does not unduly burden an employer, it plays a major role.

Nonetheless, the cost of failing to provide a reasonable accommodation will almost certainly outweigh the cost of making the accommodation. The ADA provides aggrieved employees with a damages toolkit that includes lost wages (both back pay and front pay), compensatory and punitive damages, prejudgment interest, and reasonable attorneys' fees and litigation costs.

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodations (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, which includes many health care entities) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities)—to comply with the ADA standards. Title III endeavors to make facilities and websites accessible to those with disabilities.

EEOC Enforcement and Employment Litigation Under Title I

The EEOC enforces Title I of the ADA. The EEOC reports that it received more charges of disability discrimination in 2016 than it had in its history, and 2017 saw only a slight decrease in that number.[3] In 2017, the one medical condition that drove a plurality of ADA discrimination complaints was anxiety disorder, representing 8.2% of all disability discrimination complaints received by the EEOC.[4] Depression also ranked highly among disability indications at a shade over 7% of all charges.[5]

Emotional and mental disabilities (such as anxiety disorder, depression, and ADHD) are among the least understood. Rather than engage employees in an interactive process to determine whether reasonable accommodations for these disabilities are possible, many employers do not actively address the problem. Employers should engage employees who disclose mental or physical disabilities in a good faith interactive process to discover a mutually acceptable accommodation. An employer must accommodate a disabled employee if the accommodation would not create an undue burden on the employer. Employers also must understand that there's no one-size-fits-all approach when it comes to leave policies and accommodations involving leave.

The 2008 amendments to the ADA broadened the law's definition of disability to include virtually any chronic or serious health condition. In addition, in late 2017, the EEOC made it easier for an employee to commence the charge process by opening an online public portal to submit inquiries to the EEOC.

Over the last several years, EEOC enforcement activity against health care employers has increased. For example, in February 2018, the EEOC announced a lawsuit against West Meade Place LLP, which operates a skilled nursing and rehabilitation center in Nashville, TN.[6] The company allegedly refused to provide a reasonable accommodation to an employee who suffers from an anxiety disorder, and then fired her because of her disability. According to the complaint, West Meade hired the employee as a laundry technician in February 2015. When the employee requested leave as a reasonable accommodation for her anxiety disorder in November 2015, management told her she could not take leave because the Family and Medical Leave Act did not apply to her. West Meade then required the employee to obtain and return to management a note from her doctor, clearing her to return to work without any restrictions, less than 36 hours after the employee requested a reasonable accommodation for her disability. When the employee could not quickly obtain a doctor's note, West Meade discharged her. The EEOC is seeking injunctive relief prohibiting West Meade from discriminating against employees based on their disabilities, as well as back pay and compensatory and punitive damages for the former employee.

In 2014, the EEOC sued a Michigan nonprofit called Disability Network, whose primary function is to provide services to people with disabilities.[7] The EEOC alleged that Disability Network denied a deaf employee, who worked as an independent living specialist for the nonprofit, reasonable accommodations such as TTY equipment, a video phone, and the ability to use text messaging. The complaint also alleged that Disability Network rejected the employee's requests, failed to provide him with alternate accommodations, and finally fired him because he is deaf. The EEOC ultimately settled with Disability Network, which agreed to pay $38,500 in monetary relief and sign a five-year consent decree with the EEOC that provides for training on the ADA and enjoins Disability Network from terminating any employee on the basis of disability or failing to provide reasonable accommodations.[8] Consent decrees often result in EEOC oversight and audit of an employer's practices for several years.

EEOC trial attorney Nedra Campbell said of Disability Network:

> The hypocrisy of this non-profit—whose very mission is to help disabled individuals—disadvantaging and then firing someone because of a disability—is mind-boggling . . . Disability Network, of all people, should understand the importance of working toward reasonable accommodations for a deaf employee. It only goes to show that the EEOC has its work cut out for it—and we will certainly continue our fight for the rights of the disabled.[9]

In another case, the EEOC announced a settlement with a nationwide dialysis provider to end an ADA discrimination and failure to accommodate suit. The provider agreed to pay $190,000 to a former nurse with breast cancer who it allegedly fired and then refused to rehire because she asked for more medical leave to complete her chemo treatment following mastectomy surgery.[10] The EEOC claimed that the company terminated her after four months, telling her that she exceeded the time limit set out in its medical leave policy, despite the fact that the nurse was on approved medical leave and her doctor approved her return to work without restrictions. Commenting on the case, an EEOC attorney noted: "Extending her medical leave would have posed little burden . . . Employers with inflexible leave policies lose the opportunity to help a valued employee return to work."[11]

Other examples of EEOC enforcement activity against health care employers involve cases that show how often employers may bungle employees' requests for leave as a reasonable accommodation. A Dallas home health care company paid $25,000 for allegedly discriminating against an employee with bipolar disorder by firing her when she requested leave to see her health care provider.[12] In another example a Mississippi provider of inpatient and outpatient health care services agreed to pay $85,000 to settle a disability case of a therapist who allegedly was denied several weeks of additional leave and fired after liver transplant surgery.[13] Finally, the EEOC sued a Georgia regional medical center alleging that it fired a medical records analyst who requested two weeks of leave due to a medical condition that caused her to faint at the hospital.[14]

Drive-By and Website Accessibility Litigation Under Title III

A spike in Title III litigation (and litigation under state analogs to the ADA) seems to have arisen out of what has been dubbed "drive-by lawsuits" or "Google lawsuits." In 2014, the *Wall Street Journal* reported that Title III lawsuits increased 55% from the prior year.[15] In addition, "the Department of Justice, which enforces Title III, received 6,391 accessibility complaints in fiscal year 2015—representing a 40% increase over claims in the prior fiscal year."[16]

Under Title III, almost anyone who lives with a disability can sue a place of public accommodation (including hospitals, physician practices, clinics, and other health care entities open to the public) for a perceived failure to comply with the ADA's requirement to accommodate disabled customers. According to some reports, plaintiffs (or attorneys) are able to spot perceived ADA violations simply by driving by an establishment and then claiming that he or she was unable to access the facility due to the violation—giving rise to the term "drive-by lawsuit."[17] So-called "Google lawsuits" arise from identifying accessibility deficiencies on facility grounds using imaging technology such as Google Maps or Google Earth; for example, if a clinic's parking lot doesn't provide sufficient handicap parking spaces. The most challenging new area of focus, however, involves website accessibility, which often adversely impacts visually and hearing-impaired persons.

While Title III limits liability to injunctive relief and attorneys' fees and costs, its complicated regulatory regime has spurned a cottage legal industry filing lawsuits against businesses. Many businesses that are the subject of these lawsuits may have never received a complaint from a disabled customer and try to be diligent about ADA compliance. In fact, the costs to defend against Title III

litigation often far exceed the cost of having a comprehensive ADA compliance program in place. Title III creates opportunities to foreclose claims by eliminating barriers promptly or through a comprehensive remediation plan.

The Rising Tide of Website Inaccessibility Litigation

Website accessibility litigation is on the rise—2017 saw a major spike, with the filing of approximately 800 federal suits and over 100 state court suits.[18]

The first trial involving a website accessibility lawsuit is believed to have occurred in 2017. In *Gil v. Winn-Dixie Stores, Inc.*, a federal district judge in Florida concluded that the grocery store chain's website was inaccessible to visually impaired individuals in violation of Title III of the ADA.[19] The court ordered Winn Dixie to conform its website to the Web Content Accessibility Guidelines 2.0 AA (WCAG 2.0 AA).[20]

The WCAG 2.0 AA contains technical standards for web content accessibility that meet the needs of individuals, organizations and governments internationally.[21] Regulations promulgated in 2016 by the U.S. Department of Health and Human Services under the Affordable Care Act[22] and Medicaid[23] require covered entities providing health care programs and services to have accessible electronic information technology, including accessible websites that conform to WCAG 2.0 AA.

In 2016, Tenet Healthcare, which operates several Florida hospitals, was named in a class action complaint on behalf of a putative class of blind individuals; the case settled as a result of mediation within a few months of the filing of the complaint.[24] The complaint alleged that the hospitals' websites were not accessible to blind individuals using screen-reader technology in violation of Title III of the ADA as well as Section 504 of the Rehabilitation Act. CAC Florida Medical Centers also was sued over website accessibility by a blind individual, but that case was dismissed.[25]

WellPoint agreed to a public settlement that requires modifications to its websites and apps to bring them in conformance with WCAG 2.0 AA.[26]

What Should Health Lawyers Do Now?

To protect against possible exposure, health care counsel should advise their clients to review the WCAG 2.0 AA standards and engage an experienced website accessibility consultant to help with this sophisticated process. And in the event a health care organization or its affiliates receive a demand letter from an attorney, private party, or government agency alleging website noncompliance with Title III, they should take immediate action, working with those experienced in responding to and litigating under Title III.

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4 EEOC, *ADA Charge Data by Impairment/Bases—Receipts (Charges filed with EEOC) FY 1997-FY 2017, available at* https://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm.
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20 *Id.*
21 *See* https://www.w3.org/TR/WCAG20/.
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23 81 Fed. Reg. 27498 (May 18, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-05-06/pdf/2016-09581.pdf.
24 *Gomez v. Tenet Healthcare Corp.*, No. 1:16-cv-23321 (S.D. Fla., filed Aug. 3, 2016); ECF Docket Nos. 1 and 24.
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